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**JUDGE DOUGLASS BOARDMAN**

FIRST DEAN OF THE SCHOOL

**By his Wife and Daughter**

**A. M. BOARDMAN and ELLEN D. WILLIAMS**



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AN  
ANALYTICAL DIGEST  
OF THE CASES PUBLISHED IN THE  
NEW SERIES OF THE  
LAW JOURNAL REPORTS

AND OTHER  
**Contemporary Reports**

IN THE  
COURTS OF COMMON LAW AND EQUITY,  
AND THE COURT OF BANKRUPTCY,  
IN THE HOUSE OF LORDS AND IN THE PRIVY COUNCIL,  
IN THE COURT OF PROBATE,  
THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES,  
IN THE HIGH COURT OF ADMIRALTY,  
AND  
IN THE ECCLESIASTICAL COURTS,  
FROM MICHAELMAS TERM 1870 TO TRINITY TERM 1875  
INCLUSIVE.

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BY EDMUND STORY-MASKELYNE, Esq.

AND  
CECIL C. M. DALE, Esq.

BARRISTERS-AT-LAW.

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Law J. Dig. . . .	Law Journal Digest.	
Law J. Rep. (N.S.) P.C. . .	Law Journal Reports, New Series	Privy Council.
Law J. Rep. (N.S.) Chanc. . .	_____	Chancery.
Law J. Rep. (N.S.) Q.B. . .	_____	Queen's Bench.
Law J. Rep. (N.S.) C.P. . .	_____	Common Pleas.
Law J. Rep. (N.S.) Exch. . .	_____	Exchequer.
Law J. Rep. (N.S.) Bankr. . .	_____	Bankruptcy.
Law J. Rep. (N.S.) M.C. . .	_____	{ Magistrates' Cases. } Queen's Bench, Common Pleas, and Exchequer.
Law J. Rep. (N.S.) P. & M. . .	_____	. . . Probate and Divorce.
Law J. Rep. (N.S.) Adm. . .	_____	. . . Admiralty.
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Law Rep. E. & I. App. . .	Law Reports . . . .	{ House of Lords, English and Irish Appeals.
Law Rep. Sc. App. . . .	_____ . . . .	{ House of Lords, Scotch Appeals.
Law Rep. P.C. . . .	_____ . . . .	. . . Privy Council.
Law Rep. Chanc. . . .	_____ . . . .	. . . Chancery Appeals.
Law Rep. Eq. . . .	_____ . . . .	{ Master of the Rolls and Vice Chancellors and Chief Judge in Bankruptcy.
Law Rep. Q.B. . . .	_____ . . . .	. . . Queen's Bench.
Law Rep. C.P. . . .	_____ . . . .	. . . Common Pleas.
Law Rep. Exch. . . .	_____ . . . .	. . . Exchequer.
Law Rep. P. & D. . . .	_____ . . . .	. . . Probate and Divorce.
Law Rep. Adm. & Ecc. . .	_____ . . . .	. . . Admiralty and Ecclesiastical.
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AN  
**ANALYTICAL DIGEST**  
 OF THE  
**CASES REPORTED AND PUBLISHED**  
 FROM MICHAELMAS TERM 1870 to TRINITY TERM 1875,  
 AND CONTAINED IN  
**THE LAW JOURNAL REPORTS,**  
**And other Contemporary Reports;**  
 WITH  
 REFERENCES TO STATUTES PASSED WITHIN THE SAME PERIOD.

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**ABANDONMENT.**

Abandonment of Child.  
 [See PARENT AND CHILD, 7.]

Abandonment of Railways.  
 [See RAILWAY, M.]

**ABDUCTION.**

By 24 & 25 Vict. c. 100, s. 55, "Whosoever shall unlawfully take or cause to be taken any unmarried girl under the age of sixteen years out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her shall be guilty of a misdemeanour." A man took out of the possession and against the will of her father, a girl of the age of fourteen, who, however, looked much older than sixteen; and the jury found as a fact that before the man took her away she had told him she was eighteen, and that he *bonâ fide* believed such statement, and that such belief was reasonable:—Held, that he was guilty of a misdemeanour, though he did not know the girl was under the age of sixteen, and believed he knew she was not—Brett, J., dissenting. *The Queen v. Prince*, 44 Law J. Rep. (N.S.) M.C. 122; Law Rep. 2 C. C. R. 154.  
 Digest, 1870—1875.

**ABOLITION OF TESTS.**

[Amendment of the law respecting religious tests in the Universities of Oxford, Cambridge, and Durham. 34 & 35 Vict. c. 26.]

**ACCOUNT.**

(A) WHEN AN ACCOUNT WILL BE DECREED IN EQUITY.

(B) SETTLED ACCOUNT.

(A) WHEN AN ACCOUNT WILL BE DECREED IN EQUITY.

1.—The S. Dock Company were liable under Act of Parliament to pay the S. Harbour and Pier Board deficiencies of their income which might occur after the opening of the Docks. Such deficiencies were not claimed for several years:—Held, that the Dock Company had a right to have the accounts taken in equity. *The Southampton Dock Co. v. The Southampton Harbour and Pier Board*, 40 Law J. Rep. (N.S.) Chanc. 82; Law Rep. 11 Eq. 254.

2.—Land was held under a lease by a person as trustee for a number of partners, who were not incorporated, but constituted an association for mining purposes:—Held, that the Court of Chan-

cery had jurisdiction to decree an account against the association as equitable lessees of the land. *Wright v. Pitt*, 40 Law J. Rep. (N.S.) Chanc. 558; Law Rep. 12 Eq. 408.

*Accounts on dissolution of partnership.* [See PARTNERSHIP, 15.]

*Account against vendor remaining in possession.* [See VENDOR AND PURCHASER, 13.]

*Account by donee of annuity on trust, at his discretion, for maintenance of an infant.* [See INFANT, 6.]

*Account against mining association.* [See MINE, 19.]

*Accounts as between mortgagor and mortgagee.* [See MORTGAGE, 34-36.]

*Accounts as between principal and agent.* [See PRINCIPAL AND AGENT, 16-24.]

*Account of proceeds of timber wrongfully severed.* [See WASTE, 4.]

*Compulsory reference to arbitration.* [See ARBITRATION, 13.]

#### (B) SETTLED ACCOUNT.

*Pleading settled account.* [See PLEADING IN EQUITY, 11.]

### ACKNOWLEDGMENT OF DEED.

#### *Affidavit.*

1.—Where the jurat of the affidavit of verification of an acknowledgment taken in Pennsylvania did not state the place of acknowledgment or describe the deponent, but there was a notarial certificate supplying the defects, the certificate of acknowledgment was allowed to be filed. *In re Ann Coldwell*, Law Rep. 10 C.P. 667.

2.—The affidavit verifying the certificate of acknowledgment of a deed executed by a married woman may be sworn in Guernsey before the chief bailiff and two jurats. *In re Eleanor Mary Mann*, Law Rep. 10 C.P. 473.

3.—The omission of the description of a special commissioner to take the acknowledgment of a married woman is an irregularity when it occurs in the affidavit of verification; but it may be cured by a statement of identity. *In re Howard*; and *In re Ashcroft*, 43 Law J. Rep. (N.S.) C.P. 245; Law Rep. 9 C.P. 347.

An unsigned affidavit of verification sworn in a foreign possession of the British Crown may be sufficient, if the jurat contains a statement that the oath was administered before a Court, Judge, magistrate, commissioner, or notary public, pursuant to the General Rule of this Court, Hilary Term, 1863. *Ibid.*

#### *Acknowledgment abroad.*

4.—Where a deed had been executed by a married woman and her acknowledgment taken at Melbourne, in Australia, before two commissioners under a special commission, and afterwards the deed so executed with the affidavit and certificate of acknowledgment had been returned to this country, but without the commission, the Court

allowed the certificate and affidavit verifying the same to be filed, there being an affidavit by one of the commissioners, before whom the acknowledgment had been taken, that he was one of the persons to whom the commission was directed, and that the certificate had been signed by him and A. B., "the other commissioner." *In re Edsall*, 44 Law J. Rep. (N.S.) C.P. 228; Law Rep. 10 C.P. 472.

5.—Where a commission for taking the acknowledgment of a married woman in a remote part of Victoria was returned with a defective affidavit of verification, and the documents were sent out again by post and lost; the Court allowed a duplicate commission to go. *Ex parte White*, Law Rep. 8 C.P. 106.

#### *Evidence of sealing.*

6.—A deed acknowledged by married women under the Fines and Recoveries Act, 3 & 4 Will. 4. c. 74, was duly signed by them, but no seal was affixed to it, though pieces of ribbon were inserted in the parchment opposite to the signatures on which seals were to have been put. The attestation clause stated the deed to have been "signed, sealed, and delivered" in the presence of the attesting witnesses, and the certificate of the commissioners before whom the acknowledgment had been taken certified that the married women had acknowledged the instrument as their respective acts and deeds:—Held, *prima facie* evidence, that the deed was sealed, and there being no evidence to the contrary the certificate of acknowledgment was allowed to be filed. *In re Mayer*, 40 Law J. Rep. (N.S.) C.P. 201; Law Rep. 6 C.P. 411, *nom.* *In re Sandilands*.

### ACQUIESCENCE.

*In breach of trust.* [See TRUST, C 10, 11.]  
*Effect of, in suit for injunction.* [See INJUNCTION, 21, 22.]

### ACTION.

#### (A) WHEN MAINTAINABLE.

- (a) *By executor for injury to personal estate of testator by breach of contract.*
- (b) *Breach of statutory duty.*
- (c) *Expulsion of member of insurance society without hearing defence.*
- (d) *Money paid: misrepresentation.*
- (e) *Foreign judgment: mistake as to English law.*
- (f) *For costs.*
- (g) *Effect of proceedings in previous actions.*
  - (1) *Confession of plea: release, with condition subsequent.*
  - (2) *Cross-action: settlement of previous action.*
- (h) *In other cases.*

#### (B) NOTICE OF ACTION: STATUTORY ACTS.

- (a) *Under Public Health Act.*
- (b) *Apprehension without warrant under Larceny Act.*
- (c) *Action against surveyor of highways.*



## (A) WHEN MAINTAINABLE.

(a) *By executor for injury to personal estate of testator by breach of contract.*

1.—C., whilst travelling as a passenger upon the defendants' railway, met with an accident through their default, which occasioned him bodily harm; he was in consequence unable to attend to his business of a bootmaker, which became less profitable to him, and he incurred medical expenses in endeavouring to cure his bodily injuries. C. died of a disease unconnected with the accident. The female plaintiff, as his executrix, sued to recover compensation for the sums expended in medical attendance, and for the loss of profit arising from C.'s inability to attend to his business. The declaration was framed upon a contract between C. and the defendants, and alleged that by breach of it his personal estate was lessened in value. At the trial the jury found a verdict for the plaintiff for 200*l.*, of which 160*l.* was given for the loss sustained in C.'s business, and 40*l.* for the medical expenses:—Held, that the action was maintainable; for the right to sue in respect of the breach of contract survived to the executrix, the maxim, "*actio personalis moritur cum persona*," did not apply, and none of the provisions in 9 & 10 Vict. c. 98, took away the cause of action; and held, further, that the damages given in respect of the loss of profit in C.'s business were not too remote. *Bradshaw v. The Lancashire and Yorkshire Railway Company*, 44 Law J. Rep. (n.s.) C. P. 148; Law Rep. 10 C.P. 189.

(b) *Breach of statutory duty.*

2.—Where a plaintiff's premises were burnt down owing to the neglect of a water company to keep their pipes charged with water at the statutory pressure:—Held, following *Couch v. Steel* (3 E. & B. 402), that an action for damages would lie. *Atkinson v. The Newcastle and Gateshead Waterworks Company*, Law Rep. 6 Exch. 404.

3.—A declaration alleged that the defendant contracted with the plaintiff to carry on board his vessel the plaintiff's sheep from Hamburg to Newcastle, and omitted to provide any pens, battens or footholds for the sheep on board the vessel, as required by an Order of the Privy Council; and that by reason of this omission the sheep were washed overboard by the sea and lost. The Order was made under the powers conferred by section 75 of the Contagious Diseases (Animals) Act, 1869, which imposes penalties for disobedience:—Held, that the declaration was bad, because the object of the Act and the Order of the Privy Council was not to protect owners of animals from such injuries, but to prevent the introduction and spread of contagious diseases in Great Britain. *Gorris v. Scott*, 43 Law J. Rep. (n.s.) Exch. 92; Law Rep. 9 Exch. 125.

(c) *Expulsion of member of insurance society without hearing defence.*

4.—Declaration that the plaintiff was a member of a marine insurance association, and that

the defendants were the committee of the society, and one of the rules was that they should have entire control of its affairs, and "That if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have full power to exclude such member by directing the secretary to give such member notice in writing that the committee have excluded such member . . . and after the giving of such notice such member shall be excluded, and have no claim or be responsible for or in respect of any loss or damage happening after such notice;" that the plaintiff was entitled to receive, and, but for the grievances thereafter mentioned, would have received, from the funds of the society an indemnity for any loss or damage to his ship by the perils of the sea during his membership. Breach, that the defendants, well knowing the premises, but wrongfully, collusively, and improperly contriving to deprive the plaintiff of the benefit of such indemnity . . . did wrongfully, collusively, and improperly expel the plaintiff from the society, on the alleged ground that his conduct was (in the terms of the rule) suspicious, without any just, reasonable or probable cause whatsoever for such expulsion, and without giving him any opportunity of being heard, and without in fact hearing the plaintiff or any person on his behalf in defence and vindication of his conduct. And that a few days after the expulsion his ship sustained damage, and, but for the expulsion, he would have been entitled to receive, and would have received a certain sum as indemnity for the damage, and that by reason of his expulsion he had lost the said sum:—Held, on demurrer, that the declaration was bad; per Kelly, C. B., and Amphlett, B., because as the committee had not heard the plaintiff, nor given him an opportunity of being heard before them in his own defence, their act of expulsion was void, and he remained still a member of the society, and entitled to all his rights of membership, and, therefore, had not suffered the damage alleged. Per Cleasby, B., because, even if a fraudulent expulsion would have been actionable, there was no allegation that the act of the defendants had been fraudulently done. Per Pollock, B., because the declaration omitting any distinct allegation of fraud did not shew such a wrongful act as would be actionable without damage, and the expulsion being invalid, the damage laid had not occurred. *Wood v. Wood*, 43 Law J. Rep. (n.s.) Exch. 153; Law Rep. 9 Exch. 190.

(d) *Money paid: misrepresentation.*

5.—H., who was interested in a certain process for converting sewage into manure, transferred his interest to L., who transferred the same, with certain patents which had been taken out for the process, to the defendants, a joint-stock company. H. was a shareholder in and a director of the company. The people of Berlin, wishing to utilise their sewage, applied to L., who arranged with H. that the plaintiff, acting as the agent of H., should purchase from the

defendants, as for himself, the exclusive right of using their process in Berlin for 15,000*l.*, after which he should convey the same to L. for 30,000*l.*, and then L. was to convey the same to M., a clerk of H., in trust for a company to be formed at Berlin. M. was not to incur any liability. A company, called the Berlin Company, was then formed, and a prospectus issued, stating that the company had secured the exclusive right for Berlin of using the process. The shares in the company were taken up, and the 30,000*l.* paid. Of this sum H. paid 15,000*l.* to the defendants, and kept the rest. The 15,000*l.* paid to the defendants was divided by them by way of dividends. No patent had been taken out for Prussia, nor were the defendants able to transfer the exclusive right of using the process at Berlin. This was not known to the defendants, though it was to the plaintiff and to H. and to the directors of the Berlin Company, but not to the shareholders:—Held, in an action brought by the plaintiff to recover back the 15,000*l.* paid to the defendants, that he was not entitled to recover it, on the ground of a total failure of consideration. Held also, that, inasmuch as he was aware that the exclusive right to use the process could not be granted, and as therefore the assurance of such exclusive right amounted to a false representation and to a fraud upon the parties, he was precluded from maintaining the action, upon the principle that money paid in pursuance of a fraud or other unlawful purpose cannot be recovered back. *Begbie v. The Phosphate Sewage Company*, 44 Law J. Rep. (n.s.) Q. B. 233; Law Rep. 10 Q. B. 491.

(e) *Foreign judgment: mistake as to English law.*

6.—In an action on the judgment of a foreign tribunal having jurisdiction over the defendant and the cause, the fact that the judgment proceeded on a mistake as to the English law is no more a defence to the action than a mistake as to the law of some third country incidentally involved, or as to any other question of fact; and it can make no difference as to the binding effect of the judgment whether the mistake appears on the face of the proceedings or not. *Godard v. Gray*, 40 Law J. Rep. (n.s.) Q. B. 62; Law Rep. 6 Q. B. 130.

Declaration upon the judgment of a French Court. Plea: setting out the whole of the proceedings in the French Court; by which it appeared that the plaintiffs, who were Frenchmen, sued the defendants, who were Englishmen, on a charter-party made in England, which contained the following clause:—"Penalty for non-performance of this agreement, estimated amount of freight." The French Court gave judgment against the defendants for the amount of freight of one voyage, giving as their reason that the charter-party itself fixed the amount of the indemnity to which either of the parties was entitled on the non-performance of the agreement by the other:—Held, on demurrer to the plea, that the mistake as to the English law, in treating the penal clause as fixing the limit of the damages, was no bar to

the action, by Blackburn, J., and Mellor, J., on the ground that the defendants could no more set up as an excuse relieving them from the duty of paying the amount awarded by a foreign tribunal having jurisdiction over them and the cause, that the judgment proceeded on a mistake as to the English law, than they could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact. By Hannen, J., on the ground that the mistake was as to a matter of which the foreign Court could only be informed by evidence; and that the party who failed to produce such evidence could not afterwards impeach the judgment, on account of an error into which the Court must be presumed to have fallen in consequence of his default. *Ibid.*

*Novelli v. Rossi* (2 B. & Ad. 757) explained. *Ibid.*

(f) *For costs.*

7.—An action lies to recover the costs on an indictment for libel given by 6 & 7 Vict. c. 96. s. 8. *Richardson v. Willis* (No. 2), 42 Law J. Rep. (n.s.) Exch. 68.

*To recover costs of defending an action.* [See SHIPPING LAW, I 12.]

(g) *Effect of proceedings in previous actions.*

(1) *Confession of plea: release with condition subsequent.*

8.—To an action for debt the defendant pleaded to the further maintenance a composition deed under the Bankruptcy Act, 1861, which had been made after action, and by which the defendant's creditors expressly released him from their debts, and the defendant covenanted to pay a certain composition on a day which had not arrived when the plea was pleaded, and it was declared that the deed should be void if default should be made in payment of such composition. After such default had been made, and the plaintiff had had an opportunity of replying the non-payment of the composition, he confessed the plea, and taxed and received his costs of the cause under Rules 22 and 23 of Trinity Term, 1853. He then brought a second action for the same debt, to which the defendant pleaded, by way of estoppel, a plea setting out the proceedings in the first action. The plaintiff replied to this the non-payment of the composition when due, and the defendant demurred to such replication:—Held, affirming the judgment of the Court of Common Pleas (39 Law J. Rep. (n.s.) C. P. 384; Law Rep. 5 C. P. 607), that the release pleaded in the first action was liable to be defeated by a condition subsequent, though a good answer to the action at the time it was pleaded, but that the plaintiff having confessed such plea, and taken his costs of action at a time when he might have replied an avoidance of such release by the non-payment of the composition, was estopped from afterwards bringing a fresh action for his same debt. *Newington v. Levy* (Ex. Ch.), 40 Law J. Rep. (n.s.) C. P. 29; Law Rep. 6 C. P. 180.

*Semble*—that the plaintiff might have main-

tained such second action if the confession of the plea in the first action had been before the composition was payable. *Ibid.*

*Quere*—if it would have been a good equitable defence to have rejoined that the omission to pay the composition when due, was from a mistake as to the day on which it was payable, and that the defendant afterwards tendered it to the plaintiff. *Ibid.*

(2) *Cross-action: settlement of previous action.*

9.—A having been employed by B. to do work according to a specification, brought an action to recover the price agreed to be paid upon the completion of the work. The action was settled by payment of the whole amount, after which B. brought an action against A. to recover damages for an alleged non-performance of the contract, and for an alleged improper performance of the same:—Held, that he was not precluded from maintaining the action by reason of the settlement of the action brought against him by A. *Davis v. Hedges*, 40 Law J. Rep. (N.S.) Q.B. 276; Law Rep. 6 Q.B. 687.

(h) *In other cases.*

*By married woman for breach of contract.* [See *BARON and FEME*, 25.]

*By married women for libel.* [See *BARON and FEME*, 26.]

*On bill of exchange.* [See *BILL OF EXCHANGE*, 32–35.]

*For breach of promise of marriage.* [See *BREACH OF PROMISE*.]

*To recover sums under compromise.* [See *COMPROMISE*, 3.]

*On implied promise of indemnity.* [See *CONTRACT*, 30.]

*Measure of damages.* [See *DAMAGES*.]

*By relatives, for negligence under Lord Campbell's Act.* [See *CAMPBELL'S ACT*.]

*Against arbitrator and valuer for neglect.* [See *ARBITRATION*, 16.]

*By executors carrying on testator's business.* [See *EXECUTOR*, 15.]

*Right of executor to sue in testamentary capacity.* [See *EXECUTOR*, 16.]

*For false representation.* [See *FALSE REPRESENTATION*.]

*On foreign judgment.* [See *FOREIGN JUDGMENT*.]

*Against company for fraud of agent.* [See *FRAUD*, 2.]

*Action for rent barred by distress.* [See *LANDLORD and TENANT*, 9.]

*For excessive seizure under distress.* [See *LANDLORD and TENANT*, 10.]

*For damages by negligence causing death of servant.* [See *MASTER and SERVANT*, 6.]

*Between master and servant, for breach of contract of service.* [See *MASTER and SERVANT*, 16–18.]

*For nuisance.* [See *NUISANCE*, 2.]

*For malicious prosecution.* [See *MALICIOUS PROSECUTION*, 2.]

(B) NOTICE OF ACTION: STATUTORY ACTS.

(a) *Under Public Health Act.*

10.—Where injury was sustained by the insufficient buoying of a sunken anchor, which was part of certain works authorised by a local Act, and which were to be executed subject to the provisions of the Public Health Act, 1848, it was held that notice of action under that Act was necessary before bringing an action for such injury. *Jolliffe v. Wallasey Local Board*, 43 Law J. Rep. (N.S.) C.P. 41; Law Rep. 9 C.P. 62.

(b) *Apprehension without warrant under Larceny Act, 1861.*

11.—By section 103 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), any person found committing, *inter alia*, a theft, may be immediately apprehended without a warrant, and by section 113 notice of action must be given before any one can be sued for anything done in pursuance of the Act:—Held, that to entitle a person to such notice of action, it is sufficient if he honestly believed that the person he apprehended was found by him committing a theft, and that if he might have so believed, it is no reason for disentitling him to such notice that a jury might think there was no reasonable ground for his so believing. *King v. Chamberlain*, 40 Law J. Rep. (N.S.) C.P. 273; Law Rep. 6 C.P. 474, *nom.* *Chamberlain v. King*.

(c) *Action against surveyors of highways.*

12.—The defendants, surveyors of highways of a parish, made a rate which was entered in the rate book as a composition of 1s. in the pound agreed to be taken by the defendants, surveyors, &c., in lieu of statute work to be performed and done by several inhabitants and occupiers of land, hereditaments, &c. The rate was not signed by the defendants, as surveyors, nor allowed by Justices of the peace, nor published as required by 5 & 6 Will. 4. c. 50. The plaintiff paid the amount at which he was assessed, and afterwards, discovering that the rate was bad, commenced an action to recover the money paid:—Held, that although the rate was bad, the defendants were entitled to the protection afforded by s. 109 of 5 & 6 Will. 4. c. 50, and that the action was not maintainable, inasmuch as the plaintiff had not given to them any notice of action. *Judge v. Selmes*, 40 Law J. Rep. (N.S.) Q.B. 287; Law Rep. 6 Q.B. 724.

ADEMPTION.

[See *ADVANCEMENT; LEGACY*.]

ADMINISTRATION

(1) *OF ESTATE IN CHANCERY.*

(A) *RIGHT TO SUE.*

(a) *Suit by creditor.*

(b) *Suit for mesne profits.*

(B) *PROOF OF DEBTS, ETC.*

(a) *Judgment creditor.*

(b) *Continuing guarantie.*

(c) *By bankers of executor.*

- (d) *By trustees of separate estate of partner.*
- (e) *By annuitant under award.*
- (f) *Right to interest on debt.*
- (g) *Priority: speciality and simple contract debts.*

## (C) LEGAL AND EQUITABLE ASSETS.

## (D) MARSHALLING ASSETS.

- (a) *As between devisee of mortgaged estate and descended estate.*
- (b) *As between devisee of mortgaged estate and personality.*
- (c) *As between residuary and specific devisees.*
- (d) *As between devised and descended estates.*
- (e) *As between residuary legatee and descended share of residue.*
- (f) *As between pecuniary legatee and residuary devisee.*
- (g) *As between pure and impure personality.*
- (h) *As between corpus and income.*
- (i) *As against charities.*
- (k) *Charge of debts; as from when realty is charged.*

## (E) CONTRACT BY INTESTATE TO BUY LAND.

## (F) LEGATEES.

- (a) *Charge on realty.*
- (b) *Payment where no residuary estate.*
- (c) *Payment out of real and personal estate rateably.*
- (d) *Payment out of testator's estate and appointed fund rateably.*
- (e) *Interest on legacies.*
- (f) *Set-off of debt barred by statute.*

## (G) PRACTICE AND JURISDICTION.

- (a) *Parties.*
- (b) *Supplemental bill.*
- (c) *Administration summons.*
- (d) *Effect of registration as *lis pendens*.*
- (e) *Carrying on business of testator.*
- (f) *Discovery.*
- (g) *Costs.*

## (2) IN COURT OF PROBATE.

[Rules in force in Bankruptcy to be applicable to the administration of assets of insolvent estates as from Nov. 2, 1874. 36 & 37 Vict. c. 66, s. 25.]

## (1) OF ESTATE IN CHANCERY.

## (A) RIGHT TO SUE.

(a) *Suit by creditor.*

1.—If a testator give his executors power to trade with a portion of his capital, a creditor for debts incurred by the executors has no right to a decree to administer the assets employed in trade. *Owen v. Delamere*, 42 Law J. Rep. (N.S.) Chanc. 232; Law Rep. 15 Eq. 134.

(b) *Suit for mesne profits.*

2.—Where an executor, who succeeded his testator in possession of an estate, by agreement allowed judgment to be given against him in an action of ejectment brought against his testator in respect to the estate, and admitted that the testa-

tor's estate was liable for mesne profits:—Held, on a claim by the plaintiff in a creditor's suit to administer the testator's estate, that the judgment in the action was not evidence of wrongful possession by the testator which could serve as a foundation for the claim. *Talbot v. The Earl of Shrewsbury*, Law Rep. 14 Eq. 503.

*Suit for administration against executor de son tort.* [See EXECUTOR, 29, 30.]

## (B) PROOF OF DEBTS, ETC.

(a) *Judgment creditor.*

3.—Where the foreign administrator of a creditor had obtained judgment against an English debtor in a foreign Court, and the debtor having died, his estate was being administered in England:—Held, that it was not necessary for the foreign administrator to take out administration in this country in order to prove for the amount due on the judgment. *In re Macnicol; Macnicol v. Macnicol*, Law Rep. 19 Eq. 81.

4.—A judgment recovered against executors:—Held, in a creditor's suit to be *prima facie* evidence of a debt as against the persons interested in the testator's real estate. *Harvey v. Wilde*, Law Rep. 14 Eq. 438.

(b) *Continuing guarantie.*

*Proof under continuing guarantie.* [See PRINCIPAL AND SURETY, 4.]

(c) *By bankers of executor.*

5.—A testator died indebted on his general account to his bankers, with whom he had deposited as a security title deeds of his estate. His widow and executrix was by his will empowered to charge his real estate in aid of his personal estate. She drew large sums from the bank on account of the testator's executors, the account being so entitled, and deposited other title deeds of the testator's estate, to secure such advances. Without the knowledge of the bank, she misapplied the advances. In a suit to administer the testator's estate, upon the securities deposited turning out insufficient:—Held, that the bank was entitled to prove for the insufficiency against the testator's general estate. *Farhall v. Farhall*, 40 Law J. Rep. (N.S.) Chanc. 728; Law Rep. 12 Eq. 98.

(d) *By trustees of separate estate of partner.*

6.—A., a partner in a bank, becoming treasurer of a board of guardians, gave a bond as security, in which B., one of his two partners, and C. joined as sureties. The account was kept at the bank in the name of the board. The bank stopped. A. died, and shortly afterwards B. and the surviving partner in the bank were adjudicated bankrupts. A.'s separate estate was insolvent, B.'s solvent. C., as surety under the bond, paid to the board the whole amount due to them from the bank on their account, and then recovered half of it as contribution from B., his co-surety. The trustees of B.'s separate estate now claimed, in the suit for administering the estate of A., the amount so recovered from B.'s estate by C.:—Held, that the law laid

down in *Ex parte Topping* (34 Law J. Rep. (N.S.) Bankr. 13; 4 D. J. & S. 551) was not applicable, and that as the claim, if admitted, would increase the surplus of B.'s estate that would go to the creditors of the bank, diminishing the separate estate of A., it was, in effect, a claim by the joint creditors to the prejudice of the separate creditor, and therefore could not be allowed. *Lacey v. Hill*, 42 Law J. Rep. (N.S.) Chanc. 86; Law Rep. 8 Chanc. 441.

(e) *By annuitant under award.*

7.—An arbitrator awarded an annuity of 1,200*l.* to be paid by A. to B., and to be secured by the purchase of a government annuity; and in case it should not be secured within two months, a further sum of 100*l.* to be paid monthly till it was secured as a penalty. A. paid the annuity and penalty for two years until his death. He died insolvent, and a creditors' suit had been instituted for the administration of his estate:—Held, that the annuitant could prove for the annuity and the penalty until the annuity should be secured. *Parfit v. Chambre*; *Ex parte the Assignee of the Countess D.*, 42 Law J. Rep. (N.S.) Chanc. 6.

The testator had procured some evidence as to the annuitant's age, but it was not perfect. The annuitant was formally required to perfect the evidence, but would not incur the expense unless it was shewn that the annuity would thereupon be purchased:—Held, that this was no default such as to prevent the penalty from running. *Ibid.*

(f) *Interest on debt.*

8.—To entitle a creditor in an administration suit to interest on his debt, the decree must have been obtained, as well as the debt proved, since the Gen. Ord. 46 of the 26th of August, 1841 (Cons. Ord. xlii. r. 10). *Wheeler v. Gill*, 44 Law J. Rep. (N.S.) Chanc. 181; Law Rep. 19 Eq. 316.

A creditor's suit was instituted, and the usual decree made in 1830, but no enquiries or other further proceedings were prosecuted until 1873, when an order was made on petition in the suit directing enquiries as to debts, under which the Chief Clerk ultimately certified the plaintiff's debt:—Held, that the plaintiff had not "come in and established" his debt within the meaning of the Gen. Ord. 46 of the 26th of August, 1841 (Cons. Ord. xlii. r. 10), so as to entitle him to interest thereon. *Ibid.*

(g) *Priority: specialty and simple contract debts.*

9.—A simple contract creditor of a deceased intestate, who obtains, but does not register, a judgment for his debt against the legal personal representative, is entitled to priority over the intestate's specialty and simple contract creditors. *In re Williams*; *Williams v. Williams*, 42 Law J. Rep. (N.S.) Chanc. 158; Law Rep. 15 Eq. 270.

10.—E. B., the tenant of business premises, covenanted by a deed of arrangement made between himself and the administrator of his deceased partner, in whom the premises were vested, to accept a lease of the premises for a certain term at a rent

named in the deed, and it was stipulated that the lease should contain a covenant by E. B. to keep the premises in repair, and other covenants usual in leases of a like nature. E. B. retained possession of the premises till his death, but was never called upon to execute a lease:—Held, that the administrator was entitled to rank as a specialty creditor in respect of his claim for rent and dilapidations in the same manner as if a lease had been executed in pursuance of the deed on the day of the date thereof. *Kidd v. Boone*; *Evans's Claim*, 40 Law J. Rep. (N.S.) Chanc. 581; Law Rep. 12 Eq. 89.

As part of the same arrangement E. B. gave to the administrator a bond to secure part of a certain sum due from him to the partnership, and thereby bound himself, in case he should not punctually pay the instalments therein mentioned, to pay the remainder of the said sum due. The instalments were not paid regularly:—Held, that the administrator was entitled to claim as a specialty creditor for the whole sum. *Ibid.*

11.—On the assignment by way of settlement of a reversionary interest in certain trust funds, the settlor covenanted that he and all persons claiming through him would, upon the request of the trustees of the settlement, do all acts necessary for further assuring the premises to the trustees. The settlor afterwards obtained possession of the settled premises, and died, after applying the same to his own use:—Held, that in the administration of his estate the trustees were entitled to prove for the amount of the settled funds, as for a specialty debt. *In re Dickson*; *Blackburn v. Dickson*, 40 Law J. Rep. (N.S.) Chanc. 707; Law Rep. 12 Eq. 154.

12.—A lessor agreed in writing to demise minerals to a lessee at a certain rent. Disputes having arisen, and no rent having been paid, an action was brought for the rent, and a bill was filed to cancel the agreement. The matter was then referred to arbitration by submission under seal, and by award under seal the arbitrator decided that the lease should be cancelled, and awarded a lump sum to the lessor as damages. The lessee then died, and a bill having been filed to administer his estate, the lessor claimed to rank as a specialty creditor in respect of the sum awarded:—Held, that the sum awarded was not a specialty debt. *Talbot v. Earl of Shrewsbury*, 42 Law J. Rep. (N.S.) Chanc. 877; Law Rep. 16 Eq. 26.

(C) LEGAL AND EQUITABLE ASSETS.

13.—Notwithstanding *Lovegrove v. Cooper* (2 Sm. & G. 271),—Held, that proceeds of real estate ordered to be sold and for payment of debts, and paid into Court are equitable, not legal, assets. *Bain v. Sadler*, 40 Law J. Rep. (N.S.) Chanc. 791; Law Rep. 12 Eq. 570.

(D) MARSHALLING ASSETS.

(a) *As between devisee of mortgaged estate and descended estate.*

14.—Testator devised part of a freehold estate (the whole of which was subject to a mortgage),

upon trust, to pay his widow an annuity, and out of the surplus income to apply so much as the trustees thought fit for the benefit of his children, and to apply the surplus in paying off the principal and interest of the mortgage debt, and after the death of the wife, and when the whole of the mortgage should be paid off, upon trust for his children. The rest of the property, subject to the mortgage, descended to the heir:—Held, in a suit by the mortgagee in which a sale had been decreed, that, against a purchaser from the heir, the descended estate must bear the burden of the mortgage in exoneration of the devised estates. *Waterhouse v. Clout*, 41 Law J. Rep. (n.s.) Chanc. 223.

(b) *As between devisee of mortgaged estate and personality.*

15.—The 30 & 31 Vict. c. 69 amounts to a legislative declaration that the Court of Chancery had put a wrong interpretation on the 17 Vict. c. 113. (Locke King's Act), and though it only expressly enacts that a direction for payment of debts out of personality shall not be held to indicate a contrary intention to the rule that a mortgage is to be paid primarily out of the estate subject to it, it really overthrows the whole reasoning on which the former cases had proceeded. *Gall v. Fenwick*, 43 Law J. Rep. (n.s.) Chanc. 178.

A testator seized of an estate partly leasehold and partly freehold subject to a mortgage devised it specifically, and also created a mixed fund consisting of personality the proceeds of a sale of some realty and annuities to be raised out of the mortgaged estate and other estates, and directed his debts to be paid out of this mixed fund:—Held, that he did not manifest a contrary intention to the rule laid down by Locke King's Act, but as leaseholds were not within that Act the mortgage ought to be apportioned between the freeholds and leaseholds according to their values at the testator's death, and the part apportioned in respect of the leaseholds paid out of the mixed fund. *Ibid.*

16.—B., entitled under a deed of 1831 to a share in real estate directed to be sold, mortgaged it, having by his will specifically given it to C. By the same will he gave all his residuary estate and effects to trustees upon trust, "for payment thereof of all my just debts subject thereto for L.":—Held, that Locke King's Act and the Amendment Act only apply to an interest in land taken as land, and that this property, having been converted in equity, did not come within those Acts, and that C. was entitled to have it exonerated from the mortgage debt out of the residuary personal estate. *Lewis v. Lewis*, 41 Law J. Rep. (n.s.) Chanc. 195; Law Rep. 13 Eq. 218.

Semble—the Amendment Act, 30 & 31 Vict. c. 69, applies where there is a general direction for payment of debts, out of real and personal estate. Quære—whether Locke King's Act applies to leaseholds. *Ibid.*

17.—Testator devised his mansion-house and other real estate (which were subject to a mortgage to trustees, upon trust as to the mansion-house to permit his widow to reside in it for her life, and as to the residue upon trust for certain

persons in tail. He gave the trustees power to sell all except the mansion-house, and out of the proceeds discharge "incumbrances," he gave his residuary personal estate to trustees upon trust to pay "debts" and legacies, and to pay the surplus, if any, to his brother, and declared that if the residuary personality was not sufficient for payment of debts and legacies, the same should be charged on the real estate other than the mansion-house:—Held, that the mansion-house was not to be exonerated from the mortgage out of the personal estate. *Brownson v. Lawrance* (37 Law J. Rep. (n.s.) Chanc. 351; Law Rep. 6 Eq. 1) questioned. *Sackville v. Smyth*, 43 Law J. Rep. (n.s.) Chanc. 494; Law Rep. 17 Eq. 153.

18.—A residuary devise of land is specific as well since as before the Wills Act (1 Vict. c. 26). Consequently devised estates specifically mentioned in the will are subject, equally with residuary devised estates, to the payment of debts which the personal estate is insufficient to satisfy. Decision of Bacon, V.C., 43 Law J. Rep. (n.s.) Chanc. 570; Law Rep. 17 Eq. 556, reversed. *Hensman v. Fryer* (37 Law J. Rep. (n.s.) Chanc. 97; Law Rep. 3 Chanc. 420) followed. *Lancefield v. Iggulden*, 44 Law J. Rep. (n.s.) Chanc. 203; Law Rep. 10 Chanc. 136.

(d) *As between devised and descended estates.*

19.—Where there is a charge of debts, a share of realty which lapses to the heir will bear only its proportion of the charge. *Ryves v. Ryves*, 40 Law J. Rep. (n.s.) Chanc. 252; Law Rep. 11 Eq. 539.

20.—A testator gave to his trustees all his real and personal property to be disposed of by them according to the directions contained in his will: and he directed that as soon as possible after his death his trustees should pay all his debts, funeral and testamentary expenses. The testator then made several specific devises of real estate. The beneficial interest in part of the real estate was undisposed of and descended to the heir-at-law. The testator's personal estate having proved insufficient for the payment of his debts,—Held, that the debts and also the costs of a suit for the administration of the testator's estate must be borne rateably by the devised estates and the descended estate. *Stead v. Hardaker*, 42 Law J. Rep. (n.s.) Chanc. 317; Law Rep. 15 Eq. 175.

21.—The rule that a descended estate must exonerate a devised estate from the payment of testator's debts and costs of an administration suit equally applies, whether the descended estate has been left undisposed of at the time of making the will, or whether it has become undisposed of through lapse. *Maddison v. Pye* (32 Beav. 658) disapproved of. *Scott v. Cumberland*, 44 Law J. Rep. (n.s.) Chanc. 226; Law Rep. 18 Eq. 578.

(e) *As between residuary legatee and descended share of residue.*

22.—A testatrix, by will dated the 24th of December, 1855, bequeathed to her niece, subject to legacies and bequests, "the residue of my estate (which consisted of personality) up to the end of

this year 1855," and bequeathed all accumulations from that date to her great-nephews. The bequest to the niece of the testatrix lapsed by her death in the lifetime of the testatrix:—Held, that the bequest to the great-nephews of the testatrix was a pecuniary and not a residuary gift; that the only residuary gift was that to her niece, and that such residuary gift, having lapsed, must bear all the debts, expenses, and costs of suit. *Gowan v. Broughton*, 44 Law J. Rep. (N.S.) Chanc. 275; Law Rep. 19 Eq. 77.

Semble—the rule that a descended share of residue exonerates a share of residue well given, from debts, legacies and costs, applies equally to personal as to real estate. *Ibid*.

(f) *As between pecuniary legatees and residuary devisee.*

**23.**—Testator made a general and absolute bequest of his personalty, followed by a specific devise of realty for payment of his debts. The realty so specifically devised being insufficient for the payment of debts,—Held, that the residuary real estate must contribute with the personalty. *Powell v. Riley*, 40 Law J. Rep. (N.S.) Chanc. 533; Law Rep. 12 Eq. 175.

**24.**—A pecuniary legatee has no right to call upon a residuary devisee to contribute to the payment of debts. *Hensman v. Fryer* (37 Law J. Rep. (N.S.) Chanc. 97) not followed. *Dugdale v. Dugdale*, 41 Law J. Rep. (N.S.) Chanc. 565; Law Rep. 13 Eq. 234.

**25.**—Real estate in Scotland of a testator domiciled in England must be administered according to Scotch law; and the personal estate being by the law of Scotland primarily liable for the personal debts, it follows that in respect of those debts pecuniary legatees are not entitled to a marshalling of assets against the heir-at-law. *Harrison v. Harrison*, 42 Law J. Rep. (N.S.) Chanc. 495; Law Rep. 8 Chanc. 342.

(g) *As between pure and impure personalty.*

**26.**—Testator devised real estate upon trust for sale and conversion, payment of debts and legacies; he also gave his personal estate, consisting of pure and impure personalty, upon trust for payment of so much of his debts and legacies as the proceeds of sale of his real estate should be insufficient to pay, and directed his trustees to hold the residue upon trust for certain charities, and he declared that only such part of his estate should be comprised in the residue as might by law be given to charitable purposes. The proceeds of the real estate being insufficient to pay the debts and legacies,—Held, that the debts and legacies must be paid out of the impure personalty. *Wills v. Bourne*, 43 Law J. Rep. (N.S.) Chanc. 89; Law Rep. 16 Eq. 487.

(h) *As between corpus and income.*

[See TENANT FOR LIFE.]

**27.**—In administering an estate a proportionate amount of capital and the income actually made in the first year are to be applied in payment of debts, legacies, funeral and testamentary

expenses and costs, and the profits made in a business are to be treated as income. *Lambert v. Lambert*, 43 Law J. Rep. (N.S.) Chanc. 106; Law Rep. 16 Eq. 320.

(i) *As against charities.*

[See CHARITY, 25, 26.]

(k) *Charge of debts: when real estate charged.*

**28.**—Where a legacy is given to an infant, vesting at once, but payable on the infant's attaining twenty-one, and real estate is charged with so much of the debts and legacies as the personal estate shall be insufficient to discharge, the time for determining whether and to what extent the real estate is charged is the death of the testator, and not the time at which the infant attains twenty-one; and if the personalty is then sufficient, the real estate will not be affected by a deficiency subsequently arising from a default of the executor. *Howard v. Chaffer* (32 Law J. Rep. (N.S.) Chanc. 686; 2 Dr. & S. 236) distinguished. *Richardson v. Morton*, 41 Law J. Rep. (N.S.) Chanc. 8; Law Rep. 13 Eq. 123.

(E) CONTRACT BY INTESTATE TO BUY LAND.

**29.**—A contracted to purchase real estate, subject to a condition that, if he made any requisition which the vendor was unable or unwilling to comply with, the vendor should be at liberty to rescind the contract. He made several requisitions, and died intestate, without completing the contract, and after his death the vendor rescinded it on account of his alleged inability to comply with one of the requisitions, which, if not complied with, might have given the purchaser a right to compensation, but would not have entitled him to annul the contract:—Held, that the heir-at-law of the purchaser was entitled to have the amount of the purchase-money paid to him out of the intestate's personal estate. *Hudson v. Cooke*, 41 Law J. Rep. (N.S.) Chanc. 306; Law Rep. 13 Eq. 417.

(F) LEGATEES.

(a) *Charge on realty.*

**30.**—Gift of legacies followed by devise of testator's farm at N., and all the residue of his estate and effects, for the benefit of his wife and children:—Held, that the legacies were not charged on the farm or on the residuary real estate. *Castle v. Gillett*, Law Rep. 16 Eq. 530.

[And see supra No. 28.]

(b) *Payment where no residuary estate.*

**31.**—A testator gave certain legacies to his trustees and to his wife, and then gave to his trustees copyhold and leasehold property, and all the stocks, funds and securities and all sums of money in his house or at his bankers or elsewhere at the time of his death, and also all debts or sums of money and securities for money owing to him, upon trust to pay to his wife, in addition to the legacies and bequests therein given, an annuity, and, subject to the annuity, gave this property to two children equally. He then gave

several other specific bequests, and gave the residue of his property to trustees upon trust for his wife, but subject to the payment of debts, legacies and other charges:—Held, that the gift of copyhold and leasehold properties, and of stocks, funds, securities and debts was specific, and that, as there was no residuary estate out of which to pay the legacies, they must fail. *Roffey v. Early*, 42 Law J. Rep. (N.S.) Chanc. 472.

(c) *Payment out of realty and personality pro rata.*

**32.**—It is not necessary that there should be an absolute direction for conversion of real estate, in order that the real and personal estate may constitute a mixed fund for payment of legacies. *Allan v. Gott*, 41 Law J. Rep. (N.S.) Chanc. 571; Law Rep. 7 Chanc. 439.

A testator gave his real and personal estate to trustees, and empowered them to sell the real estate, and he directed that an annuity should be paid out of the annual income of the estate; and he also directed certain legacies to be paid out of his trust estates, moneys and premises. He was intestate as to the residuary estate by reason of the death, in his lifetime, of the residuary devisee and legatee:—Held, that the legacies were payable out of the real and personal estate rateably. *Ibid.*

(d) *Payment out of testator's estate and appointed fund rateably.*

**33.**—A testatrix, being entitled to exercise a non-exclusive testamentary power of appointment amongst her brother and four sisters, made a will giving her brother and two sisters *5l. a-piece*, and giving to her other two sisters all the residue of her property of whatever kind and wheresoever situate, and over which she had any power of appointment:—Held, that the effect of giving the residue of the appointable fund with the testatrix's own property, was to make the legacies payable out of both rateably, and so make the power well exercised. *Gainsford v. Dunn*, 43 Law J. Rep. (N.S.) Chanc. 403; Law Rep. 17 Eq. 405.

(e) *Interest on legacies.*

[And see LEGACY, K.]

**34.**—Testator by his will directed that certain pecuniary legacies thereby given should be paid out of the proceeds of sale of his real estate. Testator's estate became the subject of an administration suit, upon the further consideration of which the question arose from what time the interest on the said legacies was payable:—Held, that the interest ran from a year after testator's death. *Turner v. Buck*, 43 Law J. Rep. (N.S.) Chanc. 583; Law Rep. 18 Eq. 301.

(f) *Set-off of debt barred by statute.*

**35.**—Where the husband of a person entitled as one of the next-of-kin to a small fund was unable to support his family, the whole fund was settled. *White v. Cordwell*, 44 Law J. Rep. (N.S.) Chanc. 746; Law Rep. 20 Eq. 644.

A debt due to an intestate's estate from one of the next-of-kin, barred by the Statute of Limitations, was set off against his share in the estate. *Ibid.*

(G) PRACTICE AND JURISDICTION.

(a) *Parties.*

**36.**—The 6th and 8th rules of sec. 42 of the statute 15 & 16 Vict. c. 86, do not authorise the making of an administration decree in a suit in which one of several executors is sole plaintiff, but all the other executors are not made parties. *Latch v. Latch*, 44 Law J. Rep. (N.S.) Chanc. 445; Law Rep. 10 Chanc. 464.

A decree for an account cannot be made against an executor who is not a party to the suit. A decree so made was discharged, but with leave to amend. *Ibid.*

**37.**—Previously to the marriage of A. two settlements were executed whereby certain lands and moneys were conveyed and assigned on certain trusts. A. after his marriage became a partner in an iron business, under articles, giving the executor or administrator of a deceased partner the option of becoming a partner in the place of his testator or intestate. A. died intestate, and his widow and administratrix having elected to become a partner, assigned A.'s share to two persons on trust to pay his debts. A bill having been filed for the administration of A.'s estate and asking for the execution of the trusts of the two settlements was demurred to by the assignees of A.'s share in the partnership who had been made defendants:—Held, that they were proper parties to the suit. *Coates v. Legard*, 44 Law J. Rep. (N.S.) Chanc. 201; Law Rep. 19 Eq. 56.

*Campbell v. Mackay* (1 Myl. & Cr. 603; 6 Law J. Rep. (N.S.) Chanc. 73), and *Pointon v. Pointon* (40 Law J. Rep. (N.S.) Chanc. 609; Law Rep. 12 Eq. 547), followed. *Ibid.*

(b) *Supplemental bill.*

**38.**—A common administration decree having been made, and an infant interested in the estate some years afterwards having presented a petition by her next friend for leave to file a supplemental bill, with the object of charging a trustee of the estate with a breach of trust, which she alleged had been discovered since the date of the decree, —the Court granted leave accordingly, without requiring an affidavit by the next friend that the alleged breach of trust could not with reasonable diligence have been discovered at the date of the decree. *In re Hoghton's Estate; Hoghton v. Fidley*, 43 Law J. Rep. (N.S.) Chanc. 758; Law Rep. 13 Eq. 573.

Semble—in such a case, the object being to obtain an addition to a decree already made, the proper mode of applying for leave is by petition. *Ibid.*

(c) *Administration summons.*

**39.**—A married woman, in exercise of a power given to her by a will, made a will, by which she appointed a fund to trustees, upon trust to pay certain legacies and annuities, and subject thereto



upon trust for her son for life, with remainder to his children. Under power created by various deeds, she appointed other funds on various trusts. She appointed the trustees executors; only one of whom proved the will. She died while her husband was living. The son took out a summons for administration against the executor, who proved the will:—Held, that the Court had jurisdiction, under sec. 45 of 15 & 16 Vict. c. 85, to make the usual decree for administration of the estate, with such variations as the circumstances of the case required; that it was sufficient to serve the summons on the executor alone; but that the Court had power to and would direct service of the decree upon the two other trustees and the persons interested in the same manner as in case of a decree for administration, under sec. 42 of the Act. *In re Berkeley's Estate; Berkeley v. Mason*, 44 Law J. Rep. (N.S.) Chanc. 554; Law Rep. 19 Eq. 467.

*Order for, when made on summons.* [See PRACTICE IN EQUITY, 1.]

(d) *Effect of registration as lis pendens.*

40.—The ordinary decree for administration of a testator's estate prevents an executor from dealing with any of the assets. And the registration of the suit as a *lis pendens* affects persons who deal with the executor after the decree with notice. Therefore, when after a decree made for the administration of the testator's estate in a suit registered as a *lis pendens*, a bank took a mortgage of a picture belonging to the estate from the executrix they obtained no lien upon it, although they had not express notice of the suit. *Berry v. Gibbons*, 42 Law J. Rep. (N.S.) Chanc. 89; Law Rep. 8 Chanc. 747.

(e) *Carrying on business of testator.*

41.—In a suit instituted for administration of the estate of an intestate trader by beneficiaries, where there are infants interested, the Court has no jurisdiction to authorise the administrator to carry on the trade of the intestate. *Land v. Land*, 43 Law J. Rep. (N.S.) Chanc. 311.

(f) *Discovery.*

42.—The Court will not compel a witness on an inquiry in an administration suit to give information which might be used in a pending action by the administrator against him, there being power to obtain discovery in the action at law. *Venables v. Schweitzer*, 42 Law J. Rep. (N.S.) Chanc. 389; Law Rep. 16 Eq. 76.

(g) *Costs.*

[And see COSTS IN EQUITY, 16–23.]

43.—In an administration suit testator's personality was exhausted and the costs still unpaid. Testator was seised of an undivided share of realty, which had been devised to the plaintiffs and the defendants in undivided shares. The plaintiffs, with the consent of all parties interested in the estate except one defendant, asked for a sale of the entirety of the estate to raise the costs. The defendant, who refused his consent, offered to pay his

share of the costs, or to sell enough of the land to pay the costs, but objected to selling the whole:—Held, that the Court could not make the order asked for without the consent of the dissentient defendant. *Lees v. Lees*, 42 Law J. Rep. (N.S.) Chanc. 319; Law Rep. 15 Eq. 151.

*Costs: mortgagee's suit for sale and administration: priority of costs.* [See COSTS IN EQUITY, 21.]

## (2) IN COURT OF PROBATE.

[See EXECUTOR; PROBATE.]

## ADMIRALTY.

### (A) JURISDICTION.

- (a) *Generally.*
- (b) *Admiralty Court Act, 1861.*
- (c) *County Court Acts.*
  - (1) *Demurrage: freight.*
  - (2) *Collision.*
  - (3) *Broker's commission.*
- (d) *Pirate ship.*
- (e) *Necessaries.*
- (f) *Damage and collision.*
- (g) *Salvage.*
- (h) *Booty of war.*
- (i) *Foreign Enlistment Act.*

### (B) PLEADING.

### (C) PRACTICE.

- (a) *Appeals.*
  - (1) *From County Court.*
  - (2) *From Cinque Port Commissioners.*
  - (3) *From Registrar and merchants.*
- (b) *Inspection of documents.*
- (c) *Evidence.*
- (d) *Reference to Registrar and merchants.*
- (e) *Consolidation of suits.*
- (f) *Payment out.*
- (g) *Damage and collision.*
  - (1) *Right to begin.*
  - (2) *Arrest of ship.*
  - (3) *Claim by infant en ventre sa mere.*
- (h) *Salvage.*
- (i) *Bottomry: transfer from County Court.*

### (D) COSTS.

- (a) *Security for costs.*
- (b) *Appeal for costs.*
- (c) *Taxation.*
- (d) *In general.*

### (E) PROCTOR: PROXY.

### (A) JURISDICTION.

#### (a) *Generally.*

1.—The High Court of Admiralty has not jurisdiction over breach of a stipulation in a charter-party with regard to acts to be done before the goods are shipped. *The Dannebrog*, 44 Law J. Rep. (N.S.) Adm. 21; Law Rep. 4 Adm. & Ecc. 386.

2.—Where there is a remedy both *in personam* and *in rem*, a person who has resorted to one of

these remedies may, if he does not get thereby full satisfaction, resort to the other; but if a person has resorted to one of these remedies, and has recovered full compensation and such compensation has been paid, no further proceedings can be taken. *Yeo v. Tatem; The Orient* (P. C.), 40 Law J. Rep. (n.s.) Adm. 29; Law Rep. 3 P. C. 696.

3.—Foreigners injured, or the representatives of foreigners killed, may sue in the High Court of Admiralty in respect of injuries done by a British vessel on the high seas. *The Explorer*, 40 Law J. Rep. (n.s.) Adm. 41; Law Rep. 3 Adm. & Ecc. 289.

4.—On an application for a prohibition against an order of the Court of Admiralty for the arrest in a collision suit of a vessel belonging to the Khedive of Egypt, but not a man-of-war nor in the employ of the Egyptian Government, which had come to England to be repaired:—Held, that the Court of Admiralty was the proper tribunal to determine whether the vessel was entitled to immunity from arrest. *In the matter of the Char-keih*, 42 Law J. Rep. (n.s.) Q. B. 75; Law Rep. 8 Q. B. 197.

5.—In the construction of a statute the High Court of Admiralty ought to follow the decision of the Court of Common Pleas. *The Cargo ex Argos—The Hewsons*, 41 Law J. Rep. (n.s.) Adm. 89; Law Rep. 3 Adm. & Ecc. 568.

The County Court Admiralty Jurisdiction Acts do not confer upon those Courts a jurisdiction which the High Court of Admiralty did not originally possess. *Ibid.*

The County Courts have no Admiralty jurisdiction over a breach of charter-party not involving damage to cargo, nor over a suit for payment of freight and demurrage. *Ibid.*

#### (b) Admiralty Court Act, 1861.

6.—The Admiralty Court Act, 1861, by section 6 provides "that the High Court of Admiralty shall have jurisdiction over any claim by any owner, &c., of any goods carried into any port in England or Wales, in any ship, for damage done to the goods, &c., by the negligence, &c., on the part of the owner, &c.":—Held, that this Act does not confer a maritime lien. *Giovanni Daputo v. Wyllie; The Pieve Superieure* (P. C.), 43 Law J. Rep. (n.s.) Adm. 20; Law Rep. 5 P. C. 412.

A ship under charter to proceed to certain ports in England, for orders to discharge at a port in England or on the Continent, entered Falmouth with her cargo for orders, and was ordered to discharge at Bremen, where she did discharge her cargo. She then sailed for Cardiff, where she was arrested by process of the Admiralty Court:—Held (affirming the decision below, 43 Law J. Rep. (n.s.) Adm. 1; Law Rep. 4 Adm. & Ecc. 170), that, inasmuch as the cargo was deliverable at a port in England, and as the ship with her cargo had entered such a port for orders, the cargo had been "carried into a port in England" within the meaning of the above section. *Ibid.*

[See also *infra* (f) *Damage and collision.*]

#### (c) County Court Acts.

##### (1) Demurrage: freight.

7.—If, in an action in a superior Court, on a charter-party, for freight or demurrage, the plaintiff claims and recovers a sum greater than 20*l.* and less than 300*l.*, he is entitled to costs; for over such causes 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, s. 2, confer no jurisdiction on a County Court appointed to have Admiralty jurisdiction. *Simpson v. Blues* (41 Law J. Rep. (n.s.) C. P. 121; Law Rep. 7 C. P. 290) approved. *Gunnested v. Price, and Fulmore v. Wait*, 44 Law J. Rep. (n.s.) Exch. 44; Law Rep. 10 Exch. 65.

8.—The County Courts have jurisdiction, under the County Courts Admiralty Jurisdiction Amendment Act, 1869, *in rem*, in suits for freight, demurrage and expenses, and for breach of charter-party, provided the amount claimed does not exceed 300*l.* *Gaudet v. Brown—The Cargo ex Argos; The Hewsons* (P. C.), 42 Law J. Rep. (n.s.) Adm. 1; Law Rep. 5 P. C. 134.

9.—The High Court of Admiralty may, by transfer from a County Court, acquire jurisdiction in a cause upon a question of demurrage, as to which the High Court has no original jurisdiction. *The Swan*, 40 Law J. Rep. (n.s.) Adm. 8; Law Rep. 3 Adm. & Ecc. 314.

##### (2) Collision.

10.—An action against a pilot for collision damage caused to a barge by a vessel under his charge is not an "Admiralty cause" within the meaning of the Acts 31 & 32 Vict. c. 71 and 32 & 33 Vict. c. 51, which confer Admiralty jurisdiction upon certain County Courts. *Flower v. Bradley*, 44 Law J. Rep. (n.s.) Exch. 1.

##### (3) Broker's commission.

11.—A charter-party stipulated for a commission to the brokers J. & K.:—Held, on appeal from the Court of Passage, that the brokers were not entitled to sue *in rem*, under the County Courts Admiralty Jurisdiction Acts, for their commission. And quære, as to the right of the charterers themselves to sue for the commission. *The Nuova Raffaelina*, 41 Law J. Rep. (n.s.) Adm. 37; Law Rep. 3 Adm. & Ecc. 483.

[And see COUNTY COURT, 12-15.]

##### (d) Pirate ship.

12.—A ship which had been engaged in acts of alleged piracy, and which, before any proceedings had been taken by the Crown, had been sold by her owners at a public auction to a *bonâ fide* purchaser, was afterwards arrested by the Crown:—Held, that, although the ships and goods of pirates are, upon conviction, forfeited to the Crown, yet the ship of a pirate which has not been piratically taken, and which, before conviction, has been transferred to an innocent purchaser, is not liable to seizure by the Crown. *The Queen v. McCleverty, The Telegrafo, or Restauracion*, 40 Law J. Rep. (n.s.) P. C. 18; Law Rep. 3 P. C. 673.

(e) *Necessaries.*

13.—In order to oust the jurisdiction of the Court of Admiralty over a claim for necessities, the objection that the owner of the ship is domiciled in England or Wales must be taken before judgment pronounced. Where it is not so taken, prohibition will not be granted. *Ex parte Michael*, Law Rep. 7 Q. B. 658.

(f) *Damage and collision.*

14.—There is no Admiralty jurisdiction to entertain a suit against a pilot who, in navigating a ship, has caused a collision between that ship and another. *The Alexandria*, 41 Law J. Rep. (n.s.) Adm. 94; Law Rep. 3 Adm. & Ecc. 574.

15.—A steam vessel having, through negligence, come into collision with another ship, and having been sunk and totally lost in consequence, the owners, with a view to obtaining a decree limiting their liability under the 54th section of the Merchant Shipping Act Amendment Act, 1862, instituted a suit in the Court of Admiralty. Cross-causes of damage had previously been instituted between the owners of the vessels, and the defendants had, in the cause instituted against them by the owners of the other ship and her cargo, paid into Court 5,000*l.* (being an amount less than 1*l.* per ton on each ton of the vessel's registered tonnage) as security, to enable them to prosecute the cause in which they were the plaintiffs. A passenger, who had sustained personal injury from the collision, sued the owners of the steam vessel for damages in the Court of Exchequer, whereupon the Judge of the Court of Admiralty made an order in the limitation suit, under the 13th section of the Admiralty Court Act, 1861, that all actions and suits pending in any other Court in relation to the same subject-matter should be stopped; and he afterwards decreed that the owners were entitled to limited liability, and were only answerable to the extent of 6,376*l.*, being the full amount of 1*l.* per ton, which he directed them to pay into Court:—Held (affirming the decision below, 41 Law J. Rep. (n.s.) Exch. 82; Law Rep. 7 Exch. 187), that, under these circumstances, neither the ship nor the proceeds thereof were "under arrest of the Court of Admiralty," within the meaning of the 13th section of the Admiralty Court Act, 1861, and that the Court of Admiralty had no jurisdiction under the Merchant Shipping Act, 1854, or the amending Act of 1862, to entertain the suit, and that a prohibition might accordingly issue to that Court from the Court of Exchequer. *James v. The London and South-Western Railway Company* (Exch. Ch.), 41 Law J. Rep. (n.s.) Exch. 186; Law Rep. 7 Exch. 287.

16.—The power to stay proceedings in the principal cause until bail has been given by the defendants in the cross-cause may be exercised, even though the ship of the defendants in the cross-cause has been lost, and the defendants themselves are foreigners. *The Charkieh*, 42 Law J. Rep. (n.s.) Adm. 70; Law Rep. 4 Adm. & Ecc. 120.

17.—Under 24 Vict. c. 10. s. 7, which enacts that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship," it was held by Cockburn, C.J., and Hannen, J.; Blackburn, J., *hesitante*, that the High Court of Admiralty had not jurisdiction in a suit instituted by the relatives of persons drowned by the sinking of a ship run down by another ship. *Smith v. Brown*, 40 Law J. Rep. (n.s.) Q. B. 214; Law Rep. 6 Q. B. 729.

18.—In a cause of damage to cargo, the plaintiffs had arrested the ship for an amount not sufficient to include all the costs:—Held, that, probably under the old law, but certainly under sections 15 and 22 of the Admiralty Court Act, 1861, the Court has power to order another arrest for payment of the balance. *The Freedom*, 41 Law J. Rep. (n.s.) Adm. 1; Law Rep. 3 Adm. & Ecc. 495.

(g) *Salvage.*

19.—The 9th section of the County Courts Admiralty Jurisdiction Act, 1868, revives, subject to certain conditions, the original jurisdiction of the High Court of Admiralty, when the property saved is of less value than 1,000*l.* *The Empress*, 41 Law J. Rep. (n.s.) Adm. 32; Law Rep. 3 Adm. & Ecc. 502.

20.—A salvaged ship was released upon bond being given to the receiver of wreck for 600*l.*, and the salvors obtained an order to institute a suit in the High Court of Admiralty. A motion to rescind this order was refused. *The John Evans*, 43 Law J. Rep. (n.s.) Adm. 9.

Such an order may be obtained *ex parte*. *Ibid.*  
Semble—that a County Court of one district has no jurisdiction over the receiver of wreck in another district. *Ibid.*

(h) *Booty of war.*

[See BOOTY OF WAR.]

(i) *Foreign Enlistment Act.*

[See FOREIGN ENLISTMENT ACT.]

## (B) PLEADING.

21.—The object of the preliminary act is to commit the parties to statements of the facts when they are fresh in their recollection. At the hearing of a cause of damage the Court refused to allow a material averment in the preliminary act to be amended, but admitted before the evidence was given a corresponding alteration in the answer. *The Frankland*, 41 Law J. Rep. (n.s.) Adm. 3; Law Rep. 3 Adm. & Ecc. 511.

22.—In a cause of salvage the defendants may state the sums of money which they have paid and are liable to pay to other salvors to complete the salvage. *The Antelope*, 42 Law J. Rep. (n.s.) Adm. 42; Law Rep. 4 Adm. & Ecc. 33; and see *The Due Checchi*, Law Rep. 4 Adm. & Ecc. 35, n.

23.—In answer to a suit for damage to cargo, it is not sufficient to allege that the damage was caused by accidents and perils by the bill of lading excepted. The defendant must specify the particular accidents or perils. *The Hakon Adelsteen*, 43 Law J. Rep. (n.s.) Adm. 9.

24.—In a suit by master, also part owner, for wages and disbursements, the defendants (his co-owners) may allege counter-claims against him in respect of the co-ownership, and pray for a settlement of those claims. *The City of Mobile*, 43 Law J. Rep. (N.S.) Adm. 41; Law Rep. 4 Adm. & Ecc. 191.

(C) PRACTICE.

(a) Appeals.

(1) From County Court.

25.—At the hearing of an appeal from the County Court, the Court of Admiralty may order witnesses to be examined *vivâ voce*, but will only do so under special circumstances. In every Admiralty cause, where there is any prospect of any appeal, notes of the evidence in the County Court should be taken by some reporter duly appointed. *The Busy Bee*, Law Rep. 3 Adm. & Ecc. 527.

26.—In a suit *in rem* in a County Court, the ship having remained under arrest during the suit, the Judge of the County Court dismissed the suit, and the plaintiffs appealed:—Held, that the plaintiffs were entitled to a warrant from the High Court of Admiralty to re-arrest the ship. *The Miriam*, 43 Law J. Rep. (N.S.) Adm. 35.

(2) From Cinque Port Commissioners.

27.—On an appeal from the Commissioners of Cinque Ports, the Court will allow a tender, and compel the other party to accept or reject it. Proceedings upon an appeal from the Commissioners of Cinque Ports differ in many respects from appeals from magistrates or County Courts. *The Annette*, 42 Law J. Rep. (N.S.) Adm. 13; Law Rep. 4 Adm. & Ecc. 9. And see *The Caledonia*, Law Rep. 4 Adm. & Ecc. 11, n.

(3) From Registrar and merchants.

28.—Upon appeal from the report of the Registrar and merchants, the Court will not admit additional evidence unless satisfied that such evidence could not, by proper diligence and application, have been produced before the Registrar and merchants. *The Thuringia*, 41 Law J. Rep. (N.S.) Adm. 20.

A motion to admit such additional evidence by reason of surprise should be founded upon affidavits, setting forth the names of the proposed witnesses, and the character of their testimony. *Ibid.*

(b) Inspection of documents.

29.—After a collision between one of her Majesty's ships and another ship, it is the duty of the commanding officer of her Majesty's ship to forward a report of the collision to the Lords Commissioners of the Admiralty. In a cause of damage against one of her Majesty's ships, a motion to inspect such report was refused, on affidavit by the Secretary to the Admiralty, that it would be prejudicial to the public interests to allow such reports to be inspected. *The Bellerophon*, 44 Law J. Rep. (N.S.) Adm. 5.

(c) Evidence.

30.—When judgment has been given in one of two suits the Court cannot order the two suits to be consolidated. *The Demetrius*, 41 Law J. Rep. (N.S.) Adm. 69; Law Rep. 3 Adm. & Ecc. 523.

The Court cannot, except by consent, order that evidence in one suit that has been heard shall be admitted as evidence in a subsequent suit. And where two suits *in rem* by the owners of two ships which came into collision were instituted, and judgment had been given, an application that the evidence in those suits be admitted in a suit *in personam* by the owners of cargo on board of one of the ships was refused. *Ibid.*

31.—In the absence of Judge's notes of evidence the Court of Admiralty, on an appeal, allowed a witness to be examined who had given evidence in the Court below. *The C. S. Butler*, Law Rep. 4 Adm. & Ecc. 238.

[And see *supra* Nos. 25, 28.]

(d) Reference to Registrar and merchants.

32.—One of several causes consolidated may be referred separately to the Registrar and merchants. *The Helen R. Cooper*, 40 Law J. Rep. (N.S.) Adm. 46; Law Rep. 3 Adm. & Ecc. 339.

(e) Consolidation of suits.

[See *supra* No. 30, and *infra* No. 44.]

(f) Payment out.

33.—A decree having been made *per incuriam* in a suit *in rem* for the payment out of money in Court to satisfy the plaintiff's claim, the Court can revoke or vary the decree before payment. *The Markland*, Law Rep. 3 Adm. & Ecc. 340.

(g) Damage and collision.

(1) Right to begin.

34.—In a damage suit the plaintiff is to begin, although the sole defence is inevitable accident. *The Otter*, Law Rep. 4 Adm. & Ecc. 203.

35.—The defendant's vessel, the B. I., came into collision with the Y., which was riding to her nets. The defendants charged the plaintiffs with not exhibiting a proper light: Held, that the plaintiffs must begin. *The Bottle Imp*, 42 Law J. Rep. (N.S.) Adm. 48.

36.—When the issue in the cause is one of inevitable accident, the plaintiffs must begin, even though no charge of negligence is made against them by the defendants. *The Thomas Lea* (28 Law J. Rep. (N.S.) Adm. 37) overruled. *The Benmore*, 43 Law J. Rep. (N.S.) Adm. 5; Law Rep. 4 Adm. & Ecc. 132.

(2) Arrest of ship.

37.—In cross-causes of damage the Judge of the County Court found that one ship was not to blame, and ordered that it be released. An appeal was instituted in the High Court of Admiralty, and on motion by the appellants, it was ordered that the ship (which was foreign) should be rearrested without notice to the owners. *The Freir; The Albert*, 44 Law J. Rep. (N.S.) Adm. 49.

(3) *Claim by infant en ventre sa mere.*

**38.**—Where in a suit for limitation of liability an appearance was entered on behalf of a child of a man drowned in a collision *en ventre sa mere*, the Court reserved leave to the child, if born within due time, to prefer its claim for damages sustained by the death of its father. *The George and Richard*, Law Rep. 3 Adm. & Ecc. 466.

(h) *Salvage.*

[And see *supra* Nos. 19, 20, 22.]

**39.**—In differing from the Court below as to the quantum of reward for salvage services the Privy Council intimated that they would not have interfered unless the difference amounted to one-third at least. *Arnold v. Cowie, The Glenduror*, Law Rep. 3 P.C. 589.

**40.**—Notwithstanding the general rule not to interfere with the discretion of the Judge of first instance in awarding salvage remuneration, the Judicial Committee reduced the amount, in a case where the Judge appeared to have paid undue regard to the value of the property salvaged, as compared with the amount of services rendered. *The Amerique*, Law Rep. 6 P.C. 468.

**41.**—A tender which does not include costs should contain the reasons for not tendering them. *The Thracian*, 41 Law J. Rep. (n.s.) Adm. 71; Law Rep. 3 Adm. & Ecc. 504.

**42.**—In a suit for salvage of a derelict ship and cargo worth 6,694*l.*, the service being of extraordinary merit, the Court, after allowing the salvors their expenses, awarded them also more than a moiety of the residue. *The Rasche*, 42 Law J. Rep. (n.s.) Adm. 71; Law Rep. 4 Adm. & Ecc. 127.

**43.**—Where in a salvage suit a mistake has been made relative to the value of the vessel to which the salvage services were rendered, the Court has power to correct the mistake and vary the decree. *The James Armstrong*, Law Rep. 4 Adm. & Ecc. 380.

**44.**—The Court of Admiralty ordered two suits of salvage to be consolidated though the application was made on behalf of the plaintiffs, and opposed by the defendants. *The Melpomene*, 42 Law J. Rep. (n.s.) Adm. 45; Law Rep. 4 Adm. & Ecc. 129.

Semble—though the suits have been consolidated, the Court can deal separately with the costs in each cause. *Ibid.*

(i) *Bottomry: transfer from County Court.*

**45.**—A cause of necessities was instituted in a County Court, and subsequently referred to the High Court of Admiralty. The petition in the High Court of Admiralty alleged that a bottomry bond was given as security for the amount due for necessities:—Held, first, that the claim for necessities merged in the bottomry; secondly, that the suit having been transferred as one for necessities could not be retained as a cause of bottomry. *The Elpis*, 42 Law J. Rep. (n.s.) Adm. 43; Law Rep. 4 Adm. & Ecc. 1.

(D) *Costs.*(a) *Security for costs.*

**46.**—Upon an appeal from a County Court to the High Court of Admiralty security for the costs of the appeal must be given in the County Court, and not in the High Court of Admiralty. *The Forest Queen*, 40 Law J. Rep. (n.s.) Adm. 17; Law Rep. 3 Adm. & Ecc. 299.

**47.**—In a suit instituted in 450*l.* for recovery of wages by German seamen against a German ship, the Court ordered the plaintiffs to give security for costs in the sum of 130*l.* *The Zufall*, 44 Law J. Rep. (n.s.) Adm. 16.

(b) *Appeal for costs.*

**48.**—Although an appeal will not be allowed in respect of costs only, yet where there has been a mistake upon some matter of law which governs or affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal. *Yeo v. Tatem; The Orient* (P.C.), 40 Law J. Rep. (n.s.) Adm. 29.

(c) *Taxation.*

**49.**—The practice in salvage suits of presenting two bills of costs (*i.e.* "plaintiff's bill" and "out-port charges") is objectionable, and must be discontinued. *The City of Brussels*, 42 Law J. Rep. (n.s.) Adm. 72; Law Rep. 4 Adm. & Ecc. 194.

A person not a solicitor may be employed in a salvage suit as agent for the proctor at the out-port, and the agent's charges may be properly included in the proctor's bill of costs. *Ibid.*

**50.**—When a ship under arrest by the High Court of Admiralty is also arrested by a warrant from a County Court, the possession fees of the high bailiff of the County Court will not be allowed. *The Rio Lima*, 43 Law J. Rep. (n.s.) Adm. 4; Law Rep. 4 Adm. & Ecc. 157.

**51.**—Where in a collision suit (in which it was decided that the defendants were alone to blame) the plaintiffs had subpoenaed a receiver of wreck to produce the originals of certain depositions of the defendants, made before him, but did not call on the defendants to admit copies; the Court refused to interfere with the discretion of the registrar who had, in taxation, disallowed the costs of the subpoena and the attendance of the receiver. *The Cromwell*, Law Rep. 3 Adm. & Ecc. 316.

(d) *In general.*

*Costs of consolidated suits.* [See *supra* No. 44.]

**52.**—In cross-causes of damage the defendants in the principal suit alleged various defences, and established only the defence of compulsory pilotage. The Court refused to apportion the costs, so as to allow the plaintiffs the costs of the defences they had established. *The Schwan; The Robert Morrison*, 43 Law J. Rep. (n.s.) Adm. 18; Law Rep. 4 Adm. & Ecc. 187.

**53.**—Although a suit for salvage might have been tried in a County Court, the Judge of the High Court of Admiralty will certify for costs if

it be less expensive to try there than in the County Court. *The Beaumaris Castle*, 40 Law J. Rep. (N.S.) Adm. 41.

54.—When a suit has been already commenced in the High Court of Admiralty for an amount within the County Court jurisdiction, the plaintiff cannot obtain an order for leave to proceed, so as to relieve him from liability for costs. *The Loretta*, 40 Law J. Rep. (N.S.) Adm. 50.

#### (E) PROCTOR: PROXY.

55.—A proctor in the Admiralty Court is not usually required to exhibit a proxy; but if called upon for a proxy, he satisfies the law by stating the name of the party for whom he is authorised to appear. *Harvey v. The Owners of the Euxine* (P.C.), 41 Law J. Rep. (N.S.) Adm. 17; Law Rep. 4 P. O. 8.

#### ADMISSION.

[See EVIDENCE, 11.]

#### ADULTERATION OF FOOD.

1.—The Adulteration of Food, &c., Act, 35 & 36 Vict. c. 74, by sect. 2, enacts that every person who shall sell any article of food or drink with which to the knowledge of such person any ingredient or mineral injurious to the health of persons eating or drinking such article has been mixed, and every person who shall sell as unadulterated any article of food or drink, or any drug which is adulterated, shall be liable to (certain prescribed penalties). By section 3, any person who shall sell any article of food or drink, or any drug, knowing the same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk, and who shall not declare such admixture to any purchaser thereof, before delivering the same, and no other, shall be deemed to have sold an adulterated article of food or drink or drug, as the case may be, under this Act. The appellant went into the shop of the respondent, a provision and butter dealer, and asked for a pound of butter at sevenpence. A pound of butter was handed to him, in the presence of the respondent, which was afterwards found to be adulterated with different fats, not necessarily injurious to health:—Held, first, that there was sufficient evidence under section 2 of a sale of the butter as unadulterated; secondly, that it was not made necessary by section 3 to prove that the respondent knew the butter had been mixed with some substance, with intent fraudulently to increase its bulk. *Fitzpatrick v. Kelly*, 42 Law J. Rep. (N.S.) M. C. 132; Law Rep. 8 Q. B. 337.

2.—By the Adulteration of Food, &c., Act, 35 & 36 Vict. c. 74, s. 2, "Every person who shall sell any article of food or drink with which to the knowledge of such person any ingredient or material injurious to the health of persons eating or

drinking such article has been mixed, and every person who shall sell as unadulterated any article of food or drink, or any drug which is adulterated," shall for every such offence be liable to certain prescribed penalties. The appellant was charged with selling, as unadulterated, two ounces of green tea which was then adulterated. The appellant kept a shop for the sale of tea and coffee. M. went to the shop and asked for some green tea, which was served to him by one of the shopmen, and he bought two ounces. It was delivered to the public analyst for the county, who certified that it was adulterated by a thick facing of mineral matter and Prussian blue. The green tea in question was sold by the appellant in the same state in which it came from abroad, and the appellant did not in any way cause the tea to be painted or faced in this country. A sample of tea was produced by the public analyst before the magistrates, which resembled in colour and appearance what is popularly known as green tea. This was proved by the public analyst to be neither painted nor faced. It was also proved that the tea which is imported from China as green tea, and generally known as such in the tea trade, is painted and faced in the manner previously stated, and that the sample proved to be neither painted nor faced was imported from Japan, and not known generally in the trade as green tea. The Justices convicted the appellant:—

Held, by the majority of the Court, Cockburn, C. J.; Blackburn, J.; and Archibald, J. (Quain, J., dissenting), that the conviction was right, for in the case of a simple commodity like tea, the mode by which it was coloured was an adulteration, and this adulteration, though known to the trade, being unknown to the public, the tea must be taken to be sold as unadulterated. *Roberts v. Egerton*, 43 Law J. Rep. (N.S.) M. C. 135; Law Rep. 9 Q. B. 494.

3.—The 2nd section of the Adulteration of Food, &c., Act, 1870 (35 & 36 Vict. c. 74), imposes a penalty on a person who sells as unadulterated an adulterated article of food; and the 3rd section enacts that anyone who shall sell any article of food, "knowing the same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk, and who shall not declare such admixture to any purchaser thereof, before delivering the same, and no other, shall be deemed to have sold an adulterated article of food" under the Act:—Held, that a person commits no offence under the 3rd section, if he does not come under the 2nd section, by selling an adulterated article as an unadulterated. And Semble—that the 3rd section does not require the seller of an admixture to declare the ingredients of such admixture to the purchaser. *Pope v. Tearle*, 43 Law J. Rep. (N.S.) M. C. 129; Law Rep. 9 C. P. 499.

[And see BREAD, 1.]

ADVANCEMENT.

- (A) WHAT CONSTITUTES AN ADVANCEMENT.
- (B) ADEMPMENT AND SATISFACTION.
- (C) POWER OF TRUSTEES.

(A) WHAT CONSTITUTES AN ADVANCEMENT.

1.—On a transfer by a father into a son's name, —Held, that the presumption was that an advancement was intended, notwithstanding the fact that the son was already fully advanced, and that the father had by a previous will manifested an intention to provide for the son's children. *Hepworth v. Hepworth*, 40 Law J. Rep. (N.S.) Chanc. 111; Law Rep. 11 Eq. 10.

2.—A father purchased copyholds in his son's name, but dealt with them as owner. There was an admission that the father was intended to take during his life:—Held, that the presumption that an advancement was intended was rebutted. *Stock v. M'Avoy*, 42 Law J. Rep. (N.S.) Chanc. 230; Law Rep. 15 Eq. 55.

3.—A father who died intestate, allowed his sons, first, varying yearly sums till marriage; second, paid a son's fee to a special pleader; third, his dues to an Inn of Court; fourth, the outfit and passage money of a son in the army and of his wife to India; fifth, his debts without payment of which he must have left the army:—Held, that these payments were not "advancements by portion" within the Statute of Distributions, 22 & 23 Car. 2. c. 10. *Taylor v. Taylor*, 44 Law J. Rep. (N.S.) Chanc. 718; Law Rep. 20 Eq. 155.

He further paid, first, a son's entrance fee to one of the Inns of Court; second, the price of his commission in the army, and contemporaneously that of his outfit; third, certain sums for establishing him, late in life, in business:—Held, that these payments were advancements within the statute. *Ibid.*

To constitute "an advancement by portion" the gift must be something given by the parent to establish the child in life, or to make what is called a provision for him. *Ibid.*

An administrator, being one of the two next-of-kin of the intestate, advanced since the intestate's death out of his own moneys sums to A. B., the other next-of-kin:—Held, that he might set off in an administration suit the amount of such advances against the moneys due to the other next-of-kin from him as administrator, out of the estate of the intestate. *Ibid.*

4.—W. (a widow) transferred stock (previously standing in her name and that of her deceased husband) into the names of herself, her daughter and daughter's husband. W. received the dividends on the stock during her life. The daughter predeceased W., who died, leaving her daughter's husband surviving:—Held, that she was entitled to the stock absolutely. (*Batstone v. Satter*, 44 Law J. Rep. (N.S.) Chanc. 209; Law Rep. 19 Eq. 250. Affirmed on appeal, 44 Law J. Rep. (N.S.) Chanc. 760; Law Rep. 10 Chanc. 481.

*Advancement of wife by husband: banking account.* [See *BARON AND FEME*, 2, 3.]

DIGEST, 1870—1875.

(B) ADEMPMENT AND SATISFACTION.

5.—There is no presumption of law that the payment of a sum of money to a child (even by a father) before the date of his will, is to go against a legacy, bequeathed by the will to that child. *Taylor v. Cartwright*, 41 Law J. Rep. (N.S.) Chanc. 529; Law Rep. 14 Eq. 167.

6.—Bequest of legacies of 500*l.* each to testator's three sons T., J. and P., and to his daughter 200*l.*, with a direction that neither of his sons whom he should have advanced in his lifetime should be entitled to receive his said legacy without bringing the advances into hotchpot, and bequest of residue to testator's four sons C., T., J. and P., and the daughter. The testator had, *before the date of his will*, made advances exceeding 700*l.* to C., and *after the date of his will* had advanced 500*l.* and 380*l.* to T.:—Held, that the advances to C. should not be taken into account against him; but that, as to T. the 500*l.* must go against his legacy and the 380*l.* against his share of residue. *In re Peacock's Estate*, Law Rep. 14 Eq. 236.

7.—Testator gave his wife a life interest in half his residue. Subject to that life interest he directed his residue to be divided among his children. He made advances to some of his children, which it was admitted would adeem their shares *pro tanto*:—Held (affirming the decision of one of the Vice Chancellors, 41 Law J. Rep. (N.S.) Chanc. 407), that the widow was entitled to a life interest in only half the actual residue, without regard to the amount paid by way of advancement, ademption operating only to equalise as between the children what they took from their father. *Meinertzhagen v. Walters*, 41 Law J. Rep. (N.S.) Chanc. 801; Law Rep. 7 Chanc. 670.

8.—M., on the marriage of his daughter covenanted to settle 8,500*l.*, and advanced 2,000*l.* to purchase a share in a business for his son; by his will he gave the residue of his property equally between his daughter and his son:—Held, that these advances were both *pro tanto* in satisfaction of the children's shares. *Stevenson v. Masson*, 43 Law J. Rep. (N.S.) Chanc. 134; Law Rep. 17 Eq. 78.

9.—A testator devised real estates in strict settlement, subject to a term for raising portions for younger children, and directed that if the tenant for life should during his life advance or pay any sum or sums of money to or for the use or benefit of any younger child for whom a portion was thereby intended to be provided, then, unless the contrary should be declared by the person making such advance by deed, the sum or sums of money so to be advanced should be taken to be in full or part satisfaction as the case might be of such child's portion. The tenant for life by will gave legacies and shares of residuary estate to some of the younger children:—Held, that such gifts were not to be taken in satisfaction *pro tanto* of the portions. *Rickman v. Morgan* (1 Bro. C.C. 63; 2 Ib. 394); *Twisden v. Twisden* (9 Ves. 413); *Leake v. Leake* (10 Ib. 476); and *Golding v. Ha-verfield* (M'Cle. 345; 13 Price, 593), observed upon. *Cooper v. Cooper*, 43 Law J. Rep. (N.S.) Chanc. 158; Law Rep. 8 Chanc. 818.

D

10.—Where a father after giving by his will a portion to a child advanced to such child a portion without any deed or instrument, such provision in the absence of circumstances negating the presumption, was held an ademption *pro tanto*. *Leighton v. Leighton*, 43 Law J. Rep. (N.S.) Chanc. 594; Law Rep. 18 Eq. 458.

The occasion of a subsequent advancement satisfying or adeeming a previous one need not be the marriage of the child or any other occasion calling specially for the advancement of the child. *Ibid*.

*Presumption that legacy is adeemed by a subsequent advancement by the testator.*  
[See TRUST, A 17.]

#### (C) POWER OF TRUSTEES.

11.—By a deed of settlement a sum of money was settled upon trust for A. for life, and after death for B. for life, or until alienation, and afterwards in trust for B.'s children, and it was declared that the trustees might in their absolute discretion, but with the consent of the first tenant for life, if living, advance any sum not exceeding 2,000*l.* for the promotion in the army of B. The purchase of commissions in the army having been abolished,—Held, that inasmuch as the power of applying the fund for the promotion in the army of B. could not now be exercised, the trustees could not raise and pay the money to him. *Palmer v. Flower* (41 Law J. Rep. (N.S.) Chanc. 193; Law Rep. 18 Eq. 250) distinguished. *In re Ward's Trusts*, 42 Law J. Rep. (N.S.) Chanc. 4; Law Rep. 7 Chanc. 727.

12.—A power in a marriage settlement to advance a part of the trust funds to a son for placing him in any profession or employment, or otherwise for advancing him in the world:—Held, to authorise payment of part of the funds to the trustees of a post-nuptial settlement by the son on himself, his wife and issue, neither the son nor the wife having any property producing income, and the son being engaged in studying for the law. *Roper-Curzon v. Roper-Curzon*, Law Rep. 11 Eq. 452.

*Power to advance an adult: payment of his debts, whether within power.* [See POWER, 29.]

#### ADVOWSON.

[See CHURCH, 3-6.]

#### AGRICULTURAL CHILDREN.

[Prohibition of employment of children under eight years of age in agricultural work, and restriction on their employment when over that age. 36 & 37 Vict. c. 67.]

#### ALEHOUSE.

##### (A) GRANT OF LICENSE.

- (a) *Jurisdiction of special sessions.*
- (b) *Discretion of Justices.*
- (c) *Renewing application at special sessions.*
- (d) *Right of appeal.*
- (e) *Conviction for felony.*
- (f) *New license: confirmation.*

##### (B) RENEWAL OF LICENSE.

- (a) *Jurisdiction of Justices.*
- (b) *Adjournment.*
- (c) *Rating qualification.*
- (d) *Application to special sessions.*

##### (C) HOUSE FOR PUBLIC REFRESHMENT.

##### (D) OFFENCES.

- (a) *Supplying constable on duty.*
- (b) *Hours of closing.*
- (c) *Liquors kept for unlawful sale.*
- (d) *Sunday trading: traveller.*

[Amendment and extension of Wine and Beer-houses Acts. 33 & 34 Vict. c. 29.]

[Restrictions on the grant by Justices of the peace of new licenses and certificates for the sale of intoxicating liquors by retail. 34 & 35 Vict. c. 88.]

[Amendment of the law relating to the sale of intoxicating liquors. 35 & 36 Vict. c. 94.]

[Amendment of the laws relating to the sale and consumption of intoxicating liquors. 37 & 38 Vict. c. 49.]

##### (A) GRANT OF LICENSE.

##### (a) *Jurisdiction of special sessions.*

1.—A license, dated 10th October, 1870, was granted by the Commissioners of Inland Revenue to W., authorising him to sell exciseable liquors by retail on the premises occupied by him. The license expired by effluxion of time on the 10th of October, 1871. At the General Annual Licensing Meeting held on the 25th of August, 1871, he applied for a renewal of his license, but the justices refused to renew it. He continued to occupy the premises until the 13th of October, 1871. He was succeeded in the occupation by S., who, after giving the proper notices, applied at the Special Sessions holden on the 4th of January, 1872, for a license to sell exciseable liquors by retail to be drunk on the same premises, which he intended to keep as an inn. The justices at the Special Sessions refused the application, considering that they had no jurisdiction inasmuch as W. had remained in possession until after the expiration of the license:—Held, that they were right, and that there was no jurisdiction at the Special Sessions to grant the license. *The Queen v. Justices of the Borough of Birmingham*, 41 Law J. Rep. (N.S.) M.C. 102.

##### (b) *Discretion of Justices.*

2.—Where an application is made under 32 & 33 Vict. c. 27. s. 5, for a certificate for a license to sell beer to be consumed on the premises in respect of a house not previously licensed, the



justices may take into account the requirements of the district, and the number of beer-houses already existing within it, and refuse the application, although the fitness of the applicant and of the house are admitted. *The Queen v. Justices of Lancashire*, 40 Law J. Rep. (n.s.) M.C. 17; Law Rep. 6 Q.B. 97.

3.—By the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), s. 19, where, on the 1st of May, 1862, a license is in force with respect to any house for the sale of beer to be consumed on the premises, it shall not be lawful to refuse an application for a certificate in respect of such house, except on one or more of the grounds specified in section 8. By the Intoxicating Liquors (Licensing Suspension Act) Act, 1871, 34 & 35 Vict. c. 88, s. 3, it was declared that, where a license had by forfeiture or lapse of time ceased to be in force, the justices might, in their discretion, refuse a certificate upon any ground on which they might refuse a certificate with respect to any house as to which a license was not in force on the 1st of May, 1869. By the Licensing Act, 1872, 35 & 36 Vict. c. 94, s. 75, the Act of 1871 is repealed, and section 19 of the Act of 1869 is made perpetual:—Held, that, notwithstanding the repeal of 34 & 35 Vict. c. 88, s. 3, the justices retained their discretion to refuse a certificate in the case of a house licensed on the 1st of May, 1869, where the license had lapsed before application was made for renewal. *The Queen v. Curzon*, 42 Law J. Rep. (n.s.) M.C. 155; Law Rep. 8 Q.B. 400.

4.—The tenant of a house who had obtained a license for the sale of exciseable liquor under 9 Geo. 4. c. 61, was fined for an offence against the tenor of his license, and ejected by his landlord. Before the expiration of the year of the license another tenant was let into possession, and applied to justices, under 5 & 6 Vict. c. 44, to endorse the license to him, which they refused. He then gave up the house to the landlord, and at the next annual licensing meeting it was unoccupied, and no application was made for a license in respect of it. In the following November a special licensing meeting was held under 9 Geo. 4. c. 61, s. 4, and the appellant, who had become tenant since the licensing meeting, applied for a new license under s. 14, but the justices after considering the application on the merits rejected it. On appeal, the Quarter Sessions found that the appellant was a proper person to make the application, but held that the grant or refusal of a license under s. 14 was a matter for the discretion of the justices, and on this ground declined to interfere:—Held, that it was within the discretion of the justices to grant or refuse the license. And quære, by Lush, J., whether in the particular case the Special Sessions had any jurisdiction to grant a license. *The Queen v. Rowell*, 41 Law J. Rep. (n.s.) M.C. 175; Law Rep. 7 Q.B. 490.

(c) *Renewing application at special sessions.*

5.—A house in Middlesex, kept for years as an inn under 9 Geo. 4. c. 61, was in February, 1872, left by the licensed tenant, who gave up possession to T. In March following, at the annual

general licensing meeting, application was made for a license on behalf of T., but this was refused, and no appeal was made from the decision. The license expired on April 5th, when the house was shut up, and in May T. applied under s. 14 to the special sessions for a license, who refused it on the ground that the application had been already disposed of at the general licensing sessions:—Held, that after an unsuccessful application at the annual general licensing meeting, T. could not afterwards renew his application at the special sessions. *The Queen v. Taylor*, 42 Law J. Rep. (n.s.) M.C. 13; Law Rep. 7 Q.B. 487.

(d) *Right of appeal.*

6.—By "The Wine and Beerhouse Act, 1869," 32 & 33 Vict. c. 27, s. 8, all the provisions of the Act, 9 Geo. 4. c. 61, as to appeal from any act of the justices at the general annual licensing meeting, shall, so far as may be, have effect with regard to grants of certificates under this Act, &c. . . . By the Licensing Act, 1872, 35 & 36 Vict. c. 94, s. 75, and schedule 2, the provisions of the Act, 9 Geo. 4. c. 61, as to appeal (ss. 27, 28, 29), are repealed, "except in so far as these sections relate to the renewal of licenses or transfer of licenses:—" Held, that in the absence of any express repeal of s. 8 of the Wine and Beerhouse Act, 1869, the appeal given by that section was not taken away by the repeal of the appeal sections in the original Act, 9 Geo. 4. c. 61. *The Queen v. Smith*, 42 Law J. Rep. (n.s.) M.C. 46; Law Rep. 8 Q.B. 146.

(e) *Conviction for felony.*

7.—The 14th section of the Wine and Beerhouse Amendment Act, 1870, disqualifies any person "convicted of felony" from selling spirits by retail, and makes a license, taken out or had by any person after being so convicted, void to all intents and purposes:—Held (by Cockburn, C.J., Mellor, J., and Archibald, J.; Lush, J., *dissentiente*), that the expression "convicted of felony" is equivalent to "convicted felon," and applies to persons who have been convicted before the passing of the Act, so as to invalidate licenses held by such persons. *The Queen v. Vine*, 44 Law J. Rep. (n.s.) M.C. 60; Law Rep. 10 Q.B. 195.

(f) *New license: confirmation.*

8.—Up to the general annual licensing meeting in March, 1874, the appellant held licenses granted by the Excise for the sale of wine and beer for consumption on premises in his occupation. The licenses were granted to him under the authority of a justice's certificate, which had been given him annually since the passing of the Wine and Beerhouse Act, 1869, and which was renewed at the last general annual licensing meeting. At such meeting, the appellant, for the first time, applied for a victualler's or publican's license, under 9 Geo. 4. c. 61, and the Licensing Act, 1872. It was granted, but was not confirmed by the confirming authority for the county appointed under section 37 of the Licensing Act, 1872:—Held, that this license was a "new license," which

under section 37 required confirmation by the licensing committee, and as it had not been so confirmed, it was invalid. *Marwick v. Codlin*, 43 Law J. Rep. (N.S.) M.C. 169; Law Rep. 9 Q. B. 509.

## (B) RENEWAL OF LICENSE.

### (a) Jurisdiction of Justices.

9.—Sections 45 and 46 of the Licensing Act, 1872, do not apply to public houses licensed, at the time of the passing of the Act, under 9 Geo. 4. c. 61. *The Queen v. Mann*, Law Rep. 8 Q. B. 235.

10.—Section 14 of 9 Geo. 4. c. 61 does not apply to the case of a man who does not remove from the house specified in the license until after the license has run out, and therefore the justices at Special Sessions have no jurisdiction to grant a new license in respect of the premises to the successor of a man so removing. *Simpkin v. The Justices of Birmingham*, Law Rep. 7 Q. B. 482.

11.—By the Wine and Beerhouse License Act, 1869 (32 & 33 Vict. c. 27), sec. 19, where on the 1st of May, 1869, a license under the recited Act is in force with respect to any house for the sale therein of beer, &c., to be consumed on the premises, "it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, &c., to be consumed on the premises, in respect of such house, except upon one or more of the grounds upon which an application for a certificate under this Act for the sale of beer, &c., not to be consumed on the premises may be refused, in accordance with this Act." By section 8 the provisions of 9 Geo. 4. c. 61, shall apply to grants of certificates under this Act, subject to this qualification, that no application for a certificate under this Act in respect of a license to sell by retail beer, &c., not to be consumed on the premises, shall be refused except on one of the following grounds: first, "that the applicant has failed to produce satisfactory evidence of good character:"—Held, that after justices have refused an application for a certificate under sec. 19, on the ground that the applicant has failed to produce satisfactory proof of good character, the Quarter Sessions, on appeal, are not limited to the evidence before the justices below, but may receive fresh evidence of the applicant's character. *The Queen v. Pilgrim*, 40 Law J. Rep. (N.S.) M.C. 3; Law Rep. 6 Q. B. 89.

12.—At a general annual licensing meeting, M., the occupier of a house licensed as a public-house under 9 Geo. 4. c. 61, applied for a renewal of the license. The justices renewed the license, but with the following notice upon it, "This license is renewed on condition that the licensed premises shall, before the next general annual licensing meeting, be improved and made of the annual value of 30*l.*, in default of which this license will not be renewed:"—Held (Mellor, J., *hesitante*), that the justices had no power to impose such a condition upon M.; that the provision in section 46 of the Licensing Act, 1872, as to improving the premises does not apply to a house already licensed under 9 Geo. 4. c. 61, and that the condition was null and void. *The Queen v.*

*The Justices of Exeter*, 42 Law J. Rep. (N.S.) M.C. 35.

Semle—that part of a license cannot be quashed upon certiorari without quashing the whole. *Ibid.*

Observations on the requisites of the affidavit under the "Review of Justices' Decisions Act, 1874." *Ibid.*

### (b) Adjournment.

13.—Where justices under the above section adjourn an application for the renewal of a license, to which no objection has been made, they must give the applicant notice of the adjournment, and require his presence at the adjourned meeting; merely giving notice in open Court that the case will be adjourned is not sufficient if not brought home to the applicant. Semle—any licensing justice may himself make an objection to the renewal of a license. *The Queen v. Farquhar*, Law Rep. 9 Q. B. 258.

### (c) Rating qualification.

14.—By 3 & 4 Vict. c. 61. s. 1, it is enacted that no license to sell beer by retail shall be granted "in respect of any dwelling-house which shall not, with the premises occupied therewith," be rated in one sum to the rate for the relief of the poor, on a rent or annual value of 15*l.*, if situate in any town corporate, the population of which shall exceed 10,000. The borough of Blackburn has more than 10,000 inhabitants. On an application made to justices for a certificate under 32 & 33 Vict. c. 27, for the renewal of a license for the sale of beer, it was proved that the applicant occupied a house and shop in the said borough, which were together assessed to the relief of the poor in the sum of 15*l.*, and were attached to and communicated with each other, and that the shop was used for the sale of groceries and beer. That portion of the house and premises occupied for the sale of beer without the shop would not have been rated in a sufficient sum. The justices being of opinion that the applicant was not entitled to a certificate by reason of his occupying part of such house and premises as a shop, refused the application:—Held, that as in fact the shop was occupied with the dwelling-house, and they were together assessed in a sufficient sum, the terms of the 1st section of 3 & 4 Vict. c. 61 were satisfied, and that therefore the decision of the justices was wrong. *Garatty v. Potts*, 40 Law J. Rep. (N.S.) M.C. 1; Law Rep. 6 Q. B. 86, *nom. Garetty v. Potts*.

### (d) Application to special sessions.

15.—The holder of a certificate for a license to sell beer to be consumed on the premises, assigned the licensed premises, and removed from and yielded up possession of them on the 14th of February. The next ensuing general annual licensing meeting was held on the 6th of March. The old tenant applied for a renewal of the certificate at such meeting, and was refused. The new tenant did not apply at that meeting, but gave the requisite notices, and applied for a certificate at the special licensing sessions, held

under 9 Geo. 4. c. 61. s. 4, on the 12th of April:—Held, that he was entitled to such certificate at the special sessions, under 9 Geo. 4. c. 61. s. 14, and 33 & 34 Vict. c. 29. s. 4. subs. 5. *The Queen v. The Justices of Middlessex*, 40 Law J. Rep. (n.s.) M. C. 184; Law Rep. 6 Q. B. 781.

(C) HOUSE FOR PUBLIC REFRESHMENT.

**16.**—The resident occupier of a house called the Café, in Lower Temple Street, Birmingham, in which were found, between eleven and twelve o'clock at night, seventeen females and twenty gentlemen, who paid for, and were supplied with, cigars, coffee and ginger-beer, which they consumed there, was convicted of keeping open such house without taking out a license under 23 Vict. c. 27. s. 6, to keep a refreshment house:—Held, that such house was "kept open for public refreshment, resort and entertainment," and required such a license, and that the conviction was right. *Muir v. Keay*, 44 Law J. Rep. (n.s.) M. C. 143; Law Rep. 10 Q. B. 594.

(D) OFFENCES.

(a) *Supplying constable on duty.*

**17.**—By sec. 16 of the Licensing Act, 1872, "If any licensed person supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior of such constable, he shall be liable to a penalty, &c." A constable on duty and in uniform went to the house of a licensed person. He was there supplied with some brandy by a servant. He did not go there by the authority of a superior officer, nor was the brandy supplied by the authority of any superior officer. The licensed person was not present at the time; he did not know that the brandy was supplied, nor had he given any express authority to the servant to supply it:—Held, that, under the above section, he was liable to be convicted. *Mullins v. Collins*, 43 Law J. Rep. (n.s.) M. C. 67; Law Rep. 9 Q. B. 292.

(b) *Hours of closing.*

*As to hours of closing in Scotland.* [See SCOTCH LAW, 6.]

**18.**—Where a town was divided into two parishes, one of which contained less than 2,500 inhabitants:—Held, that a conviction against the keeper of a beer-shop in such parish, for keeping his house open after 10 p.m., could not stand, as the town was "a place" in which a beer-shop might lawfully be kept open until 11 p.m., under 3 & 4 Vict. c. 61, s. 15. *Rice v. Slee*, Law Rep. 7 C. P. 378.

(c) *Liquors kept for unlawful sale.*

**19.**—When liquors kept for unlawful sale have been seized under s. 15 of 33 & 34 Vict. c. 29, the justices cannot order them to be sold without giving the person, upon whose premises they are seized, an opportunity of being heard, and of

showing that the seizure was wrong, and that the sale ought not to take place. *Gill v. Bright*, 41 Law J. Rep. (n.s.) M. C. 22.

(d) *Sunday trading: traveller.*

**20.**—The law as settled by the decision in *Davis v. Scrace* (38 Law J. Rep. (n.s.) M. C. 71; Law Rep. 4 C. P. 172), that upon an information against a beerhouse keeper for opening his house on Sunday for the sale of beer within the hours prohibited by 11 & 12 Vict. c. 49. s. 1, except for refreshment for travellers, the burthen of proving that persons drinking in the house are not travellers is upon the informer, is unaffected by the Wine and Beerhouse Act, 1869. *Morgan v. Hcdger*, 40 Law J. Rep. (n.s.) M. C. 13; Law Rep. 5 C. P. 485.

**21.**—By the Licensing Act, 1872, 35 & 36 Vict. c. 94, s. 24, "any person who sells or exposes for sale, or opens or keeps open premises for the sale of, intoxicating liquors during the time that such premises are directed to be closed in pursuance of this section," shall be liable to (a prescribed penalty); and by the same section, "none of the provisions contained in the section shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor to *bonâ fide* travellers, or to persons lodging in his house." By section 51, subsection 4, "any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information, and if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant or complainant."

At the hearing of an information against the appellant (who had the usual license to sell liquor to be consumed on the premises), for keeping his premises open in prohibited hours on Sunday, it was proved that nineteen workmen were found drinking, and some of them smoking, there at the time in question, and that all except one came from central parts of the town of Birmingham, at distances varying from a mile and three-quarters to two miles from the premises, which were only 400 yards distant by road from Birmingham. There was no evidence that they had travelled or were about to travel. On the part of the appellant it was proved that an attendant was placed near the premises for the purpose of preventing the entrance of any except *bonâ fide* travellers; that no one was admitted who did not state that he had come more than three miles. The appellant also proved that notices were posted on his premises stating that none but travellers could be admitted, and that during the hours in question no persons were admitted who did not represent themselves to be *bonâ fide* travellers.

The justices found that the men found on the premises were not all *bonâ fide* travellers, and also that inasmuch as upon misrepresentations made by the persons who were not *bonâ fide* travellers, intoxicating liquors had been obtained by them,

sufficient diligence had not been used. That it was for the appellant to bring himself within the exception as to *bonâ fide* travellers, and that he had failed to do so. They accordingly convicted him in a penalty of 5*l.*:—Held, that the justices were right in holding that under the Act the burden lay upon the appellant of shewing that the sale of liquor was within the exception in section 24; but upon the point taken that the honest belief of the appellant that the men were *bonâ fide* travellers brought him within the exception, the case must be remitted to the justices to find as a fact whether the appellant *bonâ fide* thought that the persons admitted by him were travellers within the meaning of the Act,—Quain, J., inclining to the opinion that such a *bonâ fide* belief would bring the appellant within the exception; Blackburn, J., and Archibald, J., to the opinion that the appellant must prove that the persons admitted were actually *bonâ fide* travellers. *Roberts v. Humphreys*, 42 Law J. Rep. (n.s.) M. C. 147; Law Rep. 8 Q. B. 483.

*Compensation under lease for goodwill of alehouse.* [See LEASE, 21.]

#### ALIEN.

In March, 1862, L. and S. (the wife of an alien conveyed land of which they were tenants) in common to a trustee, upon trust to sell and stand possessed of the proceeds in trust for L. and S. in equal shares, the share of S. to be for her separate use. In April, 1862, L. and S. entered into an agreement to allot the lands in severalty, and that the trustees should stand possessed of each such respective allotment on the respective trusts declared by the deed of March, and that nothing in the agreement should prejudice or affect any of the powers or trusts of the deed. No sale was ever effected, and S. died in 1866, having by her will given to her husband, the alien, her personal estate absolutely and a life interest in her real estates:—Held, first, reversing the decision of one of the Vice Chancellors, that the land was not in equity converted into money; secondly, that the title of the alien having accrued before the passing of the Naturalisation Act, 1870, that Act did not remove his disability to hold land; thirdly, following the decision of Lord Romilly, M.R., in *Barrow v. Wadkin* (24 Beav. 1, 327; 27 Law J. Rep. (n.s.) Chanc. 129), that the trust for the alien could be enforced for the benefit of the Crown. *Sharp v. De St. Sauveur*, 41 Law J. Rep. (n.s.) Chanc. 576; Law Rep. 7 Chanc. 343.

#### ALIMONY.

[See DIVORCE.]

#### AMALGAMATION.

[See COMPANY.]

#### ANIMALS.

##### *Cruelty to animals.*

1.—H., the huntsman of a pack of hounds, had the care and management of the kennels, and of a place which was used solely as a slaughter-house for the purpose of slaughtering horses and other cattle sent there as food for the hounds. B. sent a horse to the said place, and delivered it to H. for the purpose of the said horse being slaughtered as food for the hounds, telling him of the said purpose. Instead of slaughtering the horse, H. lent him to a person for the purpose of being worked, and he was worked by that person:—Held, that 12 & 13 Vict. c. 92. s. 9 (which imposes a penalty for using horses delivered to be slaughtered at a place used for slaughtering), applied to the huntsman, and was not confined to persons having or managing licensed slaughter-houses under 26 Geo. 3. c. 71. *Colam v. Hall*, 40 Law J. Rep. (n.s.) M. C. 100; Law Rep. 6 Q. B. 206.

2.—A match took place in a field of between three and four acres as to which of two dogs could kill the greatest number of rabbits. The field was walled and paled round so that a rabbit could not escape therefrom. The two dogs were held in a slip. A rabbit was let loose before the dogs who ran and killed it. The appellant was convicted under 12 & 13 Vict. c. 92. s. 3, for using the field for the purpose of baiting a rabbit:—Held, that such conviction could not be supported, inasmuch as a rabbit treated in the manner above described could not be said to be baited within the meaning of that section. *Pitts v. Millar*, 43 Law J. Rep. (n.s.) M. C. 96; Law Rep. 9 Q. B. 380.

##### *Conveyance of cattle.*

3.—Cattle were put into a railway truck at K., consigned to C. No request in writing was made by the consignor to supply them with food or water. They were sent off to C., where they arrived after the expiration of more than thirty hours from the time they were put into the truck, and during the whole time they were without water. An information was laid against the consignor before the borough justices at C., charging him with not making a request in writing to the railway company to supply water to the cattle during the time they were about to be carried on the railway:—Held, first, that proceedings may be taken before justices in respect of an offence committed under 32 & 33 Vict. c. 70. s. 64. Secondly, that the information might have been laid at K. Thirdly, that the justices in the borough of C. had no jurisdiction to convict the defendant, inasmuch as the period of thirty hours had expired before the cattle had arrived there, and the defendant did not happen to be in C. within the meaning of those words in section 109. *Johnson v. Colam*, 44 Law J. Rep. (n.s.) M. C. 185; Law Rep. 10 Q. B. 544.

Semble—that the offence of failing to make the request so that the animals remain without a supply of water for thirty consecutive hours, may be committed at any place along the transit, and that the information might be laid at any such place. *Ibid.*

*Dangerous dog.*

4.—Under the Dogs Act, 1871 (34 & 35 Vict. c. 56), s. 2, a Court of summary jurisdiction may order a dangerous dog to be destroyed, without giving the owner the option of keeping it under proper control. *Pickering v. Marsh*, 43 Law J. Rep. (N.S.) M. C. 143.

*Negligence in custody of animals.* [See NEGLIGENCE, 1-5.]

*Liability of carriers.* [See CARRIER, 34-37.]

## ANNUITY.

- (A) DURATION OF ANNUITY.
- (B) AMOUNT PAYABLE.
- (C) TO WHOM PAYABLE.
- (D) GOVERNMENT ANNUITY: MISREPRESENTATION.
- (E) ON WHAT PROPERTY CHARGEABLE.
  - (a) *Corpus or income.*
  - (b) *Exoneration of personality.*
- (F) ANNUITY CHARGED ON LAND: DISTRESS.
- (G) COVENANT FOR PAYMENT OF ANNUITY.
- (H) FORFEITURE ON BANKRUPTCY.

## (A) DURATION OF ANNUITY.

1.—Testator bequeathed to his wife 50*l.* a year, which he directed his executors to pay to her out of the interest, dividends, and produce arising from all his personal property during her life or widowhood, and after her decease or next marriage he bequeathed the said 50*l.* unto and amongst his two daughters, S. and A., and his granddaughter M., equally between them or the survivors of them:—Held, reversing the decree of one of the Vice Chancellors, that the gift was of a perpetual annuity, and S. having died in the lifetime of the testator, that A. and M., who survived the widow, were each entitled to a moiety of such a sum of money as at her death would be sufficient to purchase so much 3*l.* per Cent. Bank Annuities as would produce the yearly sum of 50*l.* *Bent v. Cullen*, 40 Law J. Rep. (N.S.) Chanc. 250; Law Rep. 6 Chanc. 235.

2.—Testator devised and bequeathed to trustees all his property “for the following uses, intents, and purposes.” He then “left” to his wife 56*l.* per annum, payable quarterly. He bequeathed another annuity expressly limited to the annuitant “during her life.” He left 800*l.* per annum out of the proceeds of an East Indian estate, to be appropriated to the maintenance and education of the eight children of his daughter I. H., provided they should change the name of H. for R., under forfeiture of the 800*l.* per annum if they declined to do so. Testator bequeathed any increased profit beyond 800*l.* per annum to I. H., and his brother C. R., as therein mentioned. If any of the children should die their mother was to have the benefit of the deceased child’s share. Power was given to the trustees to sell the East Indian estate in case

of the insufficiency of the profits thereof to pay the annuities, the proceeds to be invested for the benefit of the children. Should the profits from the working or sale of the estate not reach 800*l.* annually, the trustees were to charge the residue of the testator’s property to make up the annual sum of 800*l.* Any surplus proceeds were to be invested for I. H. up to a certain amount. Testator appointed his brother C. R. his residuary legatee:—Held, that the annuity to the testator’s widow was for her life only; the annuity to his grandchildren was perpetual. *Hicks v. Ross*, 41 Law J. Rep. (N.S.) Chanc. 677; Law Rep. 14 Eq. 141.

3.—Testator, by his will, bequeathed the income of 8,000*l.* to his wife during widowhood. By a codicil he gave her an annuity of 100*l.* during her life, so long as she and his son, E., should live together; but if they should cease to reside together the annuity was to cease. The son died in the widow’s lifetime, having lived with her till his death:—Held, that the annuity did not cease upon his death. *Sutcliffe v. Richardson*, 14 Law J. Rep. (N.S.) Chanc. 552; Law Rep. 13 Eq. 606.

*Annuity to trustee: cesser on determination of trust.* [See TRUST, B 25.]

## (B) AMOUNT PAYABLE.

4.—Devise to trustees in trust to pay an annuity of 6,000*l.* a year, and subject thereto to accumulate surplus rents for payment of debts, legacies and incumbrances, with a direction that as soon as the debts were paid off the annuity should be increased to 8,000*l.*, and bequest of residuary personality to the trustees upon trust to pay off the incumbrances, debts, and legacies. The testator’s personality was ascertained to be amply sufficient to pay off the debts, legacies, and incumbrances, but the trustees retained a considerable part thereof, which was beneficially invested, and did not pay off the incumbrances for several years:—Held (reversing the M. R.), that the annuity was payable at the rate of 8,000*l.* a year from the testator’s death. *Astley v. The Earl of Essex*, Law Rep. 6 Chanc. 898.

5.—A., by will, gave to his widow C., an annuity of 1,000*l.*, and directed that if the income of his residuary estate should not be sufficient to pay it, then, upon certificate by his widow what income she derived from any property she might inherit, his executors were annually to sell so much of the corpus as, with such income, would make up the annuity. B. subsequently, by will, gave C. an annuity of 200*l.*, in addition to any income or benefit she might derive from any other source, and not to be taken into account in regard to any other income:—Held that, in certifying her income, C. was not bound to bring into account that which she derived under B.’s will. *In re Hedge’s Trust Estate*, 44 Law J. Rep. (N.S.) Chanc. 116; Law Rep. 18 Eq. 419.

## (C) TO WHOM PAYABLE.

6.—An annuity was payable under a will to a woman during her life, and a proportionate part,

computed from the last day of payment to the date of her death, was payable to her executors and administrators:—Held, following *Mitchell v. Moor-man* (1 You. & J. 21), that a payment of this proportionate part to the husband of the annuitant, who never took out letters of administration, was not a good payment in law, and that the amount could therefore be recovered by the son of the annuitant, in administering her estate after the death of the husband, whose executor he also was. *Mitchell v. Holmes*, 42 Law J. Rep. (N.S.) Exch. 98; Law Rep. 8 Exch. 119.

#### (D) GOVERNMENT ANNUITY: MISREPRESENTATION.

7.—An insurance company purchased government annuities on the life of T. C., with a statement and declaration that he was born at Barking in 1779, he having, in fact (as was discovered after his death), been born at Brighton in 1786, and T. C. of Barking having died in early infancy. The Act (10 Geo. 4. c. 24) under which the purchase was made enabled the Commissioners (section 45) to correct, rectify or amend any contract or certificate in cases wherein any mistake or accidental error should have been made. The insurance company offered to pay, with interest, the difference between the price they paid and the price they ought to have paid, but the Commissioners desired to treat the contract as void *ab initio*:—Held (affirming the decision below, 43 Law J. Rep. (N.S.) Chanc. 321), that they were entitled to a decree on that footing, that the power of rectification in the Act was merely discretionary, and that neither on the general law nor under that power could the company demand a rectification of the contract. *The Attorney-General v. Ray*, 43 Law J. Rep. (N.S.) Chanc. 478; Law Rep. 9 Chanc. 397.

#### (E) ON WHAT PROPERTY CHARGEABLE.

##### (a) Corpus or income.

8.—J. T. died in 1839, having by his will devised and bequeathed the residue of his real and personal estates to trustees for eleven years from his death, upon trust out of the rents and proceeds to pay (in the events which had happened) certain annuities, one of which was an annuity of 500*l.* to the two petitioners for their lives, and the life of the survivor of them. The residue of the rents and proceeds was, during the eleven years, to be accumulated for the benefit of the person who at the end of that time should be entitled to the residuary personality. At the end of the eleven years the real estate was to go, "subject to, and charged with, the payment of the annuities, and with power of distress and entry for the recovery of the same, as if they had been secured by a lease for years," to testator's nephew, J. T., for life, with remainder to his first and other sons in tail, with remainders over. Part of testator's real estates had been sold, and were now represented by a fund in Court of 13,738*l.* 14*s.* 5*d.* Consols. The petitioner's annuities had been paid in full till 1858; but there was now a sum of 1,367*l.* 6*s.* 5*d.* for arrears owing to the annuitants:—Held, first, that the mode in which the

payment of the annuities was secured did not necessarily make them a charge on the corpus of the estate; second, that the arrears of the annuities were payable out of the income, and not the corpus of the estate; third, that they were not necessarily payable out of the income of any particular year; and, fourth, that the remedy against the income for arrears continued beyond the lives of the annuitants. *Taylor v. Taylor*, 43 Law J. Rep. (N.S.) Chanc. 314; Law Rep. 17 Eq. 324.

9.—Gift of annuity expressly charged on corpus, with subsequent words indicative of an intention that the annuity should abate in the event of the income being insufficient:—Held, that the charge was not cut down by the subsequent words. *Pearson v. Helliwell*, Law Rep. 18 Eq. 411.

##### (b) Exoneration of personality.

10.—Where testator bequeathed annuities and immediately afterwards devised an estate, "subject to the payment of the annuities," and gave the annuitants a power of distress,—Held, that the personality was exonerated from being the primary fund for payment of the annuities. Quære—whether the personality was altogether exonerated. *Davies v. Ashford* (15 Sim. 42) commented on. *Poole v. Heron*, 42 Law J. Rep. (N.S.) Chanc. 348.

#### (F) ANNUITY CHARGED ON LAND: DISTRESS.

11.—The owner of an annuity charged upon land which is insufficient to answer the annuity has a right to distrain for it and no other remedy. *Sollory v. Leaver*, 40 Law J. Rep. (N.S.) Chanc. 398.

12.—Where an annuity charged on land had been duly paid for sixteen years, when one half-yearly instalment was paid by a dishonoured cheque, whereupon the annuitant filed a bill for a receiver:—Held, that as the estate was sufficient, and he might have recovered by distress or action on the cheque, the bill must be dismissed. The last case approved and explained. *Kelsey v. Kelsey*, Law Rep. 17 Eq. 495.

#### (G) COVENANT FOR PAYMENT OF ANNUITY.

13.—Where a husband, who by a separation deed had covenanted to pay his wife an annuity of 52*l.* a year, for her separate use on certain special quarterly days, by will bequeathed property to trustees in trust to pay her generally 52*l.* a year on the same quarterly days:—Held, that the second annuity was in satisfaction of the first, and that she was put to her election. *Atkinson v. Littlewood*, Law Rep. 18 Eq. 595.

14.—A covenant in a deed, whereby the husband covenanted with trustees that he will, during the joint lives of himself and wife, and during so long as they should live separate and apart, pay unto the trustees for the separate use of his wife a certain annuity, is an absolute covenant for payment of the annuity during the joint lives of the husband and wife, and during so long time as they lived separate, and not merely while the marriage tie subsists; therefore, a plea of disso-

lution of the marriage is no answer to an action on the covenant for arrears of the annuity. *Charlesworth v. Holt*, 43 Law J. Rep. (N.S.) Exch. 25; Law Rep. 9 Exch. 38.

(H) FORFEITURE ON BANKRUPTCY.

[See FORFEITURE, 2.]

*Grant of annuity by corporation by resolution not under seal.* [See CORPORATION.]

*Proof in administration suit by annuitant under award for annuity, and penalty awarded.* [See ADMINISTRATION, 7.]

*Proof by annuitant in bankruptcy: whether debt capable of being estimated.* [See BANKRUPTCY, E. 7.]

APOTHECARY.

[See MEDICAL ACT.]

[55 Geo. 3. c. 194, amended. 37 & 38 Vict. c. 34.]

APPEAL.

*Admiralty appeals.* [See ADMIRALTY, 26–28, 48.]

*Chancery.* [See PRACTICE IN EQUITY, 23–35.]

*Common Law.* [See PRACTICE AT LAW, 43, 44.]

*County Court.* [See COUNTY COURT.]

*Divorce.* [See DIVORCE.]

*House of Lords.* [See HOUSE OF LORDS.]

*Privy Council.* [See PRIVY COUNCIL; CHURCH, 32.]

*From decision of Judge as arbitrator.* [See ARBITRATION, 3.]

*Under Wine and Beerhouse, and Licensing Acts.* [See ALEHOUSE, 6.]

*Jurisdiction of Court of Exchequer Chamber: verdict against evidence.* [See JURISDICTION AT LAW, 2.]

*From Lord Mayor's Court.* [See LONDON, 3–9.]

*To Quarter Sessions.* [See JUSTICE OF THE PEACE, 5–11.]

*Poor rate: appeal at next practicable sessions.* [See RATE, 33–37.]

APPOINTMENT.

[See POWER.]

APPORTIONMENT.

(A) OF RENTS AND DIVIDENDS.

(a) *Under Apportionment Act, 1870.*

(b) *Under previous law.*

(B) OF OTHER PAYMENTS.

[Rents, dividends, annuities, salaries, pensions, and other periodical payments, to be considered as accruing from day to day, and recoverable accordingly. 33 & 34 Vict. c. 35.]

LAW DIGEST, 1870–1875.

(A) OF RENTS AND DIVIDENDS.

(a) *Under Apportionment Act, 1870.*

1.—The above Act applies to all instruments, whether coming into operation before or after the passing of the Act. *In re Clines Estate*, Law Rep. 18 Eq. 213.

2.—Testator, as to his share or interest in a company, bequeathed the dividends to his uncle for life, and after his death the same share or interest to his two daughters:—Held, that dividends declared after the testator's death were not apportionable between the legatees and the general estate of the testator. *Jones v. Ogle*, 41 Law J. Rep. (N.S.) Chanc. 633; Law Rep. 14 Eq. 419. [Affirmed on appeal. See next case.]

3.—Profits in a private trading partnership—carried on under a deed by which it was provided that such dividends should be made from time to time amongst the partners, as the managing partners should direct—are not dividends or other periodical payments in the nature of income within the meaning of the Apportionment Act, 1870 (33 & 34 Vict. c. 35), and are not apportionable as between tenants for life and residuary legatees under that Act. *Jones v. Ogle*, 42 Law J. Rep. (N.S.) Chanc. 334; Law Rep. 8 Chanc. 192.

4.—The Apportionment Act, 1870, 33 & 34 Vict. c. 35, applies to a specific devise of real estate, and generally as between the real and personal representatives and that in a case where a will has been made before, and the testator has died after the passing of the Act. *Hasluok v. Pedley*, 44 Law J. Rep. (N.S.) Chanc. 143; Law Rep. 19 Eq. 271.

5.—Testator, seised in fee, specifically devised real estate by a will made before the Apportionment Act, 1870. By a codicil made after the Act he confirmed his will, and he subsequently died between the half-yearly days on which the rents of the devised estate were payable:—Held, that, under the Apportionment Act, 1870, the rents of the devised estate were apportionable between the devisee and the personal representative of testator. *Capron v. Capron*, 43 Law J. Rep. (N.S.) Chanc. 677; Law Rep. 17 Eq. 288.

Observations upon the Apportionment Act, 1870, and upon *Jones v. Ogle*, 42 Law J. Rep. (N.S.) Chanc. 334; Law Rep. 8 Chanc. 192. *Ibid.*

6.—The dividends of a specific legacy are not apportionable under the Apportionment Act, 1870, between the specific legatee and the testator's estate. *Whitehead v. Whitehead*, Law Rep. 16 Eq. 528. [But see next case.]

7.—Testator bequeathed 5,000*l.* stock in a canal company to trustees, to pay the dividends to his wife for life, and afterwards to sink into his residuary estate:—Held, that the dividends were apportionable. *Whitehead v. Whitehead* (Law Rep. 16 Eq. 528) corrected. *Pollock v. Pollock*, 44 Law J. Rep. (N.S.) Chanc. 168; Law Rep. 18 Eq. 329.

(b) *Under previous law.*

8.—The second section of the Apportionment Act, 4 & 5 Will. 4. c. 22, is not intended to apply as between a mortgagee (of tenant for life)

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who has not entered and remainderman so as to give the mortgagee a right to rents which he would not have had until entry if the tenant for life had lived. *Paget v. Marquis of Anglesea—Watkin's Claim*, 43 Law J. Rep. (n.s.) Chanc. 437; Law Rep. 17 Eq. 283.

A. (tenant for life) by deed, to secure a debt, granted to W. a rent-charge with usual powers of distress and entry, and by the same deed granted a term of years to a trustee to secure the same. A. died in the middle of a quarter. Two quarters of the rent-charge were in arrear. W. had never entered. A.'s estate was insolvent. The rents had been paid to a separate account:—Held, that W. was not entitled to a charge on these rents, either for the apportioned rent-charge for the current quarter, or for the arrears. *Ibid*.

9.—Testator bequeathed his residuary personal estate to trustees upon trust for his two grand-daughters in equal shares at twenty-one or marriage, and directed that in case they or either of them should marry under twenty-one, their shares should be settled upon them and their children in the usual form. Both grand-daughters married under twenty-one, one in 1867, the other in 1870, after the passing of the Apportionment Act of that year:—Held, that in both cases the income of the respective trust funds was apportionable down to the date of the respective marriages. *Clive v. Clive*, 41 Law J. Rep. (n.s.) Chanc. 386; Law Rep. 7 Chanc. 433.

*St. Aubyn v. St. Aubyn* (1 Dr. & S. 611) followed. *Ibid*.

10.—Funds were settled upon trust to pay yearly a sum not exceeding 5,000*l.*, according to the discretion of the trustees, to A., till he attained the age of thirty, and to accumulate the surplus income; and after A. attained thirty, to pay him the income of the whole fund for life:—Held, that the dividends and interest which accrued due after A. attained thirty, were apportionable. *Donaldson v. Donaldson*, 40 Law J. Rep. (n.s.) Chanc. 64.

11.—A testator directed his executors to manage and carry on the share he might have in any colliery at the time of his decease, and to permit his wife to receive the profits thereof during her life. At the time of his death the testator was entitled to a share in a colliery partnership, carried on by him in partnership with four other persons under a deed which contained a provision for yearly settlements of accounts, and that upon such yearly settlements the clear profits, or a portion thereof, if the majority in value of the partners should so direct, should be added to the joint-stock of the company or be divided between the partners in proportion to their respective shares, or passed to their respective separate accounts. For a considerable period after the death of the testator no dividend was paid to the partners, but the undivided profits, when there were any, were accumulated. Afterwards dividends were paid which did not exhaust the profits; no resolutions were passed declaring that any portion of the profits should be added to the joint-stock of the company, but the undivided credit balances were

at the end of each year carried forward to the profit and loss account and employed for the general purposes of the concern. On the death of the widow,—Held, reversing the decision of one of the Vice Chancellors, that the accumulations of profits made during her life and not divided belonged to the testator's estate and not to her representatives, but, affirming the same decision, that they were entitled, under the Apportionment Act, 4 & 5 Will. 4. c. 22, to an apportioned share of the profits made in the year which was current at the time of her decease. *Straker v. Wilson*, 40 Law J. Rep. (n.s.) Chanc. 630; Law Rep. 6 Chanc. 503.

#### (B) OF OTHER PAYMENTS.

*As to apportionment of debts, legacies, charges, &c., as between tenant for life and remainderman.* [See TENANT FOR LIFE, 2-21.]

*Of charitable bequest on subdivision of parish.* [See CHURCH, 13.]

*Of costs.* [See COSTS IN EQUITY, 45, 46; PARTITION, 25, 26.]

### APPRENTICE.

#### *Misconduct of apprentice.*

1.—To a declaration setting out an agreement by the defendant to teach the plaintiff's son a trade, and containing the following proviso—"Provided always that he obeys all commands, and gives his service entirely to the business during office hours," and alleging a wrongful dismissal, the defendant pleaded justifying the dismissal on the ground that the son had habitually neglected his duties, &c.,—Held, a good plea. *Westwick v. Theodore*, 44 Law J. Rep. (n.s.) Q. B. 110; Law Rep. 10 Q. B. 224.

#### *Recovery of premium.*

2.—By an apprenticeship deed A. was to serve B., and B. teach A., for a term of years; there was no provision as to service to B.'s executors or return of premium; B. died before the expiration of the term:—Held, that no action for damages, or for money had and received, lay against B.'s executors for a return of portion of the premium. *Whincup v. Hughes*, 40 Law J. Rep. (n.s.) C. P. 104; Law Rep. 6 C. P. 78.

Lord Cottenham's judgment in *Hirst v. Toulson* (19 Law J. Rep. (n.s.) Chanc. 441; 2 Mac. & G. 134) dissented from. *Ibid*.

*Action by, for wages: evidence of usage in trade.* [See CUSTOM.]

### ARBITRATION.

#### (A) SUBMISSION TO ARBITRATION.

(a) *Validity and effect of.*

(b) *When revocable.*

(c) *Staying proceedings.*

(d) *Pleading agreement to refer.*

(e) *Making submission a rule of Court.*



- (B) COMPULSORY REFERENCE.
- (C) ARBITRATOR.
  - (a) Powers.
  - (b) Liability for negligence.
  - (c) Evidence of, in action on award.
- D) AWARD.
  - (a) Validity and sufficiency.
  - (b) Setting aside and remitting.
    - (1) What grounds sufficient.
    - (2) Mode of procedure.
  - (c) Enlarging time.
- (E) FAILURE TO APPOINT ARBITRATOR.
- (F) COSTS.
  - (a) Costs to abide event.
  - (b) Discretion of arbitrator.
  - (c) Power of Sessions.

[5 Geo. 4. c. 96, and 30 & 31 Vict. c. 141, amended and applied to arbitrations between masters and workmen. 35 & 36 Vict. c. 46.]

#### (A) SUBMISSION TO ARBITRATION.

##### (a) Validity and effect of.

1.—A building contract contained the usual clause, appointing the architect arbitrator in respect of extra works; the architect had guaranteed to his employer that the total cost should not exceed a certain sum, but that fact had not been disclosed to the builder at the time he signed the contract:—Held, that the guarantee was a material fact tending to influence the architect's decision; and as it was not disclosed to the builder, he was not bound by the submission to the architect's arbitration, and the Court would perform the part of arbitrator in the matter. *Kimberley v. Dick*, 41 Law J. Rep. (N.S.) Chanc. 38; Law Rep. 13 Eq. 1.

2.—The rules of a Marine Insurance Association provided that disputes should be referred to arbitration:—Held, that the assured was not bound to submit a legal point to the decision of arbitration before suing in equity. *Alexander v. Campbell*, 41 Law J. Rep. (N.S.) Chanc. 478.

3.—Where differences arose in a winding up between persons claiming a charge upon the company's estate and the official liquidator, and the parties agreed that their rights should be determined in a summary way by the Judge acting in the matter of the winding up:—Held, that this was a submission to arbitration by the Judge personally, and there was no appeal from his decision as an arbitrator. *In re The Durham County Permanent Building Society; Ex parte Wilson*, 42 Law J. Rep. (N.S.) Chanc. 164; Law Rep. 7 Chanc. 45.

[And see Nos. 6-8, 10 *infra*.]

##### (b) When revocable.

4.—A submission to arbitration, which is not made in any action, and does not contain an agreement that it shall be made a rule of Court, is revocable by either party at pleasure before an award can be made, although such submission has been made a rule of Court pursuant to the Common Law Procedure Act, 1854. So held by Willes,

J., Montague Smith, J., and Brett, J. (*Bovill, C.J., dissentiente*). *In re Rouse and Meier*, 40 Law J. Rep. (N.S.) C. P. 145; Law Rep. 6 C. P. 212.

##### (c) Staying proceedings.

5.—Where an order to stay proceedings in an action has been made under section 11 of the Common Law Procedure Act, 1854, on the ground that the parties had agreed to refer, the Court or Judge has power to vary such order as to costs of the action at any time, even after the award has been made. So held by Bovill, C.J., Byles, J., and Montague Smith, J. (*Brett, J., dissentiente*). *Bustros v. Lenders*, 40 Law J. Rep. (N.S.) C. P. 193; Law Rep. 6 C. P. 259.

6.—Two partners gave to a third partner a notice of dissolution of partnership, which alleged breaches of the partnership articles. The articles provided that any dispute or difference between the partners should be referred to arbitration. The two partners filed their bill for dissolution, and on the same day the third partner gave notice that he required all the matters in dispute to be settled by arbitration:—Held, on the motion of the third partner, that he was entitled to an order staying proceedings in the suit, and to have the matters in dispute referred to arbitration. *Plews v. Baker*, 43 Law J. Rep. (N.S.) Chanc. 212; Law Rep. 16 Eq. 564.

7.—A mining lease contained a clause providing that if any dispute, question or difference should arise between the parties, "touching these presents, or any clause, matter or thing herein contained, or the construction hereof, or the working of the said mines, or any compensation or satisfaction to be had or made, or any other thing to be done under the covenants by the lessees herein contained, or touching the rights, duties and liabilities of either party in connection with the premises," the matter in difference should be referred to two arbitrators or their umpire, pursuant to, and so as in all respects to conform to, the provisions in that behalf contained in the Common Law Procedure Act, 1854. The lessors having filed a bill to restrain the lessees from working adjoining mines by means of a shaft sunk on the lessor's land, some of the defendants applied to stay proceedings in the suit, and to refer the matter in difference to arbitration under the above-mentioned clause:—Held, affirming the decision of Wickens, V. C. (42 Law J. Rep. (N.S.) Chanc. 90; Law Rep. 14 Eq. 152), that the subject-matter of the suit was within the arbitration clause; also that it was not necessary for all the defendants to join in the application to stay proceedings in the suit. *Willesford v. Watson*, 42 Law J. Rep. (N.S.) Chanc. 447; Law Rep. 8 Chanc. 473; and *Witt v. Corcoran*, Law Rep. 8 Chanc. 476, *n*.

8.—The plaintiff and the defendant entered into a partnership for one year under articles in writing, executed on the 6th of July, 1869. The articles provided for the taking of due accounts, and contained an arbitration clause. The partnership was continued after the 6th of July, 1870, under the articles, which were not renewed by writing; but the plaintiff's solicitor wrote to the

defendant's solicitor on one occasion to say that the plaintiff was ready to abide by the arbitration clause. Serious difficulties subsequently arose between the parties. The defendant appointed an arbitrator. The plaintiff refused (when requested) to appoint another, and filed the bill in this suit to take the partnership accounts, and for an injunction and receiver. The defendant moved to refer "all" matters in dispute between the parties to an arbitrator, under the Common Law Procedure Act, 1870, s. 11:—Held, that the proceedings in this suit must be stayed, and the matters referred accordingly. No costs. *Gillett v. Thornton*, 44 Law J. Rep. (N.S.) Chanc. 398; Law Rep. 19 Eq. 599.

(d) *Pleading agreement to refer.*

9.—Declaration, that the defendant became tenant to the plaintiffs of lands upon the terms that the defendant would keep such number only of hares and rabbits as would do no injury to the trees, &c., belonging to the plaintiffs, or to the growing crops of any of their tenants, and that in case the defendant should keep such number of hares and rabbits as should injure the trees, &c., the defendant should and would pay to the plaintiffs or their tenants a fair and reasonable compensation for such injury. Breach, that the defendant kept such a number of hares and rabbits as did injury to such trees, &c., and had not paid a fair and reasonable or any compensation. Plea, that one of the terms of the said tenancy was that, in case any such injury should be done by the defendant, he, the defendant, would pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, one to be chosen by the plaintiffs and the other by the defendant, &c. Averment, that a difference arose, no arbitrators had been appointed, nor had an award ever been made deciding the amount of such compensation, according to the terms of the said tenancy. On demurrer.—Held (Bramwell, B., *dubitante*), that the plea was good; for that the stipulation stated therein did not consist of two separate agreements, viz., one to pay compensation, the other to refer the amount, but was an indivisible agreement to pay such compensation as should be assessed by arbitration, and not otherwise. *Dawson v. Fitzgerald*, 43 Law J. Rep. (N.S.) Exch. 19; Law Rep. 9 Exch. 7.

[Reversed on appeal, Law Rep. 1 Exch. Div. 257.]

10.—An agreement, scheduled to an Act of Parliament, binding the parties to settle differences by arbitration, Held, to exclude the jurisdiction of the Courts. *The Caledonian Railway Company v. The Greenock and Wemyss Bay Railway Company*, Law Rep. 2 Sc. App. 347.

(e) *Making submission a rule of Court.*

11.—Upon an application for production by the defendant of an agreement between the plaintiff and the defendant, in order that it might be made a rule of Court under section 17 of the Common Law Procedure Act, 1854, it appeared that the agree-

ment was for the erection of four houses by the plaintiff, which were to be inspected by Messrs. S. & C., or some other architect or valuer, to be appointed by the defendant, who were to give a certificate of the progress and value of the works. The agreement contained a power for the defendant to employ other persons to execute the contract, if "the plaintiff should become bankrupt, &c. . . . or if there should be any unreasonable delay or unsatisfactory conduct on the part of the plaintiff with regard to the erection of such buildings, or with regard to any work, matter or thing connected therewith: the fact of such delay or unsatisfactory conduct to be ascertained and decided by Messrs. S. & C., or other the architect or valuer for the time being . . . against whose decisions there should be no appeal:—Held, rejecting the application, that the agreement was not a "submission to arbitration by consent," within section 17 of the Common Law Procedure Act, 1854, as the decision of the architect was not in the nature of a judicial proceeding, but was intended to be the sole foundation of any liability on the part of the defendant. *Wadsworth v. Smith*, 40 Law J. Rep. (N.S.) Q. B. 118; Law Rep. 6 Q. B. 332.

12.—A submission to arbitration under sec. 25 of the Lands Clauses Act is a submission to arbitration by consent, and may be made a rule of Court. *Ex parte Harper*, Law Rep. 18 Eq. 539.

[And see Nos. 14, 23, *infra*.]

(B) COMPULSORY REFERENCE.

13.—Particulars of demand delivered with a declaration claimed upwards of 600*l.* for seven million cubic feet of gas consumed by the defendant in a period extending over five years before action. The defendant paid 150*l.* into Court, and pleaded "never indebted" and "payment" to the residue:—Held, by Channell, B., Pigott, B., and Cleasby, B., that although the plaintiffs intended to impute fraud to the defendant by proving at the trial that he had abstracted their gas clandestinely, a Judge at chambers had power to refer the action to arbitration under the 3rd section of the Common Law Procedure Act, 1854, as it appeared from the pleadings and particulars that the matter in dispute consisted wholly or in part of matters of mere account which could not be conveniently tried in the ordinary way. But held, *contra*, by Kelly, C.B., that when once it appeared from the plaintiffs' affidavit that the plaintiffs proposed to shew that the defendant had been guilty of the fraud intimated, the matter in dispute could not be said to consist of matters of mere account, and that there was therefore no power to refer compulsorily. *The Birmingham and Staffordshire Gas Co. v. Ratcliffe*, 40 Law J. Rep. (N.S.) Exch. 186; Law Rep. 6 Exch. 224.

(C) ARBITRATOR.

(a) *Powers.*

14.—An umpire appointed to ascertain the amount of compensation under the Lands Clauses Consolidation Act, 1845, has no right to state a special case for the opinion of a superior Court; and if by consent of the parties the time for

making the award be extended and power to sit with the arbitrators be conferred upon the umpire, a reference under the foregoing statute will not become a reference by consent within the meaning of the Common Law Procedure Act, 1854, sec. 5. *Rhodes v. The Airedale Drainage Commissioners*, 43 Law J. Rep. (N.S.) C. P. 323; Law Rep. 9 C. P. 508.

[And see *infra* No. 18.]

(b) *Liability for negligence.*

15.—Where parties, in order to ascertain average contribution in dispute, agree that an average adjuster for reward shall ascertain and adjust the amount and agree to abide by his decision, such average adjuster, having given his decision, is not liable to an action for carelessness, negligence and unskilfulness, if he has acted in good faith. *The Tharsis Sulphur and Copper Co. (Lim.) v. Loftus*, 42 Law J. Rep. (N.S.) C. P. 6; Law Rep. 8 C. P. 1.

16.—The plaintiff purchased the goodwill, stock and effects of a business at a valuation, the amount of which was to be fixed by valuers, one to be appointed on each side for that purpose, and in case of difference by an umpire to be chosen by the valuers. The plaintiff employed the defendant as his valuer, and the defendant and the valuer appointed by the vendor fixed between them the amount of valuation. In an action for negligence in making such valuation, by which the value of the goodwill was fixed too high, the plaintiff applied to administer interrogatories to the defendant to ascertain the basis on which he had agreed with the valuer of the vendor to calculate the valuation:—Held, that the defendant had not acted in the matter as an arbitrator, but as a valuer only, and was therefore liable to his employer for negligence, and the plaintiff accordingly was allowed to administer the interrogatories. *Turner v. Goulden*, 43 Law J. Rep. (N.S.) C. P. 60; Law Rep. 9 C. P. 57.

(c) *Evidence of, in action on award.*

17.—In an action upon an award, the arbitrator's evidence is admissible to shew in respect of what matters he allowed or refused compensation, but not to explain his reasons for awarding a particular sum in respect of any particular matter. *The Duke of Buccleuch and Queensberry v. The Metropolitan Board of Works (H.L.)*, 41 Law J. Rep. (N.S.) Exch. 137; Law Rep. 5 E. & I. App. 418.

(D) AWARD.

(a) *Validity and sufficiency.*

18.—Declaration on an award, that an action in the County Court for breaches of covenant to repair a mill and premises having been referred to an arbitrator under an order of reference giving him power to "decide all matters and questions to do justice between the parties," and power to order and direct what should be done by either or both of the parties, "either immediately or prospectively whether relating to the action or to the other matters in difference," and declaring that the costs

of the action, reference and award should be in his discretion, he made his award, reciting, *inter alia*, that by a lease for seven years of the mills and premises, the defendant covenanted to repair and keep in repair the mill, weir and millbank, and ordering that the defendant should pay a certain sum for damages claimed in the particulars of the action, and another sum for damages from the date of the summons to that of the award. Breach, non-payment. On demurrer,—Held, that the terms of the reference authorised the arbitrator to give damages accruing up to the date of the award, and that so much of the award was good. *Lewis v. Rossiter*, 44 Law J. Rep. (N.S.) Exch. 136.

The declaration also alleged a further direction by the arbitrator in his award that the defendant should forthwith repair the weir and the eastern bank of the river L., so as to divert the waters of the river to the mill in the plaintiff's occupation as it was diverted when the lease was granted. Breach, non-repair. Plea, that the eastern bank of the river L. was not the land of the defendant, nor had he any right to go on the same for the purpose of executing the works ordered. On demurrer—Held, a good plea, inasmuch as the arbitrator had no power to order a trespass. *Ibid.*

The declaration also alleged a direction that the defendant should, from the date of the award until the completion of the repairs, pay the plaintiff a certain sum per week as compensation for the loss he would sustain until the completion. Breach, non-payment. On demurrer—Held, a bad direction for not limiting the payment of such compensation to such time as the plaintiff remained in possession of the premises. *Ibid.*

The declaration also alleged a direction that the costs of the action, reference and award should be paid by the defendant. Breach, non-payment. Plea, that they were not before action ascertained or taxed. On demurrer to the declaration and plea,—Held, the award was good and the plea bad. *Ibid.*

On demurrer to the declaration generally and to a plea of want of finality,—Held, that the good part of the award was separable from the bad, which therefore did not vitiate the rest, and that it was sufficiently final. *Ibid.*

19.—Declaration upon an award by an umpire under the Public Health Act, 1848, ss. 123, 144, determining that there was due from the defendants to the plaintiffs the sum of 1,735*l.*, as compensation for the entry by the defendants on certain land of the plaintiffs, and for surface and other damage occasioned by reason of the construction by the defendants of a sewer though a part of the plaintiff's land. Third plea, that the umpire proceeded on the assumption that the plaintiffs would be prevented by the defendants from building on the land over the sewer. Fourth plea, that the umpire proceeded on the assumption that the plaintiffs were entitled to compensation by reason of the sewer having been constructed in a defective manner. Sixth plea, that the umpire proceeded on the assumption that the plaintiffs were entitled to compensation by reason of stench proceeding from the said sewer:—Held, on demurrer, that all the foregoing pleas were bad.

*Uttley v. The Local Board of Health of Todmorden*, 44 Law J. Rep. (N.S.) C.P. 19.

(b) *Setting aside and remitting.*

(1) *What grounds sufficient.*

20.—The Courts at Westminster have no power to direct an award to be reconsidered upon the ground that the arbitrator has decided wrongly as to a question of law arising during the reference, unless he admits the award to have been made under a mistake; it is insufficient that he gives an erroneous reason for his judgment without stating that his conclusion was arrived at owing to a misapprehension of the law. *Dinn v. Blake*, 44 Law J. Rep. (N.S.) C.P. 276; Law Rep. 10 C.P. 388.

21.—When an arbitrator has executed an instrument as and for his award, he is *functus officio* and cannot of his own authority remedy any mistake that he may have made in executing it. *Mordue v. Palmer*, 40 Law J. Rep. (N.S.) Chanc. 8; Law Rep. 6 Chanc. 22.

Some words were omitted in the engrossment which were in the draft of an intended award. The arbitrator executed the erroneous engrossment. After service on one party, the arbitrator discovered the mistake and, before the time for making his award had expired, executed a fresh award:—Held (reversing the decision of Bacon, V.C.), that the first instrument was the award of the arbitrator, but that it must be referred back to him, to re-consider and re-determine the matter with regard to the mistake made therein. *Ibid.*

An arbitrator had power in a reference in a suit in Chancery to award costs:—Held (affirming the decision of Bacon, V.C.), that he might give costs as between solicitor and client. *Ibid.*

22.—Neither a Court of law nor of equity will interfere to set aside an award, unless corruption, partiality, misconduct, or irregularity be distinctly proved against the arbitrator, mere suspicion is not sufficient. *Moseley v. Simpson*, 42 Law J. Rep. (N.S.) Chanc. 739; Law Rep. 16 Eq. 226.

The plaintiff and the defendant referred their differences to A. and B. and such third "arbitrator" as A. and B. should appoint. After several meetings had been held by A. and B. alone, they appointed C. as "umpire," and the reference commenced before A., B. and C. *denovo*, the plaintiff and the defendant agreeing that no proceedings should be taken to impugn the award on any ground whatever. B. absented himself from one of the sittings. A. and C. ultimately made an award in favour of the defendant, B. refusing to sign it, on the ground that his co-arbitrators had not consulted with him upon it. The Court, on motion by the plaintiff, refused to set aside the award, holding that all irregularities in the proceedings had been waived by the agreement and by acquiescence, and that it appeared that B. had had ample opportunity afforded him of considering the terms of the award. *Ibid.*

Each day during the progress of the reference A. and C. lunched with the defendant at his expense, and in the absence of the plaintiff and his advisers. There was no evidence of any allusion having been made at the luncheons to the subject of the

arbitration, or of any corrupt intention on the part of the defendant:—Held, that the mere fact of A. and C. lunching with one of the parties only, though an incautious act, did not constitute such misconduct as would vitiate the award. *Ibid.*

Notice of motion to set aside an award ought not to be served upon the arbitrators. *Ibid.*

23.—Although it has been held that an arbitration under the Lands Clauses Consolidation Act is not a submission by consent within the meaning of the Common Law Procedure Act, nevertheless when an award is made a rule of Court under section 36 of the Lands Clauses Consolidation Act, the Court has the same jurisdiction with respect to setting it aside and enforcing it as in other cases; that is to say, the jurisdiction conferred by 9 & 10 Will. 3. c. 15 is let in. It follows, therefore, that a motion to set aside the award must be made before the end of the term next after the publication of the award. *In re Harper and the Great Eastern Rail. Co.*, 44 Law J. Rep. (N.S.) Chanc. 507; Law Rep. 20 Eq. 39.

Where an arbitrator appointed under the Lands Clauses Act, and having power to assess the amount of damage, but no power to decide the question of liability, made an award containing an order for payment, but the recitals showed the extent of the arbitrator's authority,—Held, that this was an error of form only, and that the award could not be set aside on account of it. *Ibid.*

(2) *Mode of procedure.*

24.—The last day of term is too late for the commencement of a proceeding to set aside an award under 9 & 10 Will. 3. c. 15. s. 2. *The Corporation of Huddersfield and Jacob*, 43 Law J. Rep. (N.S.) Chanc. 748; Law Rep. 17 Eq. 476.

Service of notice of motion to set aside an award which has been made a rule of the Court of Chancery is "making a complaint" within the meaning of the statute. *Ibid.*

25.—The filing of an affidavit in support of a notice of motion to set aside an award is a complaint within the meaning of 9 & 10 Will. 3. c. 15. s. 2, which requires complaint to be made within a certain time, though notice of motion alone is not sufficient. *The Corporation of Huddersfield and Jacob*, 44 Law J. Rep. (N.S.) Chanc. 96; Law Rep. 10 Chanc. 92.

26.—Where a Court of law has referred an action to arbitration, and the arbitrator makes a mistake in his award, any application to remedy the mistake must be made to the Court of law in which the arbitration originated, and not to a Court of Equity. *Grafham v. Turnbull*, 44 Law J. Rep. (N.S.) Chanc. 538.

Certain actions between A. and B. (a discharged bankrupt) were referred by the Court of Queen's Bench to one of the Masters of that Court, who in his award made the mistake of crediting A., first, with a debt which he claimed to be due from B., but which had been barred by section 164 of the Bankruptcy Act, 1861; and secondly, with the whole of a debt for which A. had proved in B.'s bankruptcy, instead of the amount of the composition then agreed on. The Master, however, did

not admit his mistake, and declined to reconsider his award, whereupon B. obtained an order to sign judgment on the award.

Motion by B. to the Court of Chancery for an injunction to restrain A. from signing judgment and issuing execution dismissed with costs.

(c) *Enlarging time.*

27.—An agreement of reference provided that the arbitrator should make his award on or before a day specified, or on or before any other day "not exceeding three months from the date of the agreement, to which the arbitrator should, by endorsement on the agreement, from time to time enlarge the time for making the award." On a day exceeding three months from the date of the agreement, a Judge's order was obtained enlarging the time for making the award two months:—Held, upon the true construction of the Common Law Procedure Act, 1854, s. 15, that the Judge had power to enlarge the time, notwithstanding the limit fixed by the parties. *In re Denton*, 43 Law J. Rep. (N.S.) Q.B. 41; Law Rep. 9 Q.B. 117, *nom. Denton v. Strong*.

(E) FAILURE TO APPOINT ARBITRATOR.

28.—A submission to reference provided for the appointment of one arbitrator by each party, and the appointment of a third by the first two arbitrators:—Held, that the Common Law Procedure Act, 1854, s. 13, did not apply. *Gumm v. Hallett*, 41 Law J. Rep. (N.S.) Chanc. 514; Law Rep. 14 Eq. 555.

(F) Costs.

(a) *Costs to abide event.*

29.—A cause having been referred, together with all matters in difference between the parties, the costs of the cause to abide the event of the reference, the arbitrator awarded—first, as to the cause, that there was due to the plaintiff from the defendant the sum of 259*l.* 1*s.*; and secondly, as to the matters in difference other than the cause that there was due from the plaintiff to the defendant the sum of 242*l.* 13*s.* 10*d.*, and the arbitrator directed the latter sum to be allowed out of and deducted from the damages and costs recoverable by the plaintiff in the action, and the balance to be paid to the plaintiff:—Held, that the event of the reference was in favour of the plaintiff, and that he was not precluded from recovering his costs of the action by the 5th section of the County Courts Act, 1867. *Stevens v. Chapman*, 40 Law J. Rep. (N.S.) Exch. 123; Law Rep. 6 Exch. 213.

(b) *Discretion of arbitrator.*

30.—Reference by consent of an action both on contract and tort, the costs of the reference to be in the discretion of the arbitrator. The arbitrator awarded the plaintiff less than 50*l.* in respect of the contract, and less than 20*l.* in respect of the tort, and directed the defendant to pay the plaintiff's costs of the reference:—Held, that there was nothing in section 5 of the County Courts Act, 1867, to prevent the parties agreeing that the costs of reference should be in the arbitrator's discretion,

and that the plaintiff, even without the certificate required by that section, was entitled to the costs. *Forshaw v. De Witt*, 40 Law J. Rep. (N.S.) Exch. 153; Law Rep. 6 Exch. 200.

[And see No. 21 supra.]

(c) *Power of Sessions.*

31.—By Baines's Act (12 & 13 Vict. c. 45), s. 13, power is given to any Court of General or Quarter Sessions before which any appeal . . . shall be brought, to order, by consent, that the matter of such appeal be referred to arbitration, the order to be made a rule of the Court of Queen's Bench on the application of either party, and the award of the arbitrator, on motion by either party, to be entered as the judgment of the sessions on the appeal. Upon appeal to Quarter Sessions against a poor-rate, the sessions by consent made an order adjourning the appeal, and that the matter in dispute should be referred to J. G. to enquire into and arbitrate thereon, the several parties agreeing to abide the report of such his arbitration. By his award the arbitrator ordered that the appeal should be dismissed, and that the appellants should pay the respondents their costs of the appeal. The Court of Queen's Bench directed that the award should be referred back to the arbitrator, as the order of sessions did not confer upon him the power of awarding costs. The arbitrator amended his award, and the appeal having been adjourned from time to time, application was made to sessions to grant the respondents their costs of the appeal; but the sessions ordered the award, as amended, to be enrolled as the judgment of the Court, and refused the application for costs, on the ground that their duty was ministerial only:—Held, that the sessions were right, as it was clear that the reference was intended to be under the statute, and in such a case the sessions have no control over the costs of the appeal. *The Queen v. The Justices of Middlesex*; and *The West London Extension Railway Company v. The Assessment Committee of Fulham Union*, 40 Law J. Rep. (N.S.) M. C. 109; Law Rep. 6 Q. B. 220.

*Arbitration clause in rules of benefit building society: disputes between members and the society.* [See FRIENDLY SOCIETY, 5.]

ARMY.

[See REGIMENTAL EXCHANGES.]

[30 & 31 Vict. c. 34. ss. 9, 10, repealed. 34 & 35 Vict. c. 9 (s. 104).]

*Equitable assignment of commission moneys: priority of assignees.* [See MORTGAGE, 17, 18.]

ARREST FOR DEBT.

[See DEBTORS ACT.]

## ARSON.

1.—By 24 & 25 Vict. c. 97. s. 7, whosoever shall unlawfully and maliciously set fire to any matter or thing being in or under any building, under such circumstances that, if the building were thereby set fire to, the offence would amount to felony, shall be guilty of felony. By s. 3 of the same Act, whoever shall unlawfully and maliciously set fire to any house, with intent thereby to injure or defraud any person, shall be guilty of felony. The prisoner maliciously set fire to goods in a dwelling-house, with intent to injure the owner of the goods, who was a lodger in the house, and not to injure the house or the landlord. The house, though endangered, was not set fire to. The jury found the prisoner guilty, but that he was not aware that what he was doing would probably set the house on fire, and so necessarily injure the owner, and that he was not reckless as to whether he did so or not:—Held, that the prisoner was not properly convicted. *The Queen v. Child*, 40 Law J. Rep. (N.S.) M. C. 127; Law Rep. 1 C. C. R. 307.

2.—An unfinished house, brick-built, of which all the walls, external and internal, were built and finished, the roof on and finished, the flooring of a considerable part laid, and the internal walls and ceilings prepared for plastering, is a “building” within the meaning of 24 & 25 Vict. c. 96. s. 6, the setting fire to which is made a felony. *The Queen v. Manning*, 41 Law J. Rep. (N.S.) M. C. 11; Law Rep. 1 C. C. R. 338.

3.—By 24 & 25 Vict. c. 97. s. 17, whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorze, heath, &c., or to any stack of wood, shall be guilty of felony.” A quantity of straw, packed on a lory, in course of transmission to market, and left for the night in the yard of an inn, is not a stack of straw within the meaning of the above section, and the setting fire thereto, wilfully and maliciously, is not felony. *The Queen v. Satchwell*, 42 Law J. Rep. (N.S.) M. C. 63; Law Rep. 2 C. C. R. 21.

4.—In an indictment charging arson, the first count alleged that the prisoners set fire to a shop of and belonging to the prisoner N., and then being in the possession of the said N., with intent to injure; and the second count was the same, alleging an intent to defraud. Upon the evidence the jury found that the prisoner N. was tenant of the premises, and had the intention of injuring the landlady of the shop, and also to defraud an insurance office:—Held, upon an indictment framed upon 24 & 25 Vict. c. 97. s. 53, that if the allegation of the property in the shop amounted to an averment that N. was owner in fee, it was immaterial, and might be struck out, and that, if it meant merely that he was tenant, it was proved; and that, in either case, it was competent on this indictment for the jury to find that there was an intent to injure the landlady, inasmuch as, by section 60 of 24 & 25 Vict. c. 97, it was unnecessary to allege an intent to defraud any particular person. *The Queen v. Newbould*,

41 Law J. Rep. (N.S.) M. C. 63; Law Rep. 1 C. C. R. 344.

5.—The respondent was indicted for arson; and at the trial the deposition of the respondent, taken on oath, upon an inquiry into the cause of the fire, was admitted as evidence in support of the indictment:—Held, that the evidence was admissible. *The Queen v. Coote*, 42 Law J. Rep. (N.S.) P. C. 114.

## ARTICLED CLERK.

[See ATTORNEY, 1-14.]

## ARTISANS' DWELLINGS.

[Provisions for the improvement of the dwellings of artisans and labourers. 38 & 39 Vict. c. 36.]

## ASSAULT.

*Liability for another's Act.*

1.—The defendant was chairman of a public meeting at which persons in the position of stewards were employed to keep order, and policemen were present. In the course of the proceedings an interruption occurred, and the defendant said, “Bring those men to the front who are making a disturbance.” The plaintiff was not making a disturbance, but he was seized by one of the stewards and two policemen, and brought to the front:—Held, in an action of assault, that the defendant was not liable for the act of the steward and the policemen. *Lucas v. Mason*, 44 Law J. Rep. (N.S.) Exch. 145; Law Rep. 10 Exch. 261.

*Indecent assault.*

2.—On an indictment for indecent assault, as in cases of rape, or attempt to commit rape, the answer of the prosecutrix to questions put to her on cross-examination as to particular acts of connexion with persons named to her, other than the prisoner, is final, and the party questioning is bound thereby, and if her answer be a denial, the persons named cannot be called to contradict her. *The Queen v. Holmes*, 41 Law J. Rep. (N.S.) M. C. 12; Law Rep. 1 C. C. R. 334.

Semble—that the question may be put to her on cross-examination, but that she is not bound to answer it. *Ibid.*

3.—An assault must, in the absence of fear or fraud to procure consent, be an act done contrary to the consent of the patient; but mere submission by the patient, in ignorance of the moral nature of the act, to an act of indecency done by the agent, does not amount to such consent; therefore, where two boys of eight years of age submitted to indecent acts on the part of a grown-up man, in ignorance of the nature of the acts to be done and done, the man was held to be rightly convicted of an indecent assault. *The Queen v.*

*Lock*, 42 Law J. Rep. (N.S.) M. C. 5; Law Rep. 2 C. C. R. 10.

*Carnal knowledge of girl: evidence of girl's age: certified copy of register of births.*  
[See EVIDENCE, 8.]  
*Service of summons.* [See SERVICE OF SUMMONS.]

#### ASSIGNMENT.

*Assignment of debt.* [See DEBTOR AND CREDITOR, 1.]  
*Of leaseholds.* [See LEASE, 30, 31.]

#### ATTACHMENT.

##### (1) OF DEBTS.

- (A) WHAT DEBTS MAY BE ATTACHED.
- (B) PROCEDURE.
- (C) EFFECT OF ATTACHMENT.
- (D) FOREIGN ATTACHMENT: CUSTOM OF CITY OF LONDON.

##### (2) OF PERSON.

[See DEBTORS ACT.]

[Attachment of wages of any servant, labourer, or workman, in satisfaction of judgment, abolished. 33 & 34 Vict. c. 30.]

##### (1) OF DEBTS.

###### (A) WHAT DEBTS MAY BE ATTACHED.

1.—The surplus money due to a bankrupt out of his estate after payment of 20s. in the pound to the creditors under the bankruptcy, is not a "debt" due to the bankrupt from the official assignee (though the bankrupt's estate remains vested in him) which can be attached under the garnishee clauses of the Common Law Procedure Act, 1854, by a judgment creditor of the bankrupt. *Hunter v. Greensill*; *Fitzgerald v. Greensill*, 42 Law J. Rep. (N.S.) C. P. 55; Law Rep. 8 C. P. 24, *nom.* *In re Greensill*.

2.—An order made under the Common Law Procedure Act, 1854, section 61, that a garnishee should pay to a judgment creditor the debt due from him to the judgment debtor which had been attached by the same, or a prior order, under the same section, may be made to include a *debitum in presenti solvendum in futuro*, and to extend to the future instalments of a debt payable by instalments. *Tupp v. Jones*, 44 Law J. Rep. (N.S.) Q. B. 127; Law Rep. 10 Q. B. 591.

3.—An order for the payment of costs, made in pursuance of 1 & 2 Will. 4. c. 58, which, by section 7, may be entered of record, and shall then have the force and effect of a judgment, does not become a judgment so as to enable the person in whose favour it is made, to obtain the benefit of the garnishee clauses of the Common Law Procedure Act, 1854. *Best v. Pembroke*, 42 Law J. Rep. (N.S.) Q. B. 212; Law Rep. 8 Q. B. 363.

DIGEST, 1870-1875.

##### (B) PROCEDURE.

4.—After a rule has been discharged with costs, the person in whose favour the rule has been discharged cannot obtain a garnishee order under the Common Law Procedure Act, 1854, sects. 60, 61; the Act 1 & 2 Vict. c. 110. sect. 18, giving to rules of the Courts of Common Law the effect of judgments for the purposes of the Act, but not actually making them judgments. *The Sunderland Local Marine Board v. Frankland*, 42 Law J. Rep. (N.S.) Q. B. 13; Law Rep. 8 Q. B. 18, *nom.* *In re Frankland*.

5.—Upon the hearing of a garnishee summons under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), sects. 63, 64, the Judge is to decide whether the circumstances make it right that the judgment creditor should have execution against the garnishee, and for this purpose he may and ought to consider the state of accounts between the garnishee and the judgment debtor, but having decided against the garnishee, he cannot go on to settle accounts between him and the judgment creditor, nor to impose as a condition to the statutory remedy that the judgment creditor shall pay what he may owe to the garnishee. *In re Sampson*, 44 Law J. Rep. (N.S.) Q. B. 31; Law Rep. 10 Q. B. 28.

##### (C) EFFECT OF ATTACHMENT.

6.—A garnishee order made against executors will not affect money paid into Court by them in an administration suit, and carried to a separate account to meet a debt due to the judgment debtor. *Stevens v. Phelps*, 44 Law J. Rep. (N.S.) Chanc. 689; Law Rep. 10 Chanc. 417.

7.—A garnishee's order and an attachment issued under the Common Law Procedure Act, 1854, unless followed by seizure and sale before the presentation of a petition for liquidation, does not make the creditor a "secured creditor," within the meaning of the Bankruptcy Act, 1869. The order of the County Court Judge, directing the amount levied under such an order to be repaid to the trustee in the liquidation, was confirmed. *Ex parte Greenway*; *In re Adams*, 42 Law J. Rep. (N.S.) Bankr. 110; Law Rep. 16 Eq. 619.

8.—The plaintiff, on March 24, obtained judgment against the defendant for 310*l.* On April 2, he obtained a garnishee order under sect. 61 of the Common Law Procedure Act, 1854, by which all debts due from the garnishees were ordered to be attached to answer the judgment debt. By the same order, the garnishees were to shew cause on April 12 why they should not pay to the plaintiff the debt due from them to the defendant. The rule *nisi* was served on the garnishees on April 2. On the 5th the judgment debtor presented his petition for liquidation by arrangement, or composition with his creditors, under the Bankruptcy Act, 1869. On April 10, a receiver was appointed, who, on the part of the general creditors, claimed the amount of the debt, which the garnishees, on the 12th, appeared and admitted:—Held, that the plaintiff was a secured creditor within sect. 12 of the Bankruptcy Act, 1869, and was entitled to

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have the money admitted by the garnishees to be due. *Lowe v. Blackmore*, 44 Law J. Rep. (N.S.) Q. B. 155; Law Rep. 10 Q. B. 485.

*Garnishee order: secured creditor.* [See BANKRUPTCY E. 23.]

(D) FOREIGN ATTACHMENT: CUSTOM OF CITY OF LONDON.

9.—Where an action was brought in the Mayor of London's Court against the indorsee of a bill of exchange, and neither the plaintiffs nor the defendant resided within the City of London, nor did the cause of action arise there; it was held that the Mayor's Court had no jurisdiction, so as to give the plaintiffs a right to attach moneys of the defendant in the hands of the garnishee, a resident in the City of London. *The Mayor of London v. Cox* (Law Rep. 2 H. L. 439) followed. *Banque de Cr dit Commercial v. De Gas; Lazard garnishee*, Law Rep. 6 C. P. 142.

10.—Where a defendant in a proceeding by foreign attachment surrenders himself in dissolution of the attachment, and the plaintiff goes on and recovers judgment, the defendant is entitled to be discharged under sec. 4 of the Debtors Act, 1869, notwithstanding that sec. 29 preserves the custom of foreign attachment. *Waine v. Wilkins*, 42 Law J. Rep. (N.S.) Q. B. 75; Law Rep. 8 Q. B. 107.

[And see DEBTORS ACT, 12.]

(2) OF PERSON.

[See DEBTORS ACT.]

*Attachment against attorney.* [See ATTORNEY, 25, 26.]

*Attachment for non-production of documents.* [See PRODUCTION, 12.]

ATTORNEY AND SOLICITOR.

(A) ARTICLED CLERK.

(a) *Service under articles.*

(1) *Time of service.*

(2) *Under unstamped articles.*

(3) *Office or employment.*

(b) *Binding clerk to a firm.*

(c) *Covenant in restraint of trade.*

(d) *Cancellation of articles.*

(e) *Admission.*

(1) *Notices.*

(2) *Member of university.*

(B) UNCERTIFICATED ATTORNEY.

(C) POWERS AND PRIVILEGES.

(a) *Discovery.*

(b) *Authority.*

(D) LIABILITIES.

(a) *For costs.*

(b) *For negligence.*

(c) *Attachment against attorney.*

(d) *Liability in respect of acts of partner.*

(E) SUMMARY JURISDICTION OVER.

(F) DEALINGS WITH CLIENT.

(G) BILL OF COSTS.

(a) *Enforcement against several defendants.*

(b) *Agreement with client as to remuneration.*

(c) *Examination on taxation.*

(d) *Interest on advances.*

(e) *Suit against London agent.*

(f) *Claim for, when barred.*

(H) LIEN FOR COSTS.

(a) *On documents.*

(b) *On property recovered or preserved.*

[Agreements between client and solicitor authorised, and provisions made in relation to attorneys' costs. 33 & 34 Vict. c. 28.]

[6 & 7 Vict. c. 73, and 23 & 24 Vict. c. 127, amended. Power to Judges to admit articulated clerks as attorneys in certain cases, notwithstanding they have held some office or employment during their articles. Regulations as to applications to strike attorneys off the roll. Penalties for wrongfully acting as attorney. 37 & 38 Vict. c. 68.]

[6 & 7 Vict. c. 73. sec. 73 amended so as to authorise an action for costs before the expiration of one month from the delivery of the bill where the party chargeable is about to leave the country, become bankrupt, &c. 38 & 39 Vict. c. 79.]

(A) ARTICLED CLERK.

(a) *Service under articles.*

(1) *Time of service.*

1.—A clerk, duly articulated to an attorney, served a portion of his time with his master; it was then agreed that he should be assigned to another attorney for the residue of his term. On this understanding the clerk left his first master, and went into the service of the second master. From circumstances over which the clerk had no control, the assignment to the second master was not executed for about eight weeks after his entering the second master's service. The clerk served under the assignment for the residue of the term:—Held, that the interval between entering the second master's service and the execution of the assignment could not be reckoned as service under the articles within 6 & 7 Vict. c. 73, sec. 13, and that the Court would not follow *Ex parte Bruton*, 23 Law J. Rep. (N.S.) Q. B. 290. *Ex parte Harrison*, 44 Law J. Rep. (N.S.) Q. B. 103.

2.—An articulated clerk was, at his own request, assigned, during the articles, to one D., an attorney, for fifteen months, at the expiration of which time he returned to his original master, and continued to serve him up to the end of the term:—Held, that such period of fifteen months could not be reckoned as a portion of the five years required by the statute. *Ex parte Adams*, 44 Law J. Rep. (N.S.) Q. B. 102; Law Rep. 10 Q. B. 227.

3.—An articulated clerk, who had served under his articles for three of the term of five years, was then absent from illness for eleven months, but on his return served to the end of the term of his



articles, and passed his final examination:—Held, that an application for his admission as though he had served the full term of five years could not be granted, but that he might be allowed to complete his term by serving for a further period of eleven months. *Ex parte Moses*, 43 Law J. Rep. (n.s.) Q.B. 13; Law Rep. 9 Q.B. 1.

(2) *Under unstamped articles.*

4.—Where the stamp duty on articles of clerkship to an attorney had not been paid within six months after the execution of such articles, and it was not shewn to the satisfaction of the Court that there had existed a state of things at the time the articles were entered into, on which a man might have had a fair ground to reasonably expect that the duty would have been paid within the six months, the Court refused to allow the service to be computed from the date of the execution of the articles. *Ex parte Banyard*, 44 Law J. Rep. (n.s.) C.P. 305; Law Rep. 10 C.P. 638; and *Ex parte Sayer*, 44 Law J. Rep. (n.s.) C.P. 307, n.; Law Rep. 10 C.P. 569.

5.—Before granting an application that the service of a clerk to an attorney under unstamped articles may be computed from the date thereof, and not from the time of enrolment, the Court will require that notice of the application shall be given to the Incorporated Law Society, in order that an opportunity may be afforded of investigating the truth of the statements upon which the application is founded. *Ex parte Blades*, 44 Law J. Rep. (n.s.) C.P. 115.

(3) *Office or employment.*

6.—The appointment as clerk to a vestry is both an office and an employment within 23 & 24 Vict. c. 127, sec. 10; and therefore the service of a clerk under articles to an attorney is insufficient, when the clerk also holds the appointment of clerk to a vestry. *Ex parte Greville*, 43 Law J. Rep. (n.s.) C.P. 58; Law Rep. 9 C.P. 13.

(b) *Binding clerk to a firm.*

7.—A clerk may be article to more than one member of a firm of attorneys. *In re Holland*, Law Rep. 7 Q.B. 297.

8.—A clerk entered into articles of clerkship by which he bound himself to serve a firm of attorneys consisting of two partners:—Held, that the binding was valid, and the articles must be enrolled. *In re an article Clerk*, 41 Law J. Rep. (n.s.) Q.B. 141; Law Rep. 7 Q.B. 587.

(c) *Covenant in restraint of trade.*

9.—The defendant bound himself to a London solicitor by articles for a term, and covenanted that he would not at the expiration of the term, or at any time thereafter, either solely, or jointly with, or as agent for, any other person or persons, directly or indirectly practise the business of an attorney or solicitor within the City of London, or the counties of Middlesex or Essex, nor directly or indirectly act as such attorney or solicitor for any client or clients of the plaintiff, or any partner or partners of the plaintiff, or for any person or

persons who should have been a client or clients of the plaintiff, or any partner or partners of the plaintiff, at any time during the term. At the expiration of the term the defendant having commenced business on his own account in Southwark:—Held, that the restriction was not unreasonable, and that the defendant's acting for a petitioner in the London Court of Bankruptcy was a breach of the covenant. *May v. O'Neill*, 44 Law J. Rep. (n.s.) Chanc. 660.

(d) *Cancellation of articles.*

10.—Where a son, under articles to his father, became out of health, and, under medical advice, his father purchased him a commission in the army:—Held, that this amounted to a virtual cancellation of the articles by mutual consent within the above section. *Ex parte Trenchard*, Law Rep. 9 Q.B. 406.

(e) *Admission.*

(1) *Notices.*

11.—An article clerk gave the proper notices for examination and admission as an attorney in Easter Term. He passed his examination in that Term, but did not apply for admission, nor did he renew his notices as required by Rule (Attorneys) of Hilary Term, 1853, r. 6:—Held, upon an application in Trinity Term to be allowed to renew the notices, so that he might be admitted during that Term, that the rule was positive, and that this Court would not dispense with it. *Ex parte Hay*, 41 Law J. Rep. (n.s.) Q.B. 375.

12.—If an attorney's clerk intentionally omits to give the notice and cause the entries to be made as required by the Rule (Attorneys) of Hilary Term, 1853, r. 5, for the proper period before the Term in which he proposes to be admitted, this Court will not assist him by allowing such notice to be given and entries made subsequently. *Ex parte Cumberland*, 44 Law J. Rep. (n.s.) Q.B. 73; Law Rep. 10 Q.B. 138.

13.—Under special circumstances the Court allowed an article clerk, who had passed his examination, to give his notices at the end of the Term preceding that in which he might be admitted an attorney, instead of giving the notices three days before its commencement as required by rule 5 of Reg. Gen. H. T. 1853. *Ex parte Taylor*, 44 Law J. Rep. (n.s.) C.P. 68.

(2) *Member of university.*

14.—A member of the University of Edinburgh, who has not taken the degree of M.A., but has been enrolled on the General Council by virtue of 21 & 22 Vict. c. 83, s. 6, is not entitled to be admitted an attorney after three years' service under articles. *Ex parte Stewart*, 41 Law J. Rep. (n.s.) Exch. 76; Law Rep. 7 Exch. 202.

Quære—whether this Court has jurisdiction to compel the examiners to grant a certificate to an article clerk that he has passed his intermediate examination. *Ibid*.

(B) *UNCERTIFICATED ATTORNEY.*

15.—A person ordered to pay costs cannot refuse to do so on the ground that the solicitor on

the other side is uncertificated. *In re Hope*, Law Rep. 7 Chanc. 766.

(C) POWERS AND PRIVILEGES.

(a) *Discovery*.

[And see PRODUCTION, 14-17.]

16.—The Court refused to order a solicitor to disclose the address of his client, a defendant to the suit. *Heath v. Crealock*, 42 Law J. Rep. (n.s.) Chanc. 455; Law Rep. 15 Eq. 257.

(b) *Authority*.

17.—A solicitor has authority to enter into an undertaking on behalf of his client, not to issue a writ of *fiat facias* against the client's debtor, in consideration of the acceleration of payment of the debt. *In re The Commonwealth Land, Building, Estate and Auction Co. (Lim.)*; *Ex parte Hollington*, 43 Law J. Rep. (n.s.) Chanc. 99.

A breach of such an undertaking, by the issue of writs against the debtor, was held to be contrary to good faith, and the solicitor was ordered to pay the expenses of issuing such writs, and of an application to recover them. *Ibid*.

18.—An attorney employed to sue for a debt, in a County Court, has no implied authority, after he has obtained judgment in such Court for the debt, to enter into an agreement with the debtor not to enforce such judgment for a time. *Lovegrove v. White*, 40 Law J. Rep. (n.s.) C.P. 253; Law Rep. 6 C.P. 440.

19.—If an attorney brings an action in the name of a person who has not given him any authority to do so, such person is entitled to have the proceedings stayed. *Reynolds v. Howell*, 42 Law J. Rep. (n.s.) Q.B. 181; Law Rep. 8 Q.B. 398.

*Authority of proctor: proxy*. [See ADMIRALTY, 55.]

*Authority to enter appearance for trustee of banking company*. [See BANKER, 2.]

*Law of Canada: power of avoué to suspend action*. [See COLONIAL LAW, 6.]

*Attorney to Poor Law Board: right of, to compensation for deprivation of office*. [See POOR, 5.]

*Liability of trustee for acts of solicitor*. [See TRUST B. 22, 23.]

(D) LIABILITIES.

(a) *For costs*.

20.—The plaintiff having been induced by the fraud and undue influence of L., her agent and trustee, to execute deeds by which, without any consideration, she conveyed all her property to him absolutely, filed a bill against his executor to set them aside. Her former solicitor, who prepared and had the custody of the deeds, was joined as a defendant for purposes of discovery, and costs were prayed against him, as well as the executor, on the ground of neglect of duty. The bill also charged him with fraud, which, however, was not proved. Throughout the litigation he acted as the solicitor of the defendant executor. A decree was made, setting aside the deeds with costs against L.'s estate, and the solicitor was ordered to pay

the whole costs of the suit, in case L.'s estate proved insufficient to pay them. *Baker v. Loader*, 42 Law J. Rep. (n.s.) Chanc. 113; Law Rep. 16 Eq. 49.

The Court will, in a proper case, order a solicitor to pay the costs of litigation occasioned by deeds improperly prepared by him. *Ibid*.

21.—Where an attorney brought an action, knowing he had no authority from the plaintiff, and on judgment for the defendant a rule was granted ordering him, the attorney, to pay the defendant's costs, and then such attorney, under 32 & 33 Vict. c. 71, entered into a composition with his creditors,—Held, that he was discharged from such payment, as the case was one of fraud within 32 & 33 Vict. c. 71, s. 49. *Jenkins v. Feraday*, 41 Law J. Rep. (n.s.) C.P. 152; Law Rep. 7 C.P. 358.

22.—The duty of a plaintiff's solicitor to see that a suit is not frivolous does not attach unless he has been concerned in the original institution of the suit. *Fielden v. The Northern Railway of Buenos Ayres Co. (Limited)*; *In re Jones*, 40 Law J. Rep. (n.s.) Chanc. 113; Law Rep. 6 Chanc. 497.

A solicitor who, in order to induce a plaintiff to go on with a suit, agrees to indemnify him against the costs, thereby makes the suit his own, and becomes liable to pay the costs of the defendants; and this, notwithstanding that by the abatement of the suit by the death of the plaintiff before the hearing and the non-revivor by his executor, their remedy against the plaintiff's estate may be gone. *Ibid*.

(b) *For negligence*.

23.—In an action against a solicitor for negligence, the declaration stated that the plaintiff was equitably interested in four-tenth parts of the lease of a colliery, that the lessee had entered into negotiations for the sale of the lease to a company, and that the plaintiff retained the defendant, as solicitor, to file a bill in Chancery against the lessee and the company for the purpose of enforcing the plaintiff's claim in respect of his shares, and praying that the lessee might convey and secure to the plaintiff four-tenths of the purchase-money, and that the company might be decreed to do all things necessary to confirm such conveyance and security and might be enjoined from paying the plaintiff's proportion of the purchase-money to the lessee. Breach, that the defendant did not register the bill as a *lis pendens* according to 2 & 3 Vict. c. 11, s. 7, whereby the lessee was enabled to dispose of the lease to another company and to receive the purchase-money, and the plaintiff was deprived of his share in it:—Held, that the declaration was good, as the bill in Chancery which prayed for an equitable lien against the intended purchasers of the lease was a *lis pendens*, which ought to have been registered under the statute, and that having regard to the terms of the bill it was the duty of the defendant as a solicitor to have registered it, without any express request on the part of the plaintiff. *Plant v. Pearman*, 41 Law J. Rep. (n.s.) Q.B. 169.

24.—A bill charged that a solicitor had negli-

gently recommended the plaintiff company to accept a freehold house as security for a loan of 5,000*l.*, and had advised that the mortgagors had the absolute fee-simple in the house free from incumbrance, whereas, in fact, they had only an interest in one moiety, and that subject to incumbrances and a contract for sale. The bill prayed that the solicitor might be decreed to make good the 5,000*l.* and costs, and to take over the security from the client. A suit for the realisation of the security was pending, and the mortgagors were bankrupts, so that the actual loss, if any, was not ascertained:—Held, that the Court had no jurisdiction to grant such relief, and that if such jurisdiction existed there was a discretion to refuse to exercise it in such a case, and a demurrer was allowed. *The British Mutual Investment Company (Limited) v. Cobbold*, 44 Law J. Rep. (N.S.) Chanc. 332; Law Rep. 19 Eq. 627.

[And see *supra* No. 22.]

(c) *Attachment against attorney.*

**25.**—The Court will refuse to grant an attachment against an attorney for disobeying a rule of Court ordering him to pay money, unless special circumstances be shewn, as the remedy for such disobedience is by execution under 1 & 2 Vict. c. 110, s. 18. *In re Ball*, 42 Law J. Rep. (N.S.) C. P. 104; Law Rep. 8 C. P. 104.

**26.**—An attorney was arrested under an attachment issued by a Court of law for contempt of Court in not obeying a previous order that he should pay to a client a sum which he had received for him while acting in the capacity of attorney. Before the attachment issued the attorney had been adjudicated a bankrupt, but when he was arrested the bankruptcy was not closed, nor had he obtained an order of discharge:—Held, that the Court of Bankruptcy ought not to order his release from custody, but ought to leave the Court of law to decide whether the attachment was merely a process to compel payment of a debt, or whether it was issued in the exercise of the Court's *quasi* criminal jurisdiction over its own officer. *Ex parte Deere*; *In re Deere*, 44 Law J. Rep. (N.S.) Bankr. 120; Law Rep. 10 Chanc. 658.

[And see DEBTORS ACT, 8–10.]

(d) *Liability in respect of acts of partner.*

**27.**—In order to render one partner in a firm of solicitors liable for the misapplication of money entrusted by a client of the firm to the other partner, it must be shewn that the money was received by that other partner in the ordinary course of business for the purpose of being invested on a specific security. A mere general statement to the client by the partner who receives the money that the money is to be lent on security to another client is not sufficient to bind the other partner; the receipt of money for the purpose of laying it out generally not being part of a solicitor's business, or within the scope of a solicitor partnership. *Plumer v. Gregory* (No. 2), 43 Law J. Rep. (N.S.) Chanc. 803; Law Rep. 18 Eq. 621.

[And see *infra* No. 32.]

(E) SUMMARY JURISDICTION OVER.

**28.**—Where an attorney has been suspended for a limited period by order of one of the Superior Courts, the Court of Common Pleas will not adopt such order by suspending, in like manner, the attorney from practising in that Court, without examining the facts on which the order was made, and exercising its own discretion in the matter. *In re Brutton*, 41 Law J. Rep. (N.S.) C. P. 58.

In a case in which the Master of the Rolls ordered an attorney to be suspended for a certain period, and the misconduct was such that he might have been struck off the roll for it, the Common Pleas, after reading the affidavits used before the Master of the Rolls, ordered the attorney to be suspended from practising in that Court, not only for the period ordered by the Master of the Rolls, but until the further order of the Court. *Ibid.*

**29.**—When another superior Court has made an order to suspend an attorney for misconduct, this Court will grant a rule *nisi* for a similar suspension, upon proof of all the materials used before the other Court, of the judgment delivered, and order made by such other Court, and of the identity of the attorney. This rule *nisi* will make itself absolute unless cause be shewn within the time prescribed therein. *In re Turner*, 42 Law J. Rep. (N.S.) Exch. 63; Law Rep. 8 Exch. 62.

**30.**—This Court has jurisdiction to strike an attorney off the roll of the Court of Common Pleas at Lancaster. *Ex parte Briggs*, Law Rep. 8 C. P. 63.

(F) DEALINGS WITH CLIENT.

**31.**—A solicitor is not absolutely incapacitated from purchasing from his client. In investigating the *bona fides* of such a transaction the Court will take all the facts into consideration. *Pisani v. Attorney-General for Gibraltar*, Law Rep. 5 P. C. 516.

**32.**—The liability of a firm of solicitors, to whom a client's money is entrusted for investment, is joint and several. *Plumer v. Gregory*, 43 Law J. Rep. (N.S.) Chanc. 616.

[And see *UNDUE INFLUENCE*, 1.]

(G) BILL OF COSTS.

(a) *Enforcement against several defendants.*

**33.**—Though a solicitor who accidentally (or upon separate retainers) represents two or more parties ought to distinguish the charges incurred for each separate party, yet where there is a joint retainer (or by trustees not severing in their defence) he can enforce the whole bill of costs incurred against either of the parties. *Watson v. Row*, 43 Law J. Rep. (N.S.) Chanc. 664; Law Rep. 18 Eq. 680.

Two trustees gave a joint retainer in a suit to administer the trust estate. One became insolvent and was indebted to the estate:—Held, that the surviving trustee should have the whole costs of himself and his co-trustee allowed out of the estate without any set-off in respect of the estate. *Ibid.*

(b) *Agreement with client as to remuneration.*

**34.**—The declaration alleged that the plaintiff was an attorney and set out the following agreement:—"I hereby agree to pay you a commission of 5*l.* per cent. for all money you will obtain for me to purchase shares in the B. gas works in lieu of your costs. Also I hereby agree to be prepared within six months to sell the said B. gas works, and, for the consideration aforesaid, I hereby agree that you shall have the carrying out of the sale, and I agree to pay you a commission of 4*l.* per cent. on the purchase-money in lieu of your costs." Breach, that the defendant did not employ the plaintiff in or about carrying out the agreement of sale, nor permit him to have the carrying out of the agreement of sale, and had not paid a commission of 4 per cent. or any commission on the purchase-money in lieu of costs or otherwise. Plea, that the agreement was in writing, and made between attorney and client respecting payment for future services, and was intended by both parties to be made in pursuance of the Attorneys and Solicitors Act, 1870:—Held, on demurrer, that the fact of the agreement containing, *inter alia*, a stipulation as to remuneration upon which, had the work been done under the contract, no action could have been brought, and which could only have been enforced on motion or petition in the mode prescribed by the Act, did not subject the whole agreement to the provisions of the statute so as to bar the plaintiff maintaining the action to recover unliquidated damages against the defendant for not employing him. *Rees v. Williams*, 44 Law J. Rep. (n.s.) Exch. 116; Law Rep. 10 Exch. 200.

**35.**—An agreement by an attorney with his client not to charge for costs need not be in writing. *Jennings v. Johnson*, Law Rep. 8 C.P. 425.

(c) *Examination on taxation.*

**36.**—A solicitor may be cross-examined on an affidavit made by him in support of a bill of costs under a common order for taxation, and it is the duty of the examiners to take such examination. *In re Flux, Argles, and Rawlins*, 44 Law J. Rep. (n.s.) Chanc. 375.

(d) *Interest on advances.*

**37.**—The 33 & 34 Vict. c. 28, s. 17, authorising on taxation the allowance of interest on moneys disbursed by a solicitor for his client, only applies to costs between a solicitor and his own client, not to a case where costs are to be paid out of a fund in Court not belonging wholly to the client. *Hartland v. Murrell*, 43 Law J. Rep. (n.s.) Chanc. 94; Law Rep. 16 Eq. 285.

(e) *Suit against London agent.*

**38.**—A bill filed by a country solicitor against a solicitor in London for a discovery of all matters of business transacted by the defendant as agent for the plaintiff, and for delivery and taxation of his bill of costs, stated that there was a dispute between them whether the defendant had transacted the business as agent for the plaintiff or on his own account under a special agreement to

share the profits. The defendant demurred on the ground that the plaintiff's remedy was by application under 6 & 7 Vict. c. 73, s. 37, and not by bill. The Master of the Rolls overruled the demurrer, and on appeal the decision was affirmed. *Ward v. Lawson*, 42 Law J. Rep. (n.s.) Chanc. 273; Law Rep. 8 Chanc. 65.

(f) *Claim for, when barred.*

*Claim against railway company for costs of obtaining Act of Parliament: when barred by Statute of Limitations.* [See LIMITATIONS, STATUTE OF, 23.]

## (H) LIEN FOR COSTS.

(a) *On documents.*

**39.**—A solicitor is entitled to a general lien for costs on papers deposited with him by his client for a particular purpose only, unless that general lien is excluded by special agreement. *Colmer v. Ede*, 40 Law J. Rep. (n.s.) Chanc. 185.

**40.**—A solicitor applied to his client for funds to carry on a suit, declining to continue the conduct of the litigation unless his costs, which were already considerable, were secured. The client neither furnished the funds nor gave the required security, but obtained an order appointing fresh solicitors:—Held, that the solicitor had discharged himself, and was bound to hand over to the new solicitors all the papers in his possession relating to the suit, on their undertaking to hold them without prejudice to his lien, and to return them to him within twelve days after the conclusion of the suit. *Robins v. Goldingham*, 41 Law J. Rep. (n.s.) Chanc. 813; Law Rep. 13 Eq. 440.

**41.**—R. & C., at H. & T.'s request, paid to H. & T.'s country solicitors a sum of 350*l.* in part discharge of costs incurred by H. & T. in certain administration suits. Thereupon the country solicitors by indenture assigned to R. & C. certain documents on which they had a lien, and covenanted that they would hold any charging order they might obtain from the Court of Chancery for payment of their costs, in trust to indemnify R. & C. By a subsequent order of the Court the costs were to be taxed and paid out of funds in Court to the town agents of the country solicitors:—Held, upon H. & T.'s petition, that the costs must be paid to R. & C. in satisfaction of their claims under the indenture. *Peatfield v. Barlow* (38 Law J. Rep. (n.s.) Chanc. 310; Law Rep. 8 Eq. 6) followed. *Cockayne v. Harrison*, 42 Law J. Rep. (n.s.) Chanc. 660; Law Rep. 15 Eq. 298.

**42.**—A solicitor, who has been employed in a suit for the administration of an estate, and is discharged during the course of the suit, cannot, on the ground of lien, retain documents belonging to the estate, so as to embarrass the proceedings in the suit. *Belaney v. French*, 43 Law J. Rep. (n.s.) Chanc. 312; Law Rep. 8 Chanc. 918.

(b) *On property recovered or preserved.*

**43.**—In a suit by one of several tenants in common of real estate, instituted to obtain from the defendant, to whom the plaintiff had conveyed her share in trust by a revocable deed, accounts

of his receipts and payments on her behalf, and a reconveyance of her share, and praying for a declaration that the defendant was a trustee for the plaintiff of a certain mortgage upon the estate, for a transfer whereof she had advanced a sum of money to the said defendant, a receiver of the estate was appointed at the instance of the plaintiff. Subsequently the suit was compromised by the plaintiff and the defendant without the intervention of their solicitors. By the compromise the estate was to be sold, and a portion of the proceeds thereof paid to the plaintiff:—Held, that by the appointment of the receiver, the property had been preserved, and accordingly the plaintiff's solicitors were entitled to have, paramount to the compromise, a charge for their costs of the suit upon the shares of the plaintiff and of another of the co-owners of the estate for whom they had acted in the suit, and to have such charge enforced by a sale of the shares, with the continuance meanwhile of the receiver appointed in the suit. *Twynam v. Porter*, 40 Law J. Rep. (n.s.) Chanc. 30; Law Rep. 11 Eq. 181.

44.—Any branch of the Court of Chancery has jurisdiction to make an order under the Attorneys and Solicitors Act, 1860, declaring a solicitor entitled to a charge for his costs upon property recovered by his diligence, although the suit in which the costs were incurred was in another branch of the Court, and though the suit is no longer pending. *Heinrich v. Sutton*; *In re Fiddey*, 40 Law J. Rep. (n.s.) Chanc. 518. [But see next case.]

45.—An order declaring a solicitor entitled to a charge under the Attorneys and Solicitors Act, 1860, on property recovered in a suit must be made in the branch of the Court to which the suit is attached. *Heinrich v. Sutton*; *In re Fiddey*, Law Rep. 6 Chanc. 865.

46.—A solicitor was employed by a married woman in the successful defence of a suit instituted by her husband to set aside a settlement, whereby he covenanted to pay to her an annuity for her separate use without power of anticipation, and assigned certain property to trustees to secure the annuity. Upon a petition by the solicitor to charge, under 22 & 23 Vict. c. 127, s. 28, the annuity with his costs incurred on her behalf,—Held, that the married woman was competent to employ a solicitor for the purpose of defending such a suit; that the right of the solicitor under the Act to a charge upon the property preserved by his exertions was paramount to the restraint on anticipation; and held by Wickens, V.C., varying the order of Stuart, V.C., that the charge was limited to the annuity and did not extend to the trust fund upon which it was secured. *In re Keane* and *In re Lumley v. Desborough*, 40 Law J. Rep. (n.s.) Chanc. 617; Law Rep. 12 Eq. 115.

47.—It is not merely where there is an adverse claim to property recovered or preserved in a suit through the instrumentality of a solicitor for his client, that the solicitor is entitled to a charge on the property for his costs, under the Attorneys and Solicitors Act, but he may also obtain such a declaration, where the suit is a friendly one and in-

stituted on behalf of an infant. *Baile v. Baile*, 41 Law J. Rep. (n.s.) Chanc. 300; Law Rep. 13 Eq. 497.

A bill was filed by the maternal grandmother of an infant plaintiff tenant in tail, as his next friend, praying the appointment of a guardian to the plaintiff and his brothers and sisters; directions for the maintenance and education of the plaintiff, having regard to the circumstances of the family; accounts; and a receiver. The solicitor employed by the next friend died pending the suit, and within six years from the presentation of the petition. A petition was presented by the personal representative of the solicitor for a declaration as to, and a charge for, his costs under the above Act, s. 28:—Held, that the solicitor was "employed" for the infant; that the property was "preserved" for the infant through the instrumentality of the solicitor; that the infant had, as a matter of fact, adopted the suit after attaining his majority; that the Statute of Limitations was not a bar to the petition; that it was well presented by the legal personal representative; and that the petitioner was entitled to the relief which she prayed. *Ibid.*

48.—A declaration giving a solicitor a charge for his costs upon property recovered or preserved in a suit may be made upon a petition presented in the suit after an order has been made dismissing the bill upon a compromise. *Jones v. Frost*; *In re Fiddey*, 42 Law J. Rep. (n.s.) Chanc. 47; Law Rep. 7 Chanc. 773.

The plaintiffs in a suit to set aside a conveyance of real estate sold their interest in the property, and the suit was compromised, and a conveyance of the property made to the purchaser who obtained an order dismissing the bill:—Held, that the plaintiffs' solicitor was entitled to a charge for his costs upon the property as against the purchaser. *Ibid.*

49.—A solicitor instituted an administration suit on behalf of a *cestui que trust* against a sole trustee, obtained a common decree with a direction for the appointment of a new trustee, and procured an account to be brought into chambers by the defendant. The plaintiff then abandoned the suit. On petition by the solicitor that his costs might be made a charge on the plaintiff's interest in the trust estate, under 23 & 24 Vict. c. 127, s. 28,—Held, that no property had been preserved or recovered on which the costs could be made a charge. *Pinkerton v. Easton*; *In re Pinkerton*, 42 Law J. Rep. (n.s.) Chanc. 878; Law Rep. 16 Eq. 490.

50.—The 28th section of 23 & 24 Vict. c. 127, which empowers the Court to declare a solicitor entitled to a charge for his costs upon property recovered or preserved in a suit through his instrumentality, does not apply to a suit which relates merely to an easement. *Foxon v. Gascoigne*, 43 Law J. Rep. (n.s.) Chanc. 729; Law Rep. 9 Chanc. 654.

51.—A solicitor who claims a charge or lien for his costs on property which he has "recovered or preserved in any suit or proceeding" for an infant, cannot enforce that claim under the Attorneys and Solicitors Act, 1860 (23 & 24 Vict. c. 127),

s. 28; but must establish it on a bill filed under the general jurisdiction of the Court. If such claim be allowed, it may include other costs auxiliary to those incurred for the preservation or recovery of the infant's property. *Pritchard v. Roberts*, 43 Law J. Rep. (N.S.) Chanc. 129; Law Rep. 17 Eq. 222.

52.—By an award made pursuant to an order of Nisi Prius, a sum of 179*l.* was ordered to be paid by M. to P. This amount remained unsatisfied. The plaintiffs, having obtained judgment for 1,200*l.* against P. B., who acted as P.'s attorney in the action in which the order of Nisi Prius was made, took out a summons for a charging order under 23 & 24 Vict. c. 127, s. 28, upon the sum of 179*l.* Afterwards the plaintiffs obtained a garnishee order under 17 & 18 Vict. c. 125, s. 61, against M.:—Held, that the unpaid amount of 179*l.* was property within 23 & 24 Vict. c. 27, s. 28, and the summons for the charging order having been issued by B. before the plaintiffs obtained the garnishee order, B.'s lien as the attorney by whom the 179*l.* had been recovered must prevail, and he was entitled to receive that sum in priority to the plaintiffs. *Birchall v. Pugin*, 44 Law J. Rep. (N.S.) C. P. 278; Law Rep. 10 C. P. 397.

*Lien for costs of divorce suit.* [See DIVORCE, 86, 87.]

## AUCTION AND AUCTIONEER.

1.—The plaintiff and M. carried on business in premises rented by M. of C. Being about to dissolve partnership, their respective attorneys gave a joint order to the defendant, an auctioneer, to take possession of the goods upon the premises, to "realise the same with all convenient despatch, and to hold the proceeds as stakeholder until we shall join in directing you as to the disposition thereof." The defendant took possession, and sold the goods by auction, under conditions, one of which was as follows:—"Each lot shall be paid for immediately after the sale and previously to its removal. Each and all lots shall be taken to be delivered at the fall of the hammer, after which time they shall remain and be at the exclusive risk of the purchasers, and the auctioneer shall not be called upon for compensation for any injury or loss sustained after that time." After the lots were sold, but before all had been taken away by the purchasers, the agent of C. told the defendant that he could not allow the things to go until he was paid rent then in arrear. The rent was the private debt of M., who asked the defendant to pay it out of the proceeds of the sale. The plaintiff gave the defendant notice not to pay the rent, and the attorneys gave him notice to pay the net proceeds to the plaintiff, he being entitled to the whole. The defendant paid the rent to C., and the balance of the proceeds to the plaintiff:—Held, that the defendant was not justified in paying the rent, and that the plaintiff was entitled to maintain an action against him to recover the residue of the proceeds. *Sweeting v. Turner*, 41

Law J. Rep. (N.S.) Q. B. 58; Law Rep. 7 Q. B. 310.

2.—The plaintiff sent a grey mare to the defendant for sale by auction. The defendant circulated a catalogue, forming one document with the conditions of sale, wherein the mare was described and numbered, and the sale advertised for a day named. The sale took place on such day, and the mare was knocked down to M. Prior to the sale the defendant had prepared a sales ledger, containing in several columns the particulars of each horse to be offered for sale, with blanks for the purchasers and prices, which blanks were filled up by the clerk of the defendant as soon as each horse was knocked down. The number and description of the plaintiff's mare, as entered in the sales ledger, corresponded exactly with the number and description in the catalogue, and immediately after the sale M. wrote to the defendant (to return the mare, as not up to warranty), a letter identifying her by number and description:—Held, that the defendant was liable to the plaintiff for negligence in not having made a binding contract with M., and that the letter of M. was not sufficient to shew that there was a contract which would be binding upon M. *Peirce v. Corf*, 43 Law J. Rep. (N.S.) Q. B. 52; Law Rep. 7 Q. B. 210.

3.—The defendant advertised in newspapers that a sale by auction would take place on a particular day in a country town. He also circulated catalogues specifying the articles to be sold. The plaintiff attended the sale, intending to buy certain articles specified in the catalogue, but on the day of sale they were withdrawn by the defendant:—Held, that there was no implied contract by the defendant to indemnify the plaintiff against the expense and inconvenience which he had incurred. *Harris v. Nickerson*, 42 Law J. Rep. (N.S.) Q. B. 171; Law Rep. 8 Q. B. 286.

*Covenant in lease not to permit sale by auction.* [See LEASE, 19.]

*Semble*—A contract by an auctioneer for an undisclosed principal is valid under the Statute of Frauds. [See COMPANY, D. 6.]

## AUTREFOIS CONVICT.

The appellant was convicted upon an information laid by the police under 5 & 6 Will. 4, c. 50, s. 78, for striking a horse ridden by H., and causing hurt and damage to H., then being and passing upon the highway. Subsequently, H. laid an information under 24 & 25 Vict. c. 104, s. 42, for an assault, in respect of the same matter:—Held, that the appellant could not be convicted under the last summons. *Wemyss v. Hopkins*, 44 Law J. Rep. (N.S.) M. C. 101; Law Rep. 10 Q. B. 378.

## AWARD.

[See ARBITRATION, 18-27.]

BAILMENT.

*Cabdriver and Cabowner.*

1.—Where the plaintiff, a cabdriver, was furnished by the defendant, a cabowner, with a horse and cab for the day, on the terms that the plaintiff was to pay a fixed sum for their use, and have the earnings for himself, and the defendant personally furnished the plaintiff with a horse which he, the defendant, had lately bought and not tried in a cab, and which (though the defendant did not know it) was unfit for the required purpose, and ran away and injured the plaintiff:—Held, by the majority (Grove, J., and Byles, J.) of the Court, that the relation between the defendant and the plaintiff was that of bailor and bailee, with a warranty that the horse was reasonably fit, and further, per Byles, J., that, even if it was that of master and servant, the personal interference of the defendant was evidence of such negligence as would make him liable; but, per Willes, J., that the relation was that of master and servant, and that, in the absence of knowledge, the defendant was not liable. *Fowler v. Lock*, 41 Law J. Rep. (N.S.) C. P. 99; Law Rep. 7 C. P. 272.

*Goods at sufferance wharf.*

2.—Goods ordered by L. from the plaintiff abroad were shipped and consigned to L., the bill of lading and invoice being forwarded in due course. The vessel with the goods on board arrived on the 12th of February, at a sufferance wharf kept by the defendant in London. Before she arrived L. had deposited the bill of lading at the wharf, with directions to take delivery, and warehouse the goods on his account. This was done, the goods being entered in the name of L., subject to the freight. On the 19th of February L. gave notice to the plaintiff that the goods were not according to contract, and that he refused to take them. It was agreed on the 19th of April that the plaintiff should take them back, and L. promised to send the delivery order, but instead of doing so, he indorsed the bill of lading to M., who took it to the defendant, and obtained a transfer of the goods to his own name. On the 3rd of June M. paid the freight, obtained warrants for delivery to him or his order, and a transfer was made from his name to "warrants." The plaintiff tendered both to M. and also to the defendant the amount of all "charges" due for the goods. The transaction between M. and L. was colourable, and with knowledge on the part of M. of the intention of L. to deprive the plaintiff of the goods. The defendant refused to deliver the goods to the plaintiff, and delivered them to another person by order of M.:—Held, in an action to recover the goods, that the defendant held them in no other relation than of ordinary bailee, and was liable to the plaintiff. *Batut v. Hartley*, 41 Law J. Rep. (N.S.) Q. B. 273; Law Rep. 7 Q. B. 594.

*Deposit for safe custody with bankers.*

[See *BANKER*, 10, 11.]

DIGEST, 1870–1875.

*Breach of duty by bailee: Statute of Limitations.* [See *LIMITATIONS, STATUTE OF*, 22.]

*Negligence of bailee of bills for encashment.* [See *NEGLIGENCE*, 32.]

BALLOT ACT.

[See *MUNICIPAL CORPORATION*, 13–15.]

Under the Ballot Act, 1872, it is the duty of the presiding officer at a polling station, or a clerk deputed by him, whichever of them in fact undertakes it, to deliver to the voters ballot-papers bearing the official mark, and to be present, so that each voter, before placing his ballot-paper in the box, can shew to him the official mark on its back; but *prima facie*, and in the absence of it appearing that a clerk has been deputed by such presiding officer to fulfil it, the duty lies on such officer.—So Held by the whole Court. *Pickering v. James*, 42 Law J. Rep. (N.S.) C. P. 217; Law Rep. 8 C. P. 489.

But it is doubtful whether there is a similar duty as to ascertaining, before the voters put their ballot-papers in the box, whether they are properly marked with the official mark,—Keating, J., and Brett, J., holding that there is, and Bovill, C.J., and Grove, J., that there is not. *Ibid*.

Where the presiding officer or clerk commits a breach of duty, he is liable to an action for damages by the party aggrieved, though the breach be not wilful or malicious,—So Held by the whole Court. *Ibid*.

Where the declaration sufficiently states the duty, and breach thereof by the defendant, and after stating facts not sufficiently shewing the plaintiff is aggrieved, alleges that "by reason of such neglect of duty the plaintiff was prevented from being elected," such allegation is one of fact, and sufficient to shew the plaintiff is aggrieved,—So Held by Keating, J., Brett, J., and Grove, J. (*dissentiente* Bovill, C.J.). *Ibid*.

BANK OF ENGLAND.

The Bank of England is a body having a discretion to exercise for the benefit of the public as well as itself; and is not bound to accept as sufficient evidence of the death of a stockholder on a joint account in its books, such proof as would satisfy the Court of Chancery. *Prosser v. The Bank of England*, 41 Law J. Rep. (N.S.) Chanc. 327; Law Rep. 13 Eq. 611.

C. P. died in 1871. At her death a sum of 2,560*l.* 15*s.* 9*d.* New Three per Cent. Annuities, and no other fund, was standing in her name and in the names of the plaintiffs jointly in the books of the Bank. The burial of C. P. was entered in the proper parish register. An extract from the entry, together with a statutory declaration of the identity of C. P., was forwarded by the plaintiffs to the Bank, in order that they might affix

to her name in their books the usual memorandum of death. The Bank, however, would not do so, on the ground that "the declaration did not aver that the extract had been compared with the original register for the parish where C. P. was buried." A motion for an injunction to restrain the Bank from continuing the name of C. P. in their books without the memorandum was refused with costs. *Ibid.*

## BANKER AND BANKING COMPANY.

### (A) BANKING COMPANY.

(a) *Liability for misrepresentation by manager.*

(b) *Trustee of settlement deed.*

(c) *Winding up.*

### (B) BANKER AND CUSTOMER.

(a) *Practice of bankers.*

(b) *Proof by bankers in administration suit.*

(c) *Accounts at separate branches.*

(d) *Consolidation of accounts.*

(e) *Deposit of securities.*

(1) *Separate accounts.*

(2) *Of title-deeds to secure advances.*

(3) *Under 33 Geo. 2, c. 14 (Ir.), s. 2.*

(f) *Advances prohibited by charter.*

(g) *Deposit for safe custody.*

(1) *Lien of bankers.*

(2) *Liability of bankers.*

(h) *Specific appropriation of funds in hands of bankers.*

(i) *Liability of banker dealing with company.*

(k) *Summonable as witness under Companies Act.*

### (A) BANKING COMPANY.

(a) *Liability for misrepresentation by manager.*

1.—At the request of the plaintiff, a customer, the manager of the S. & H. Bank, wrote to the manager of the C. branch of the G. Banking Company, of which one of the defendants was public officer, "I shall be much obliged by the favour of your opinion, in confidence, of the respectability and standing of R., and whether you consider him responsible to the extent of 50,000*l.*" The defendant, Goddard, who was the manager of the C. branch, wrote in answer, "I am in receipt of your favour of the 8th instant, and beg to say in reply that R. is the lord of the manor of Charlton Kings, near this town, with a rent-roll, I am told, of over 7,000*l.* per annum, the receipt of which is in his own hands, and has large expectancies, and I do not believe he would incur the liability you name unless he was certain to meet the engagement. Signed, J. B. Goddard, manager." The representation contained in the last-mentioned letter was false to the knowledge of Goddard, who, in writing it, acted within the scope of his authority as manager to answer such enquiries, but

without making any communication to the directors or other officers of the company:—Held, reversing the judgment of the Court of Queen's Bench, *sub nom. Swift v. Winterbotham* (42 Law J. Rep. (N.S.) Q. B. 111; Law Rep. 8 Q. B. 244), that the bank was not liable in respect of the misrepresentation, inasmuch as under 9 Geo. 4, c. 14, s. 6, it is necessary that the representation as to credit, &c., should "be made in writing signed by the party to be charged therewith;" and inasmuch as there was no signature by the bank. But held, affirming the judgment of the Court of Queen's Bench, that Goddard was liable. *Swift v. Jewsbury* (Exch. Ch.), 43 Law J. Rep. (N.S.) Q. B. 56; Law Rep. 9 Q. B. 301.

(b) *Trustee of settlement deed.*

2.—The deed of settlement of a banking company, provided that where property was vested in trustees, the directors should have power to direct any actions or suits to be commenced or defended on account of the property of the bank, and to direct the necessary parties to such actions and suits to carry them on or defend them, and that such parties should be indemnified:—Held, that the solicitors of the bank were justified in entering an appearance without his knowledge for a trustee who had executed the deed, and who was made a co-defendant, by persons claiming adversely to the bank. *Heinrich v. Sutton*, Law Rep. 6 Chanc. 220.

(c) *Winding up.*

[See COMPANY.]

### (B) BANKER AND CUSTOMER.

(a) *Practice of bankers.*

*Bill of exchange: payment by cheque: payment in error.* [See BILL OF EXCHANGE, 22.]

(b) *Proof by bankers in administration suit.*

*Bankers of executor: right to prove against testator's estate.* [See ADMINISTRATION, 5.]

*Proof by banker in administration suit under continuing guarantie.* [See PRINCIPAL AND SURETY, 4.]

(c) *Accounts at separate branches.*

3.—In the absence of any special contract or arrangement, there is no obligation on a banking company to honour the cheque of a customer presented at one of their branch offices where he has a balance standing to his credit, when he has overdrawn his account at another branch office to an amount greater than such balance, so that the company are in fact not indebted to him. *Garnet v. McKewan*, 42 Law J. Rep. (N.S.) Exch. 1; Law Rep. 8 Exch. 10.

(d) *Consolidation of accounts.*

4.—G., a county treasurer, as such received moneys for various county purposes. He kept a private banking account with the N. Bank, and also separate accounts headed "Police Account"



and "Superannuation Account," the cheques drawn against these being similarly headed. He on several occasions transferred special sums from his private account to these accounts. The bank knew that he held the office of county treasurer, and that these accounts were opened with reference to his duties as such. In April, 1870, he absconded and was soon afterwards made bankrupt. At that time his private account was largely overdrawn, but the Police and Superannuation Accounts were in credit:—Held, that the bank could not consolidate the accounts as against the county authorities, but that the latter, to the extent of the amounts owing by G. in respect of the several funds which he received in his official capacity, were entitled to the money standing to the Police and Superannuation Accounts as being trust moneys. *Ex parte Kingston*; *In re Gross*, 40 Law J. Rep. (N.S.) Bankr. 91; Law Rep. 6 Chanc. 632.

(e) *Deposit of securities.*

(1) *Separate accounts.*

5.—Where a customer, having three separate accounts with his banker, a general, a loan, and a discount account, wrote to the banker stating that he had charged his loan account with 10,500*l.*, and that, as his credit would no longer afford a margin to that extent, he hastened to hand the banker certain bills, by way of collateral security:—Held, that this did not exclude the banker's right to a general lien on the bills in respect of the customer's general account. *In re The European Bank*; *Ex parte Agra Bank*, Law Rep. 8 Chanc. 41.

(2) *Of title-deeds to secure advances.*

6.—Certain title-deeds which had been handed by the plaintiff to his brother, F. B., to enable the latter to borrow 600*l.* from H. for seven days, were deposited by F. B. with a bank, with a memorandum purporting to be signed by the plaintiff, and stating that the deposit was made in consideration of the bank lending F. B. 1,000*l.* for seven days. The bank made him no loan for seven days, but, during the seven days next after the deposit, they allowed him to draw by cheques to an amount exceeding 900*l.* Upon a bill filed by the plaintiff against the bank for the delivery up of the deeds, on the grounds, first, that the memorandum of deposit was a forgery; and second, that the bank had not lent F. B. 1,000*l.* for seven days,—Held, that the question of forgery was one for a jury only, but that, assuming the memorandum to be genuine, the bank had no right to retain the deeds, inasmuch as they had not fulfilled the condition on which the deposit was made. *Burton v. Gray*, 43 Law J. Rep. (N.S.) Chanc. 229; Law Rep. 8 Chanc. 932.

7.—The articles of association of an Assurance Company provided that all securities made on behalf of the company should be sealed with the company's seal, signed by two of the directors and countersigned by the secretary, and when so sealed, signed, and countersigned, should be valid and enforceable against the company. The company requiring accommodation from their bankers, the

directors passed a resolution, that certain title-deeds should be deposited with the bankers as collateral security for bills under discount, and the deeds were deposited accordingly. The bankers then discounted bills directly for the company, and also bills for third persons on which the company were liable, and the company being afterwards wound up, the bankers sold the property comprised in the title-deeds for a sum greater than would cover the amount due on the bills directly discounted, but less than their general debt:—Held, first, that the deposit was only intended as a security for bills discounted directly for the company. Secondly, that the bankers not being officers of the company had not imposed upon them the duty of seeing that the formalities required by the articles of association were complied with; and that the equitable mortgage by deposit was valid, although these formalities were not complied with, and although it was not registered under section 43 of the Companies Act, 1862. Thirdly, that by analogy to *Hazelfoot's Case* (41 Law J. Rep. (N.S.) Chanc. 286; Law Rep. 13 Eq. 327), the bankers had, as mortgagees, a right to retain as against the liquidators of the company the balance which would remain in their hands after paying the amount due on the bills directly discounted for the company, in satisfaction of their general debt. *In re The General Provident Assurance Company*; *Ex parte The National Bank*, 41 Law J. Rep. (N.S.) Chanc. 823; Law Rep. 14 Eq. 507.

(3) *Under 33 Geo. 2. c. 14 (Ir.), s. 2.*

8.—A memorandum accompanying a deposit of title-deeds by a banker by way of mortgage is within the above section, and ought to be registered accordingly. The Act is not confined to bankers who issue notes for circulation. The 11th section of the Act, providing that in creditors' deeds executed by bankers, the trustee or trustees shall be approved by the majority of the creditors, is merely directory, so that such approval is not a condition precedent to the validity of the deeds. A subsequent bankruptcy will not invalidate such a deed. *Copland v. Davies*, Law Rep. 5 E. & I. App. 358.

(f) *Advances prohibited by charter.*

9.—A bank was incorporated by charter, which provided that it should not make advances on merchandise:—Held, that this provision did not prevent the property in wool upon the security of which the bank had advanced money, passing under the conveyance thereof to the bank, and that inasmuch as the person who has made an advance is to be deemed in possession, an action of trover might be brought by the bank. *Ayres v. The South Australian Banking Company*, 40 Law J. Rep. (N.S.) P.C. 22.

(g) *Deposit for safe custody.*

(1) *Lien of bankers.*

10.—Bankers have no general lien on boxes containing securities deposited with them for safe custody. And a customer who had deposited such

boxes for safe custody, having become lunatic, and his committees having been appointed.—Held, that the bankers had no right to retain or open the boxes as against the committees. *Leese v. Martin*, 43 Law J. Rep. (N.S.) Chanc. 193; Law Rep. 17 Eq. 224.

The bankers who claimed such a lien having obtained garnishee orders against debtors of their lunatic customer through information obtained after opening the boxes, the Court granted an injunction to prevent them from enforcing their garnishee orders with respect to the securities in question, but refused damages for the opening of the boxes. *Ibid*.

## (2) *Liability of bankers.*

11.—J. deposited for safe custody some certificates of railway shares with his bankers, with whom he had an account, on which they charged a commission. The certificates were placed in a strong box, of which the manager of the bank had uncontrolled care. The manager sold the shares, and forged transfers. J. sued the railway companies and the purchasers, for the purpose of having his name restored, as holder of the shares. He obtained a decree, but without costs, the costs being refused principally upon the ground that the railway companies had sent letters to J., informing him that the transfers had been addressed to him, in accordance with his instructions, to the care of the manager of the bank; to which letters the manager forged answers. J. then claimed against the bankers for the amount of the costs which he had thus incurred.—Held, that though the bankers were bailees for reward, and had committed gross negligence in leaving the certificates in the unwatched control of their manager, still the costs in question were not the natural and necessary consequences of their neglect, and therefore could not be charged against them. *In re The United Service Company, Limited (Johnson's Case)*, 40 Law J. Rep. (N.S.) Chanc. 286; Law Rep. 6 Chanc. 212.

### (h) *Specific appropriation of funds in hands of bankers.*

12.—A letter by bankers, stating that a special credit for a certain sum has been opened by them at the instructions of their customer, in favour of any particular person who supplies goods on the faith of it, does not constitute a specific appropriation or an equitable assignment of that sum in their hands, for which they are liable to be sued in a Court of Equity as if they were trustees for the person in whose favour the credit has been opened. *Morgan v. Larivière* (H. L.), 44 Law J. Rep. (N.S.) Chanc. 457; Law Rep. 7 E. & I. App. 423.

L. had contracted to supply the French Government with a certain number of cartridges by a given time, and in consequence of his request for some guarantee for the payment of the price, the bankers in London of the Government wrote by direction of the agent of the Government a letter advising L. that by such direction a special credit for 40,000*l.* had been opened with them in favour

of L., and that it would be paid rateably as the goods were delivered, upon receipt of certificates of reception issued by the agent of the French Government.—Held, that this letter did not constitute an assignment in equity, or a specific appropriation, so as to impress a trust upon the moneys in the bankers' hands, for which they could be sued in equity. Whatever responsibility they incurred under that letter could be enforced at law. *Ibid*.

The French Government did not appear to the plaintiff's bill, nor in any way submit to the jurisdiction of the Court:—Held, that if the fund had been affected by the trust, the Court would have administered it in the absence of the Government interested in the moneys. *Ibid*.

13.—On the day before certain acceptances fell due, the acceptors handed to their country bankers short bills and cash specifically to meet the acceptances which were payable at the country bankers' London agents. The bankers remitted the bills to the agents, with part of the cash and some small cheques, accompanied by a letter of advice in their usual form, debiting the remittances, and advising the agents of the acceptances, but also crediting or directing certain payments, the total of which with the acceptances exceeded the amount of the remittances. The agents acknowledged the remittances and advice in the usual manner, but on presentation refused payment of the acceptances, which they indorsed "Awaiting further advice;" and before the acceptances could be again presented, the country bankers had stopped payment. On bill filed by the acceptors seeking to have the short bills specifically appropriated to meet their acceptances:—Held, that the agents might retain the bills to answer the general balance due to them from the country bankers.—Decision of Malins, V.C. (44 Law J. Rep. (N.S.) Chanc. 465), affirmed. *Johnson v. Robarts*, 44 Law J. Rep. (N.S.) Chanc. 678; Law Rep. 10 Chanc. 505.

### (i) *Liability of bankers dealing with company.*

14.—The bankers of a company formed under the Companies Act, 1862, honoured cheques according to a form sent to them by a person purporting to be the secretary of the company, signed by three persons purporting to be directors of the company. From the company's articles of association it appeared that cheques were to be drawn by three directors. It was afterwards ascertained that there had, in fact, been no appointment of directors, or of a secretary, but that the promoters of the company had treated themselves as such:—Held, that the bankers were not liable in respect of sums which they had so paid *bonâ fide*. *Mahony v. East Holyford Mining Company*, Law Rep. 7 E. & I. App. 869.

[And see supra No. 7.]

### (k) *Summonable as witness under Companies Act.*

15.—A banker with whom a contributory has formerly kept an account may be summoned under section 115 of the Companies Act, 1862, and com-

pelled to produce his books relating to the contributory's account, and to give all information in his power touching his affairs. *In re The Contract Corporation*; *Forbes' Case*, 41 Law J. Rep. (N.S.) Chanc. 467; Law Rep. 14 Eq. 6, *nom. Druitt's Case*.

*Exoneration of bankers from liability under 16 & 17 Vict. c. 59. s. 19.* [See NEGLIGENCE, 27.]

*Payment of cheque in error.* [See BILL OF EXCHANGE, 22.]

## BANKRUPTCY.

### (A) JURISDICTION OF THE COURT OF BANKRUPTCY.

- (a) *As to locality.*
- (b) *As to property.*
- (c) *Power of Court to review its own orders.*
- (d) *In composition and liquidation proceedings.*
- (e) *Cases within jurisdiction of Court of Chancery.*

### (B) ACT OF BANKRUPTCY.

- (a) *Fraudulent preference.*
  - (1) *What amounts to, generally.*
  - (2) *Assignment of entire property to secure past debt.*
  - (3) *Pressure by creditor.*
  - (4) *Pledge of partnership property.*
  - (5) *Security to take effect on bankruptcy.*
  - (6) *Protection of payee for value.*
- (b) *Absence with intent to defeat or delay creditors.*
- (c) *Declaration of inability to pay.*
- (d) *Execution of process for 50l.*
- (e) *Failure to comply with debtor's summons.*
- (f) *Notice of act of bankruptcy.*

### (C) ADJUDICATION.

- (a) *Petition: petitioning creditor's debt.*
- (b) *Tender after petition.*
- (c) *Joint and separate estates.*
- (d) *Annulling adjudication.*

### (D) FIRST MEETING OF CREDITORS.

- (a) *Power to deal with assets.*
- (b) *Notices.*
- (c) *Adjourned meeting: voting.*
- (d) *Fresh meeting.*

### (E) PROOF.

- (a) *Damages.*
- (b) *Contingent liability.*
- (c) *Debt capable of being estimated.*
- (d) *Injury occasioned by disclaimer of lease.*
- (e) *Transferor of shares.*
- (f) *Official liquidator.*
- (g) *Executors of partner.*
- (h) *Advances to trader: share of profits.*
- (i) *Double insolvency: bill of exchange.*
- (j) *Double proof: joint and separate estates.*
- (k) *Secured creditor.*
- (l) *Preferential debt: payment in full.*
- (m) *Procedure and evidence.*

### (F) MUTUAL CREDIT.

### (G) TRUSTEE.

- (a) *Appointment of trustee.*
- (b) *Property in reputed ownership of bankrupt.*
  - (1) *General scope of order and disposition clauses.*
  - (2) *Custom of trade.*
  - (3) *Consent of true owner.*
  - (4) *Things in action.*
  - (5) *Effect of bill of sale.*
  - (6) *Apparent possession under Bills of Sale Act.*
- (c) *Proceeds of sale and seizure of goods.*
  - (1) *Creditor holding security.*
  - (2) *Trader; who is.*
  - (3) *"Judgment for sum exceeding 50l."*
  - (4) *Proceeds of sale.*
  - (5) *Notice of act of bankruptcy.*
  - (6) *Refunding proceeds.*
  - (7) *Execution under 50l.*
  - (8) *After-acquired property of bankrupt allowed to trade.*
- (d) *Avoidance of voluntary settlement.*
- (e) *Avoidance of fraudulent preference.*
- (f) *Disclaimer of leaseholds.*
- (g) *Other property devolving on trustee.*
- (h) *Joint and separate estate: property devolving on trustee of joint estate.*
- (i) *Powers and liabilities.*

### (H) PUBLIC EXAMINATION OF BANKRUPT.

### (I) ORDER OF DISCHARGE.

- (a) *Effect of, in general.*
- (b) *Benevolent motives towards debtor.*
- (c) *Liability incurred by fraud.*
- (d) *Debtor allowed to resume business.*

### (K) PERSONS HAVING PRIVILEGE OF PARLIAMENT.

### (L) LIQUIDATION BY ARRANGEMENT.

- (a) *Proof.*
- (b) *First meeting: statement of affairs.*
- (c) *Resolution: registration: signature.*
- (d) *Seizure and sale.*
- (e) *Reservation of rights against sureties.*
- (f) *Title of trustee: relation back.*
- (g) *Prescription of bank by creditors.*
- (h) *Close of liquidation.*
- (i) *After-acquired property.*
- (k) *Where liquidation cannot proceed without injustice.*
- (l) *Removal of trustee and committee of inspection.*
- (m) *Costs: pending proceedings.*

### (M) COMPOSITION WITH CREDITORS.

- (a) *Resolution for composition.*
- (b) *Statement and examination of debtor.*
- (c) *Registration of resolution.*
- (d) *Effect of composition.*
  - (1) *As regards creditors.*
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- (e) *Proof.*
- (f) *Trustee: surplus.*
- (g) *Default in payment of composition.*
  - (1) *Revival of original debt.*
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- (h) *Power of creditors to reduce composition.*
- (i) *Pleading composition at law.*
- (N) PRACTICE.
  - (a) *Absconding debtor.*
  - (b) *Accounts.*
  - (c) *Appeals and rehearings.*
  - (d) *Contempt of Court.*
  - (e) *Debtor summonses.*
    - (1) *By secretary of company.*
    - (2) *Affidavit in support.*
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  - (g) *Examination of trustee.*
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  - (l) *Petition: when sustainable.*
  - (m) *Res judicata.*
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  - (o) *Service.*
  - (p) *Stay of proceedings.*
  - (q) *Time.*
  - (r) *Transfer of proceedings.*
- (O) INJUNCTION.
  - (a) *"Execution or other legal process."*
  - (b) *Proceedings against debtor: fraud.*
  - (c) *Creditor objecting to composition on personal grounds.*
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  - (e) *Joint debtors.*
  - (f) *Foreign action.*
  - (g) *As affecting rights of creditors.*
- (P) RECEIVER.
- (Q) COSTS.
  - (a) *Of appeal.*
  - (b) *Of trustee.*
  - (c) *Of receiver.*
  - (d) *Stamp duty.*

[Amendment of the Irish Law of Bankruptcy. 35 & 36 Vict. c. 58.]

[Provisions of the Bankruptcy Act, 1869, for the arresting of absconding debtors, extended. 33 & 34 Vict. c. 76.]

#### (A) JURISDICTION OF THE COURT OF BANKRUPTCY.

##### (a) *As to locality.*

1.—Messrs. C. were manufacturers carrying on business at Sheffield. They were also the tenants of three rooms in London used as offices, where an agent received orders for them:—Held, that the County Court of Sheffield, and not the Bankruptcy Court in London, had jurisdiction in proceedings relating to Messrs. C.'s bankruptcy. *Ex parte Charles; In re Charles*, 41 Law J. Rep. (N.S.) Bankr. 43; Law Rep. 13. Eq. 638.

2.—If a foreigner comes to England and contracts debts in England, and commits an act of bankruptcy in England, he thereby gives the Court of Bankruptcy jurisdiction over him, and if he trades in England, although his principal place of busi-

ness is elsewhere, he may be made bankrupt upon an act of bankruptcy which consists in departing from England with intent to defeat and delay his creditors. But a foreigner not domiciled in England and not carrying on trade in England, cannot be made a bankrupt upon an alleged act of bankruptcy committed out of England. *Ex parte Crispin; In re Crispin*, 42 Law J. Rep. (N.S.) Bankr. 65; Law Rep. 8 Chanc. 374.

In order to constitute an act of bankruptcy by remaining out of England within the meaning of the 3rd sub-section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6, it is necessary that the debtor should be a person who has his home or place of business in England. *Ibid.*

3.—Where an Act of Parliament establishes a Court for a particular part of the United Kingdom, the true construction of it is, that everything which is to be done under the authority of the Court is to be done within the jurisdiction of the Court, unless the Act either in express terms or by necessary implication says that it may be done out of the jurisdiction. *Ex parte O'Loughlen; In re O'Loughlen*, 40 Law J. Rep. (N.S.) Bankr. 28; Law Rep. 6 Chanc. 406.

The personal service of a debtor's summons, issued out of the Bankruptcy Court of England under section 7 of the Bankruptcy Act, 1869, on a debtor out of England, is a nullity, and where such a service has been effected and the debtor has been adjudicated a bankrupt in England under the 6th section of the Act, because not being a trader he has for three weeks succeeding the service of the summons neglected to pay or secure or compound for the debt:—Held, on appeal (discharging the order of one of the Registrars sitting as Chief Judge), that the adjudication must be annulled. *Ibid.*

After the expiration of the three weeks from the service of the summons, the debtor applied to the Registrar to rescind the order for service; the application was refused; no appeal was brought against that order. Subsequently the debtor was adjudicated bankrupt, and appealed against the adjudication:—Held, that the question of the validity of the service was not *res judicata*, for that as the question before the Court was whether an act of bankruptcy had been committed, and that depended on the validity of the service of the summons, that point was then properly brought before the Court and could be decided. *Ibid.*

The order for personal service out of the jurisdiction was made on an affidavit stating that the debtor was keeping out of the way to avoid personal service. The Court was of opinion that the facts did not justify any such affidavit:—Held that therefore the respondent must pay all costs, including the costs of the appeal. *Ibid.*

##### (b) *As to property.*

4.—A broker and warehouseman, who had affected to pledge goods in his custody to a bank to secure advantages to himself, became bankrupt. The true owner applied in the County Court under the bankruptcy to have the goods delivered

up to him. The trustee at first made some claim to the goods, but abandoned it at the hearing, insisting only on his right to be paid rent and warehouse charges. Thereupon the bank objected that the Court had no jurisdiction; but this objection was overruled, and a decision on the merits given against them. *Ex parte The North-Western Bank; In re Slee*, 41 Law J. Rep. (N.S.) Bankr. 72.

On appeal it was held that the Court had no jurisdiction, and that the original order must be discharged. *Ibid.*

5.—The 72nd section of the Bankruptcy Act, 1869, does not give the Court of Bankruptcy jurisdiction over property or the owners of property not vested in the assignee and not originally subject to the administration in bankruptcy. Still less does it authorise that Court when a decree for sale and accounts has been made in a Chancery suit against solvent partners of a bankrupt to treat such a decree as giving rights to be worked out in Bankruptcy and not in Chancery. *Ex parte Maule, in re Motion; Motion v. Davies*, 43 Law J. Rep. (N.S.) Bankr. 59; Law Rep. 9 Chanc. 192.

Under a decree made in a suit for dissolution of partnership it was, amongst other things, ordered that the business property and effects of the partnership should be sold by auction as a going concern. One of the partners became bankrupt, and an offer by the solvent partners to purchase his interest being rejected as inadequate, another order was made for the sale of the whole of the partnership premises, plant and effects as a going concern, the solvent partners being prohibited from purchasing. Afterwards, no sale having taken place, the solvent partners entered into an agreement with the assignee for the purchase of the bankrupt's share in the partnership assets at a price to be ascertained, and in pursuance of this agreement the value of the bankrupt's interest was fixed by accountants on behalf of all parties at 14,033*l.*, which, by an order made in Chambers, was directed to be paid, and an assignment executed by the assignee. The purchase-money was paid, and the creditors received 20*s.* in the pound. At a subsequent meeting of the creditors the assignee was removed and new assignees appointed, upon whose application the Chief Judge, being of opinion that the sale was collusive, ordered it to be set aside, and the business to be sold by auction. But upon appeal it was held that the Court of Bankruptcy had no jurisdiction under the 72nd section of the Bankruptcy Act, 1869, to make the order, and it was discharged accordingly; and the Court being of opinion on the merits that the sale was *bona fide*, but not being satisfied that there was not material error in the mode in which the value of the bankrupt's interest had been arrived at, directed, with the consent of the purchaser, an enquiry whether any further sum ought to be paid by him to make up the proper value of the bankrupt's interest. *Ibid.*

The 137th section of the Bankrupt Law Consolidation Act, 1861, which makes it necessary that an assignee should have the sanction of the Court of Bankruptcy to justify him in selling by private contract all or any of the book debts due

or growing due to the bankrupt, and the books relating thereto, and the goodwill of his trade or business, relates to the sale of book debts, &c., belonging to the bankrupt only, and not to the book debts, &c., of a dissolved partnership, of which only one partner is bankrupt, such book debts, &c., not being assets distributable or saleable in the bankruptcy. *Ibid.*

(c) *Power of Court to review its own orders.*

6.—Courts having jurisdiction in Bankruptcy are entitled to rehear cases which they have decided, even if they should, by varying their former orders, give a right of appeal, which would otherwise have been lost by lapse of time. In this respect the strict rules which prevailed under the former Bankruptcy Acts have been relaxed by section 71 of the Act of 1869. *Ex parte The London and County Bank; In re Brown*, 42 Law J. Rep. (N.S.) Bankr. 112; Law Rep. 16 Eq. 391.

(d) *In composition and liquidation proceedings.*

7.—The present Bankruptcy Court under the Act of 1869, has, over deeds of arrangement and composition, registered under s. 192 of the Act of 1861, not only all the jurisdiction which the Act of 1861 gave to the old Court over such deeds, but also all the larger and more extensive jurisdiction which s. 72 of the Act of 1869 has given to the present Court over bankruptcies. *Ex parte Rumboll; In re Taylor*, 40 Law J. Rep. (N.S.) Bankr. 82; Law Rep. 6 Chanc. 842.

8.—The 72nd section of the Bankruptcy Act, 1869, gives to the Court of Bankruptcy the same powers, in cases of liquidation by arrangement and composition, as in cases of bankruptcy. *Ex parte Härtel; In re Thorpe*, 42 Law J. Rep. (N.S.) Bankr. 34; Law Rep. 8 Chanc. 743.

Where creditors had resolved to accept a composition under the provisions of the 126th section of the Act, and had appointed a trustee "in the matter," the Court, at the trustee's instance, restrained a creditor, who disputed the validity of the composition on the ground of fraud, from further proceedings in an action at law commenced by him before the filing of the debtor's petition. *Ibid.*

The plaintiff in the action was allowed to add to his debt his costs in the action up to the day when the confirmatory resolution accepting the composition was passed. *Ibid.*

(e) *Cases within jurisdiction of Court of Chancery.*

9.—To a bill filed by an equitable mortgagee against the trustee under liquidation of the mortgagor, seeking a sale of the security, the defendant demurred on the ground that the Court of Bankruptcy was the proper tribunal. Demurrer allowed by one of the Vice Chancellors, but overruled on appeal with reluctance. *White v. Simmons*, 40 Law J. Rep. (N.S.) Chanc. 689; Law Rep. 11 Eq. 425.

10.—L. filed a petition for liquidation by arrangement or composition. B. was appointed

receiver, and took possession of the stock-in-trade of the bankrupt. By an extraordinary resolution, which was duly registered under the 126th section of the Bankruptcy Act, 1869, the creditors accepted a composition of 7s. 6d. in the pound, to be paid in three instalments. When two instalments had been paid and the third provided for by promissory notes, B., who had previously given up possession of the stock-in-trade, sent in a bill of costs to L. for 400l. L. agreed to the amount, entered into a covenant under seal to pay it, and by the same instrument assigned his stock-in-trade to B. by way of bill of sale. B. subsequently took possession of part of the property under the assignment. Thereupon L. moved in the Court of Bankruptcy for an order for B. to bring in a bill of costs to be taxed, to deliver up the property, and that the bill of sale might be delivered up to be cancelled:—Held (affirming a decision of one of the Registrars), that the Court had no jurisdiction to entertain the application. *Ex parte Lyon*; *In re Lyon*, 41 Law J. Rep. (n.s.) Bankr. 41; Law Rep. 7 Chanc. 494, *nom. Lyons*.

Semble.—If the stock-in-trade had remained in B.'s possession *quâ* receiver, and therefore subject to his lien on it for his costs, and if no covenant under seal had been entered into, the Court, on application by L. to have the stock-in-trade delivered up, would have had jurisdiction to order, and would have ordered an account of B.'s charges to be taken in bankruptcy. *Ibid*.

11.—Articles of partnership between a father and son provided that upon the father's death the son's share in the business should vest in the father's executors. The father died, and the son, who was constituted his sole executor, continued for about a year to carry on the business with testator's assets. An administration suit was instituted by the creditors of the father. Shortly afterwards the son presented a petition for liquidation by arrangement, and a trustee was appointed, who took possession of the property belonging to the business, and sold a considerable portion of it. The bill was then amended by making the trustee a defendant to the suit, and praying an injunction to restrain him from meddling with the testator's assets. An application by the trustee to the Court of Bankruptcy for an order to restrain proceedings in the suit was refused, and an order was made in the suit directing the trustee to deposit in a bank the proceeds realised by the sale of the property, to be dealt with as the Court of Chancery should direct, and in default of his making such deposit, awarding an injunction against him as prayed by the bill:—Held, on appeal, that the Court of Bankruptcy was the proper tribunal to determine the questions arising in this matter, and that an injunction must be awarded restraining the proceedings in Chancery as against the trustee, in respect of any property coming to his hands under the liquidation. *Morley v. White*; *In re White*, 42 Law J. Rep. (n.s.) Bankr. 76; Law Rep. 8 Chanc. 214.

12.—The plaintiff was an uncertificated bankrupt. His creditors had been paid their principal in full, but without interest. He filed a bill against

his former solicitor, his two partners and the assignee of the estate in bankruptcy, to set aside a sale which had been made of the plaintiff's share of his business to his partners as having been made at an under-value, fraudulently and by means of a conspiracy between all the defendants. The sale had been made under the direction of the Court of Chancery in a partnership suit:—Held, that the plaintiff had no *locus standi* in the Court of Chancery. *Motion v. Moojen*, 41 Law J. Rep. (n.s.) Chanc. 596; Law Rep. 14 Eq. 202.

13.—The 72nd section of the Bankruptcy Act, 1869, does not give the Court of Bankruptcy jurisdiction over property or the owners of property not vested in the assignee, and not originally subject to the administration in bankruptcy. Still less does it authorise that Court, when a decree for sale and accounts has been made in a Chancery suit against solvent partners of a bankrupt to treat such a decree as giving rights to be worked out in bankruptcy and not in Chancery, and the Court being of opinion on the merits that the sale was *bonâ fide*, but not being satisfied that there was not material error in the mode in which the value of the bankrupt's interest had been arrived at, directed, with the consent of the purchaser, an enquiry whether any further sum ought to be paid by him to make up the proper value of the bankrupt's interest. *Ex parte Maule*; *In re Motion*. *Maule v. Davis*, 43 Law J. Rep. (n.s.) Bankr. 59; Law Rep. 8 Chanc. 192.

*Jurisdiction of County Court in Bankruptcy.* [See COUNTY COURT.]

## (B) ACT OF BANKRUPTCY.

### (a) *Fraudulent preference.*

#### (1) *What amounts to, generally.*

1.—Creditors having supplied a debtor with money and cotton, and becoming aware that he was in failing circumstances, said to him in effect, "Go and borrow from others upon long credit, and pay us." The debtor did so, and from time to time paid sums to the creditors, being pressed by them so to do:—Held, that the transaction was a fraudulent preference, and as such was not binding upon the trustee, and that the fact that there was pressure made no difference. *Ex parte Reader*; *In re Wrigley*, 44 Law J. Rep. (n.s.) Bankr. 139; Law Rep. 20 Eq. 763.

2.—Where a debtor, being indebted to N., induced N. to procure third parties to buy oil of the debtor, upon a promise that N. should be paid out of the proceeds, which was done, the transaction being conducted in the ordinary mode of trade, and it afterwards appeared that the debtor had no property, and had procured the oil which he sold on credit:—Held (1), that this was not a "fraudulent conveyance, delivery, or transfer" of the debtor's property; (2) that even if it were, N., as a payee for value without notice of an act of bankruptcy, was protected by section 92. *Ex parte Norton*; *In re Golden*, Law Rep. 16 Eq. 392.

3.—S. was a shipbuilder. He had an account with his bankers, which fluctuated largely. In

August, 1874, the bankers asked for some statement about his account. S. then offered to give them security on a ship he was building. The bankers declined to take the security then, but said that circumstances might arise which would make it desirable for them to accept the security, and S. promised to let them have it when required. In October following the bankers requested S. to give the security, and he assigned the ship accordingly:—Held, that, in the absence of other evidence to prove that the bankers knew in August that S. was insolvent, the above transaction did not amount either to a fraud on the Bills of Sale Act, or to a fraudulent preference under the 92nd section of the Bankruptcy Act, 1869, so as to render the assignment to the bankers invalid. *Ex parte Winter*; *In re Sofitley*, 44 Law J. Rep. (n.s.) Bankr. 107; Law Rep. 20 Eq. 746, *nom. Ex parte Hodgkin*.

Whether a ship not yet finished, and therefore incapable of registration under the Merchant Shipping Acts, be properly called a ship or no, it is a thing capable of assignment by certificate in the usual way. *Ibid*.

A debt assigned on the eve of filing a petition, to creditors who know the debtor's position, to secure a present advance, can only be held by the assignees as security for the amount actually advanced. *Ibid*.

4.—The abandonment of a speculation by an insolvent firm, while the result is uncertain, is not necessarily fraudulent, and differs entirely from the undue preference of one creditor over others after a debt has been incurred. *Miller v. Barlow*, Law Rep. 3 P. C. 733.

5.—At a meeting of the creditors of a bankrupt, a dividend of 2s. in the pound was proposed for acceptance, but this being opposed by A., the largest creditor, who held certain bills of the bankrupt as a security for his debt, the meeting was adjourned. Shortly before the second meeting the bankrupt's brother gave A., as an inducement to withdraw his opposition, a guarantee to make good to him all losses on the bills in his hands, less a sum of 2,000*l*. A. accordingly absented himself from the second meeting, at which a resolution was passed by the creditors, accepting the dividend of 2s. in the pound. The securities held by A. proving insufficient to satisfy the whole of his debt, he claimed the balance less 2,000*l*. from the guarantor, the amount so claimed being at the rate of 10s. in the pound on the balance of the debt:—Held, that the guarantee constituted a fraudulent preference, and a bill filed by the creditor against the guarantor to enforce it was dismissed with costs. *McKewan v. Sanderson*, 44 Law J. Rep. (n.s.) Chanc. 447; Law Rep. 20 Eq. 65.

6.—On trial before a jury as to whether a payment was a fraudulent preference, the following points were submitted: 1. Whether the bankrupt when he made the payment was unable to pay his debts as they became due; 2. whether he made it with a view to give that creditor a preference over his other creditors; and 3. whether the payment was made voluntarily and without real pressure,

bankruptcy being reasonably imminent: the jury having found in the affirmative on the 1st and 3rd points, and in the negative on the 2nd:—Held, that the finding on the 2nd point disposed of the case, and that the finding on the third issue was immaterial, as such issue was calculated to mislead. *Ex parte Bolland*; *In re Cherry*, Law Rep. 7 Chanc. 24.

7.—No payment will be void on the ground of fraudulent preference under the 92nd section of the Bankruptcy Act, 1869, unless the motive of giving the payee a preference over the other creditors is proved, or is to be inferred. And even if such a motive did exist on the debtor's part, the rights of the payee will not be affected if he has acted in good faith. *In re Cheesebrough*; *Ex parte Hitchcock*, 40 Law J. Rep. (n.s.) Bankr. 79; Law Rep. 12 Eq. 358, *nom. Ex parte Blackburn*.

Where traders in a hopeless state of insolvency, three days before they suspended payment, paid in the ordinary course of business, and without any motive for favouring the payee, a considerable sum to a creditor, who received it *bonâ fide*, the payment was upheld. *Ibid*.

8.—An uncertificated bankrupt paid his landlord, who was aware of the bankruptcy, six months' rent in advance:—Held (affirming the decision of the Chief Judge), that the trustee in the bankruptcy could not compel the landlord to refund the money so paid to him. *Ex parte Dewhurst*; *In re Vanlohe*, 41 Law J. Rep. (n.s.) Bankr. 18; Law Rep. 7 Chanc. 185.

9.—Where a debtor in England in insolvent circumstances paid sums to his sister-in-law, a Belgian lady, with whom he carried on business, partly in respect of a previous debt which he was under an agreement to pay, and partly in respect of their business transactions, under which the money was applied in the purchase of goods and their remittance to England, and there was no evidence to shew that the lady received the money otherwise than in good faith:—Held, no fraudulent preference. *Ex parte Kewan*; *In re Crawford*, Law Rep. 9 Chanc. 752.

(2) *Assignment of entire property to secure past debt.*

10.—H., a creditor of B., whose debt was secured by a bill of sale of B.'s property, having taken possession under such bill of sale, an arrangement was made between such parties and the defendant, also a creditor of B., by which the defendant paid H. 250*l*. in satisfaction of his debt, and took a bill of sale from B. of all his property, including a power to take after-acquired property, with one substantial exception in favour of farming stock, as a security for the repayment to the defendant of 450*l*., which consisted of such 250*l*. and 161*l*. the amount of the prior debt due to the defendant and 39*l*. the expenses attending the arrangement:—Held, that this bill of sale to the defendant was not necessarily an act of bankruptcy, there being such a substantial advance by the defendant of which B., the debtor, had the benefit as brought the case within the principle of *Hutton v. Cruttwell* (22 Law J. Rep. (n.s.) Q.B. 78; 1 E. & B. 15), and distinguished

it from that of *Graham v. Chapman* (21 Law J. Rep. (N.S.) C.P. 173; 12 Com. B. Rep. 85). *Lo-max v. Burton*, 40 Law J. Rep. (N.S.) C.P. 150; Law Rep. 6 C.P. 107.

Quære—if the doctrine of relation back to an act of bankruptcy is applicable to the case of liquidation by arrangement under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71). *Ibid.*

11.—S., the debtor, upon an advance of 55*l.* being made, gave to C. a bill of sale upon all his property, and an arrangement was made that the bill of sale should be renewed every twenty days, and should not be registered in the meantime. The bill of sale was renewed three times, and the bill of sale given on the last renewal was registered. The debtor afterwards went into liquidation. The trustee, under the liquidation, took possession of the property, and C. brought an action against him:—Held, that the last bill of sale was void, as constituting an act of bankruptcy, and an injunction was granted restraining C. from continuing his action. *Ex parte Cohen*; *In re Sparke*, 41 Law J. Rep. (N.S.) Bankr. 17; Law Rep. 7 Chanc. 20.

12.—An assignment of all a debtor's available property to one creditor to secure a past debt, is an act of bankruptcy, and that whether the debtor is a trader or not. *Ex parte Luckes*; *In re Wood*, 41 Law J. Rep. (N.S.) Bankr. 21; Law Rep. 7 Chanc. 302.

13.—Circumstances considered under which a mortgage of all a debtor's property to secure a past debt and a present advance constitutes an act of bankruptcy, and what is a substantial exception. *Ex parte Fisher*; *In re Ash*, 41 Law J. Rep. (N.S.) Bankr. 62; Law Rep. 7 Chanc. 636.

A trader applied to a creditor to whom he owed 600*l.* to lend him a further sum in order to make certain pressing payments. The creditor agreed to lend 100*l.*, upon condition that if the 100*l.* were not repaid within a week, the debtor was to give a mortgage of his mill and machinery (which constituted his whole property) for securing as well the 600*l.* as the new advance of 100*l.* The 100*l.* was applied in payment of pressing debts, and was not repaid within the week, and the debtor executed a mortgage in accordance with his promise. The property comprised in the mortgage was worth about 700*l.* Shortly afterwards the debtor was adjudicated bankrupt:—Held, that the mortgage was invalid as against the trustee in the bankruptcy. *Ibid.*

14.—A trader assigned all her stock-in-trade, fixtures, chattels and effects, in or about her place of business, to secure an antecedent debt of 200*l.* The bill of sale included goods subsequently acquired for the purposes of the business, and was expressed to be in consideration of further future advances, but contained no agreement for making such advances. The lease of the shop and the book debts were not included in the bill of sale. Upon the trader's bankruptcy shortly afterwards the excepted property realised about the same amount as that included in the bill of sale:—Held, that the lease and book debts formed a substantial exception, and that the bill of sale was not void as

an assignment of the debtor's whole property on the eve of bankruptcy. *Ex parte Bolland*; *In re Price*, 41 Law J. Rep. (N.S.) Bankr. 60.

15.—A debtor executed a deed of assignment of all his property, except a pension from the East India Company, to a creditor to secure a past debt:—Held (affirming a decision of Bacon, C.J.), that, as this pension could not pass to his trustee in bankruptcy, it formed no substantial exception from the assignment, and the assignment was therefore an act of bankruptcy. *Ex parte Hawker*; *In re Keely*, 41 Law J. Rep. (N.S.) Bankr. 34; Law Rep. 7 Chanc. 214.

16.—In August, 1870, two brothers, trading as grocers, in consideration of 500*l.*, previously advanced by their father and brother, as to the greater part, upon a verbal agreement for the security, executed an agreement to assign on demand their business, with the lease of their premises (which was deposited), stock-in-trade, fixtures, utensils and book debts, with a proviso that, if the 500*l.*, with any further advances and interest, was repaid, the agreement should be void, but if not, providing for the sale of the property to the mortgagees at a valuation, and payment of the balance (if any) to the traders. In March, 1873, the brother making the advance, and who was employed in the business, informed his father that the traders were in difficulties, and thereupon demand for payment was made. On the 4th of April the property was valued at 683*l.*, and on the 5th, 123*l.*, the balance over the amount due, was paid by the father and brother upon an assignment of the property, which comprised all the traders' property except furniture worth 30*l.*, which was purchased by the father and brother at the same time. The deed was not registered as a bill of sale, but possession was forthwith taken, and a circular issued to the wholesale dealers who were the principal creditors, informing them of the sale of the business. The 123*l.* and the 30*l.* were spent in paying two creditors, and on the 16th of April the traders presented a petition in liquidation, stating their assets to be *nil*, and their debts 1,833*l.*:—Held (affirming the decision of the Registrar sitting as Chief Judge), that the transaction could not be impeached as an act of bankruptcy, nor (possession having been taken) under the Bills of Sale Act. The transaction, however, being one that required investigation, the trustee's appeal was dismissed without costs. *Ex parte Izard*; *In re Cook*, 43 Law J. Rep. (N.S.) Bankr. 31; Law Rep. 9 Chanc. 271.

17.—Where the drawer of bills paid them at the request of the acceptor, who thereupon assigned all his property to the drawer to secure the amount of the bills, as well as certain past debts:—Held, that the payment of the bills, being a substantial advance, the assignment was not an act of bankruptcy. *Ex parte Reed and Steele*; *In re Tweddell*, Law Rep. 14 Eq. 586.

18.—Traders verbally pledged their goods, which formed, substantially, the whole of their property, as security for a previously contracted debt, to a creditor, who already had possession of the goods and a lien on them for money advanced.



The debtors were, in fact, insolvent, but the jury found that the transaction was entirely *bona fide*:—Held, that the pledge was not “a fraudulent conveyance, gift, delivery, or transfer,” within the Bankruptcy Act, 1869, section 6, sub-section 2. *Philips v. Hornstedt*, 42 Law J. Rep. (N.S.) Exch. 12; Law Rep. 8 Exch. 26. [affirmed on appeal Law Rep. 1 Exch. Div. 26.]

(3) *Pressure by creditor.*

19.—Creditors having supplied a debtor with money and cotton, and becoming aware that he was in failing circumstances, said to him, in effect, “Go and borrow from others upon long credit, and pay us.” The debtor did so, and from time to time paid sums to the creditors, being pressed by them so to do:—Held, that the transaction was a fraudulent preference, and as such was not binding upon the trustee, and that the fact that there was pressure made no difference. *Ex parte Reader*; *In re Wrigley*, 44 Law J. Rep. (N.S.) Bankr. 139; Law Rep. 20 Eq. 763.

20.—Where a trader, before becoming bankrupt on his own petition, under the Bankruptcy Act, 1861, assigns all his property to a particular creditor, under pressure, and without any fraud or intention to prefer the creditor, such as would have made the assignment a fraudulent preference or void against creditors if bankruptcy had not ensued, the assignment is not voidable by the assignees in bankruptcy, although, necessarily, and to the knowledge of the creditor, calculated to prevent the trader from paying the rest of his creditors, and thereby to defeat the operation of the bankrupt laws. *Jones v. Harber*, 40 Law J. Rep. (N.S.) Q. B. 59; Law Rep. 6 Q. B. 77.

21.—To constitute fraudulent preference (according to the law previous to the Bankruptcy Act, 1869), the conveyance must be spontaneous on the part of the debtor. If there are mixed motives, if the debtor is partly influenced by pressure, or simple demand, or by a negotiation carried on between him and his creditor, then, although he may, from the debtor being his friend, desire to prefer him to other creditors, it is not a voluntary conveyance so as to be void. *In re Craven and Marshall*, and *In re Craven's separate estate*; *Ex parte Tempest*, 40 Law J. Rep. (N.S.) Bankr. 22; Law Rep. 6 Chanc. 70.

Semble (agreeing with the Chief Judge)—That the Bankruptcy Act, 1869, s. 72, has made no alteration in the law as to fraudulent preference. *Ibid.*

22.—B. had overdrawn his account at his bankers', and the bankers, four months before he became a bankrupt, obtained a charge from him to secure this account, on moneys coming to him from third parties:—Held, reversing the decision of the Court below, that the charge was good, and that no case of fraudulent preference had been proved. *Ex parte The London and County Bank*; *In re Brown*, 42 Law J. Rep. (N.S.) Bankr. 112; Law Rep. 16 Eq. 391.

23.—A transfer of goods made by debtors in part discharge of a debt, under pressure from the creditor, on the morning of the day on which they

filed their petition in liquidation, held not a fraudulent preference, though the creditor knew that debtors were insolvent: the transaction could be sustained, either on the supposition (which was thought more probable) that the debtors had not then given up all hope of getting help and going on with their business, or on the supposition that the debtors knew their insolvency was hopeless, but gave way to the pressure. *Ex parte Topham*; *In re Walker*, 42 Law J. Rep. (N.S.) Bankr. 57; Law Rep. 8 Chanc. 614.

24.—Where a debtor on the eve of bankruptcy, and fearing that a certain creditor would attach his balance at the banker's, drew out his balance and sent it to another creditor, who declined to receive it unless he was allowed to pay his own debt out of it, to which the debtor after some hesitation agreed:—Held, that drawing out the balance was an act of bankruptcy, and that the subsequent pressure by the last-mentioned creditor would not prevent the payment to him being a fraudulent preference. *Ex parte Halliday*; *In re Liebert*, Law Rep. 8 Chanc. 283.

(4) *Pledge of partnership property.*

25.—Partners cannot effectually pledge partnership property, so as to make it available for their own private debts. To do so when the partnership is insolvent is to commit an act of bankruptcy.

A partnership, consisting of A. and B., were in insolvent circumstances, the separate estates of the partners being also insolvent. On the 14th of September, B. executed a power of attorney to C., authorising him in very general terms to deal with his property. The power contained no reference to the partnership. It contained express powers as to a ship which was in reality partnership property, though the fact did not appear in the power. On the same day B. left England, under circumstances which constituted his departure an act of bankruptcy. In November, A. and C. (as B.'s attorney), executed a mortgage of all the partnership property to S., a creditor of the partnership, and also a separate creditor of both parties, to secure all the past debts and such future advances as might be made. At the same time a bill of sale of the ship was executed by A. and C. (as attorney) in consideration of a sum of money then paid by S. on account of the partnership. In the following April A. and B. were both adjudicated bankrupts.

S., at the date of the deeds, knew the circumstances under which B. had left England, but he declared in his evidence that he did not infer that B. had any intent to delay or defeat his creditors, and therefore did not know that he had committed an act of bankruptcy:—Held, first, that the execution of the mortgage by C. as B.'s attorney, was void, as not being within the scope of the power of attorney.

Secondly, that the execution of the mortgage was an act of bankruptcy, on the ground of its being a mortgage of partnership assets to secure separate debts at a time when the partnership was insolvent.

Thirdly, that S. must be held affected with notice that B. had committed an act of bankruptcy by leaving England.

Fourthly, as a consequence of the above holding, that both mortgage and bill of sale were void as against the trustee of the joint estate. *Ex parte Snobball*; *In re Douglas*, 41 Law J. Rep. (N.S.) Bankr. 49; Law Rep. 7 Chanc. 534.

(5) *Security to take effect on bankruptcy.*

**26.**—A creditor may have by contract a good charge for his debt on sums to become due from himself to the debtor. *Ex parte Mackay and Ex parte John Brown & Co.*; *In re Jeavons*, 42 Law J. Rep. (N.S.) Bankr. 68; Law Rep. 8 Chanc. 643.

An agreement by a creditor for an extension of his security to arise in case of the debtor's bankruptcy, is against the policy of the Bankruptcy Law, and void. *Ibid.*

A patentee assigned his patent in consideration of certain royalties, with an agreement that the assignees should retain half the royalties in payment of a debt due from him to them; and a provision that in case of his bankruptcy or liquidation, they might retain the whole of the royalties. In his liquidation,—Held, that the assignees had a valid charge on the half of the royalties, giving them the usual rights of secured creditors; but, held, that the provision giving them a right to retain the whole of the royalties in case of bankruptcy was a fraud on the Bankruptcy Laws and void. *Ibid.*

Though an unregistered agreement may be a good consideration to support a duly registered bill of sale, it cannot be itself relied on as giving any right to the holder against the trustee in bankruptcy, though possession has been demanded under it. *Ibid.*

(6) *Protection of payee for value.*

**27.**—The word "payee" in the clause at the end of section 92 of the Bankruptcy Act, 1869 (as to fraudulent preferences), protecting the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration, is to be read as meaning a person receiving payment as a creditor; and the protection given by that clause extends to creditors of the bankrupt, not upon some voluntary instrument, but for valuable consideration, who are ignorant that any fraud or fraudulent preference is intended, and not merely to third parties dealing with person so preferred. Lord Selborne dissented. *Butcher v. Stead* (H.L.), 44 Law J. Rep. (N.S.) Bankr. 129; Law Rep. 7 E. & I. App. 839.

**28.**—The concluding words of section 92 of the Bankruptcy Act, 1869 (as to fraudulent preferences), which protect the right of "a purchaser, payee or incumbrancer in good faith, and for valuable consideration," apply to persons preferred by the bankrupt, who are ignorant that they are being preferred, and not merely to third parties dealing for value with persons so preferred. *Ex parte Butcher*; *In re Meldrum*, 43 Law J. Rep. (N.S.) Bankr. 98; Law Rep. 9 Chanc. 595.

This construction is not to exclude from protec-

tion third parties innocently dealing for value with persons who have knowingly accepted a preference. *Ibid.*

Appeal to House of Lords not allowed in the case of a small debt on the ground that it would determine the right to larger sums. *Ibid.*

(b) *Absence with intent to defeat or delay creditors.*

**29.**—A debtor being pressed by his creditor and unable immediately to pay, but being in the expectation of receiving money, promised to call upon his creditor the next day and pay him. This promise and some other similar promises were broken. The debtor did not absent himself from his own place of business:—Held, that no act of bankruptcy had been committed by the debtor's not keeping his promise. *Ex parte Meyer*; *In re Stephany*, 41 Law J. Rep. (N.S.) Bankr. 32; Law Rep. 7 Chanc. 188.

(c) *Declaration of inability to pay.*

**30.**—A declaration of a debtor's inability to pay his debts is filed within the meaning of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 6. subs. 4, so as to constitute an act of bankruptcy, when it is delivered to the proper officer for that purpose with the intention that it should be filed. *Ransford v. Maule*, 42 Law J. Rep. (N.S.) C.P. 231; Law Rep. 8 C.P. 672.

(d) *Execution of process for 50l.*

**31.**—A creditor seized six horses of a contractor in execution on a judgment for 79l. The sheriff did not sell, but it was arranged that the debtor should himself sell the horses to the creditor for the debt and sheriff's costs, the creditor letting the horses to the debtor under an agreement determinable at will on either side. The debtor was in insolvent circumstances at the time of the transaction, and he filed a petition in liquidation a few days afterwards, but not until after the horses had been taken away by the creditor:—Held, by James, L.J., *dissentiente Mellish, L.J.*, that this was a seizure and sale within the meaning of section 6, sub-section 5, of the Bankruptcy Act, 1869. Held also, by James, L.J., *dissentiente Mellish, L.J.*, that the transaction was void as a fraudulent preference. And held by both the Lords Justices, affirming the decisions of the County Court Judge and the Chief Judge in Bankruptcy, that the sale was a fraudulent transfer of a part of the debtor's property within the meaning of section 6, sub-sec. 2, of the Act, and therefore void as an act of bankruptcy. *Ex parte Pearson*; *In re Mortimer*, 42 Law J. Rep. (N.S.) Bankr. 44; Law Rep. 8 Chanc. 667.

(e) *Failure to comply with debtor's summons.*

**32.**—Where a summons is served upon a debtor under section 7 of the Bankruptcy Act, 1869, an act of bankruptcy (under section 6, sub-sec. 6) is committed at the expiration of seven days, or three weeks (as the case may be), from the date of service, if within that time the debtor does not pay or secure the debt, although time may be given to the debtor to give security. *Ex parte Wier*; *In*

*re Wier*, 41 Law J. Rep. (N.S.) Bankr. 14; Law Rep. 6 Chanc. 875.

Such an act of bankruptcy, being available for adjudication only on the petition of the summoning creditor, is not one to which the title of a trustee under an adjudication obtained subsequently by another creditor would relate back under section 11. *Ibid.*

**33.**—Whether more creditors than one can unite in issuing a debtor's summons, *quære*. But if several creditors issue one debtor's summons, they must continue the subsequent proceedings together. There can be but one act of bankruptcy upon the summons, and the summoning creditors cannot present separate bankruptcy petitions founded upon the failure of the debtor to comply with the summons as to each creditor separately. *Ex parte Kibble*; *In re Onslow*, 44 Law J. Rep. (N.S.) Bankr. 63; Law Rep. 10 Chanc. 373.

**34.**—The act of bankruptcy which results from the failure to comply with a debtor's summons is completed immediately upon such failure, and is not postponed until the summoning creditor presents a bankruptcy petition against the debtor. *Ex parte Henken*; *In re Buchan*, 44 Law J. Rep. (N.S.) Bankr. 74; Law Rep. 10 Chanc. 267.

Though only the summoning creditor can avail himself of this act of bankruptcy for the purpose of obtaining an adjudication against the debtor, it is an act of bankruptcy available for adjudication within the meaning of section 95 of the Bankruptcy Act, 1869, and a creditor who has notice of an act of bankruptcy so committed does not come within the protection of that section. *Ibid.*

**35.**—"A trader" within the Bankruptcy Act, 1869, section, 6 sub-sec. 6, is a trader at the time when the debtor's summons is sued out. The owner of a phosphate mine is not a trader. *Ex parte Schomberg*; *In re Schomberg*, Law Rep. 10 Chanc. 172.

#### (f) Notice of act of bankruptcy.

**36.**—A person having notice of facts from which a Court or jury would infer that an act of bankruptcy had been committed, must be considered as having notice that an act of bankruptcy had been committed, notwithstanding his oath that he did not in fact draw the inference. *Ex parte Snowball*; *In re Douglas*, 41 Law J. Rep. (N.S.) Bankr. 49; Law Rep. 7 Chanc. 534.

Partners cannot effectually pledge partnership property, so as to make it available for their own private debts. To do so when the partnership is insolvent is to commit an act of bankruptcy. *Ibid.*

Execution of mortgage by attorney void, as not being within the scope of the power of attorney. *Ibid.*

**37.**—H. took a bill of sale over the goods of J. after notice of an act of bankruptcy committed by J. The consideration for the bill of sale consisted partly of money advanced to pay off two prior bills of sale which had been made and registered before the act of bankruptcy, and partly for money due from J. for goods sold to him by H. J. was afterwards adjudicated bankrupt in respect of the pre-

vious act of bankruptcy:—Held, that the trustee in the bankruptcy was entitled to the goods subject to the payment to H. of the amount advanced in respect of the prior bills of sale. *Ex parte Harris*; *In re James*, 44 Law J. Rep. (N.S.) Bankr. 31; Law Rep. 19 Eq. 253.

#### (C) ADJUDICATION.

##### (a) Petition: petitioning creditor's debt.

**1.**—A creditor who holds garnishee orders to an amount exceeding what is due to him, may nevertheless sue out a debtor's summons against the debtor and have him adjudicated bankrupt. *In re Tupper*, Law Rep. 9 Chanc. 312.

**2.**—The debt necessary to sustain a creditor's petition for an adjudication in bankruptcy, under statute 32 & 33 Vict. c. 71. s. 6. sub-sec. 6, is a debt presently recoverable. Where, therefore, the debt of the petitioning creditor was for goods sold to the debtor on credit, and the credit had not expired at the date of the petition being filed,—Held, that there was no debt upon which to found a petition for adjudication. *Ex parte Sturt*; *In re Pearcey*, 41 Law J. Rep. (N.S.) Bankr. 12; Law Rep. 13 Eq. 309.

**3.**—A married woman having no separate estate is not liable under the 12th section of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), to be made bankrupt in respect of debts contracted before marriage. Whether if she had separate estate she could be made bankrupt, *quære*. *Ex parte Holland*; *In re Heneage*, 43 Law J. Rep. (N.S.) Bankr. 85; Law Rep. 9 Chanc. 307.

**4.**—A non-trader cannot be adjudicated bankrupt in respect of a debt contracted before the Bankruptcy Act, 1861, came into operation. For this purpose further advances under a mortgage to secure a specific debt and further advances must be deemed a debt contracted at the date of the mortgage deed. *Ex parte Rashleigh*; *In re Dalzell*, Law Rep. 20 Eq. 782.

##### (b) Tender after petition.

**5.**—When an act of bankruptcy has been proved, and a petition for adjudication presented, the creditor is not bound to accept an offer of payment of the debt, but is entitled to an order for adjudication. *Ex parte Boss*; *In re Whalley*, 43 Law J. Rep. (N.S.) Bankr. 110; Law Rep. 18 Eq. 375.

Under such circumstances an adjournment of the petition, in order to give the debtor time for payment, was held not to be warranted by section 8 of the Bankruptcy Act, 1869. *Ibid.*

##### (c) Joint and separate estates.

**6.**—R., carrying on business in London, in partnership with M. in Dublin, committed an act of bankruptcy by executing an assignment of all his estate and effects to trustees for the benefit of his creditors. He was afterwards adjudicated bankrupt, and property belong to the firm having been sold by order of the trustees of the deed of assignment, the purchase-money was by the London

Court of Bankruptcy ordered to be placed to a deposit account in the bank in certain names. In the meantime a separate adjudication was made against M. in Ireland, and was followed by a joint adjudication in Ireland against R. and M., the assignees under M.'s separate adjudication being also assignees under the joint adjudication. Upon the application of the assignees under the Irish bankruptcies for an order directing payment to them of the money produced by the sale:—Held, that the separate adjudication in England not having been either superseded or impounded, the joint assets were vested in the English trustee under R.'s separate bankruptcy, and the Irish assignees under M.'s separate bankruptcy as tenants in common; that the Irish assignees had no better title to the joint assets by reason of the joint adjudication, and it being more convenient that the assets should be distributed in England, the order was refused. *Ex parte James; In re O'Reardon*, 43 Law J. Rep. (N.S.) Bankr. 13; Law Rep. 9 Chanc. 74.

7.—Where a petition for adjudication has been presented against the separate estate of a debtor, and afterwards a petition is presented and an adjudication made against the joint estate of the debtor and a partner, the Court will, notwithstanding no adjudication has been made on the separate petition, order the proceedings under the separate petition to be consolidated with the proceedings under the joint petition. *Ex parte McKenzie; In re Hellwell*, 44 Law J. Rep. (N.S.) Bankr. 117; Law Rep. 20 Eq. 88.

The trustee alone is interested in such an application, and the debtor has no right to be heard in opposition. *Ibid*.

8.—Under the Bankruptcy Act, 1861, a separate adjudication was made against a partner. The separate debts were about 8,000*l.*, the joint debts about 90,000*l.* The separate estate realised about 4,000*l.* There was no partnership estate. Two joint creditors were appointed assignees:—Held, on the application of the principal separate creditor, that an inspector might be appointed to protect the interests of the separate creditors, but that he must take no step in the matter without the approval of the registrar. *Ex parte Melbourne; In re Melbourne*, 40 Law J. Rep. (N.S.) Bankr. 56; Law Rep. 6 Chanc. 835.

9.—A document in the form of a bill of exchange, but accepted with the drawer's name in blank, does not exist as a bill until the drawer's name is inserted, and even then does not create a debt against the parties to it until value has been given for it. *Ex parte Hayward and Batten, and Ex parte Jones; In re Hayward and Co.*, 40 Law J. Rep. (N.S.) Bankr. 49; Law Rep. 6 Chanc. 546.

The acceptance of a firm was written across such a document. The firm afterwards made an assignment for the benefit of creditors. After the assignment, and when the document had become to all appearance a complete bill by the insertion of a drawer's name, it passed into the hands of holders for value:—Held, that it did not create a debt capable of supporting an adjudication of bankruptcy against the acceptors. *Ibid*.

### (d) Annuling adjudication.

10.—The Court of Bankruptcy has power, under its general jurisdiction, to annul an adjudication, independently of any express power given to it by statute. *Ex parte Ashworth; In re Hoare*, 43 Law J. Rep. (N.S.) Bankr. 142; Law Rep. 18 Eq. 7.

After a creditor had filed a bankruptcy petition against his debtor, the debtor himself filed a liquidation petition. An adjudication was made on the creditors' petition, and after this the creditors resolved upon a liquidation:—Held, that, either under rule 266 of 1870, or under its general jurisdiction, the Court had power to annul the adjudication. *Ibid*.

11.—An adjudication in bankruptcy is not invalidated by the fact that the registrar sealed the copies of the petitions for adjudication on production of an affidavit of service of the debtor summons which had not then been filed. The above rule is merely directory. *Ex parte Hunt; In re Hunt*, Law Rep. 8 Chanc. 164.

12.—After the presentation of a petition for adjudication, the debtor summoned a meeting of his creditors under section 125 of the Bankruptcy Act, 1869, with a view to liquidation by arrangement, but before the meeting an adjudication was made, with a stay of proceedings till after the meeting, the petitioning creditors consenting. At the meeting the creditors resolved to accept a composition; and the resolution having been confirmed at a subsequent meeting and duly registered, the adjudication was thereupon annulled by the registrar on the application of the debtor:—Held, upon appeal, that the adjudication was properly annulled. *Ex parte Foster; In re Pooley*, 44 Law J. Rep. (N.S.) Bankr. 22; Law Rep. 10 Chanc. 59.

13.—S. filed a petition for liquidation. During these proceedings he was adjudicated bankrupt under rule 266, upon a petition of which he had received no notice. The petition was presented by creditors whose debts exceeded one-fourth of the whole liabilities of the debtor, and without whose consent, therefore, the liquidation could not proceed:—Held, that notice ought to have been given, and that as it had not, the adjudication must be annulled. *Ex parte Stebbing; In re Stebbing*, 44 Law J. Rep. (N.S.) Chanc. 76; Law Rep. 19 Eq. 441.

14.—Quære—whether the practice of staying proceedings on equitable grounds is applicable to proceedings under the Bankruptcy Act, 1869; if so, a special application to annul the adjudication or stay proceedings must be made, and the equitable grounds cannot be used as a defence to a petition for adjudication.

C. was the plaintiff and next friend of her infant the co-plaintiffs in a Chancery suit. She was ordered to pay some costs, and upon her failing to pay these, the defendant took proceedings in bankruptcy. She defended these upon the ground that her bankruptcy would embarrass the suit, and that the proceedings in bankruptcy were taken with this object:—Held, that the adjudication was *ex debito justitiæ*, and could not be refused.

*In re Claxton*, 41 Law J. Rep. (N.S.) Bankr. 56; Law Rep. 7 Chanc. 532.

15.—A creditor presented a petition for adjudication. The debtor raised no objection, and did not appear at the hearing. The petition did not allege any specific act of bankruptcy, but only that the debtor had made a fraudulent conveyance of his property, or some part thereof. The only evidence was an affidavit that the statements in the petition were true. The deputy registrar adjudicated the debtor bankrupt:—Held, that the terms registrar and deputy registrar are convertible terms, and that there would have been no reason to annul the adjudication because it was made by the deputy registrar; but held also, that the evidence of the act of bankruptcy was insufficient to justify an adjudication. *Ex parte Lindsay*; *In re Lindsay*, 44 Law J. Rep. (N.S.) Bankr. 5; Law Rep. 19 Eq. 52.

*Effect of, as to bankrupt's right of set-off.*  
[See *infra* F. 2.]

#### (D) FIRST MEETING OF CREDITORS.

##### (a) Power to deal with assets.

1.—A petition for liquidation by arrangement having been filed by a debtor trading in partnership, a resolution was passed at the first meeting of his creditors that his affairs should be liquidated by arrangement, for the appointment of a trustee and committee of inspection, and the discharge of the debtor. The resolution also purported to authorise the trustee to sell a specific part of the debtor's property for such a sum as would pay the costs of the liquidation, and a composition of one shilling in the pound to be paid to his separate creditors. This resolution was registered:—Held, that so much of the resolution as authorised the trustee to sell and make a composition was *ultra vires* and void, but that the rest of the resolution was valid, and the liquidation must proceed thereunder. *Ex parte Browning*; *In re Marks*, 43 Law J. Rep. (N.S.) Bankr. 129; Law Rep. 9 Chanc. 583.

##### (b) Notices.

2.—Creditors under a liquidation petition resolved that the liquidation should close, and the trustees be released as from January, 1871, but no order of discharge was given to the debtor. Four years after, the debtor filed a second petition, and the creditors again resolved on liquidation:—Held, that the creditors under the second petition need not give notices of their meetings to the creditors under the first petition. *Ex parte Williams*; *In re Williams*, 44 Law J. Rep. (N.S.) Bankr. 122; Law Rep. 20 Eq. 743.

3.—The notices summoning the first general meeting of the creditors under a liquidation petition were signed with the name of the debtor's attorney, but the signature was affixed by the clerk of the attorney by his direction:—Held (reversing the decision of the Judge of the County Court), that the rules had been sufficiently com-

plied with, and that the resolutions ought to be registered. *Ex parte Hirst*; *In re Hirst*, 43 Law J. Rep. (N.S.) Bankr. 180; Law Rep. 18 Eq. 704.

##### (c) Adjourned meeting: voting.

4.—The creditors of a debtor at their first meeting resolved on an adjournment. Some of the creditors who voted in favour of the adjournment held bills of exchange and bonds of the debtor, which they did not produce. If their votes had been rejected the adjournment would not have been duly carried. At the adjourned meeting these creditors produced their bills of exchange and bonds, and a liquidation was then resolved upon:—Held, that the production of the bills and bonds at the adjourned meeting was sufficient. *Ex parte Ashworth*; *In re Hoare*, 43 Law J. Rep. (N.S.) Bankr. 142; Law Rep. 18 Eq. 705.

A secured creditor who votes without producing his security by so doing gives up the benefit of his security, but his vote is not invalidated. *Ibid.*

The registrar can reject such of the resolutions tendered to him for registration as are *ultra vires*, and register the rest. *Ibid.*

##### (d) Fresh meeting.

5.—A debtor did not distinguish in the statement made at the first meeting of his creditors his joint from his separate debts. The objection was taken, but it was disregarded, and resolutions for liquidation were passed. Their registration having been refused on account of the informality of the proceedings,—Held, that a new first meeting was rightly ordered, the creditors having had no real opportunity of expressing their wishes. The case would be different if the informality were owing to the wilful default of the debtor, or if it were manifest that the creditors did not desire a liquidation or composition. *Ex parte Gibbs*; *In re Webb*, 44 Law J. Rep. (N.S.) Bankr. 73; Law Rep. 10 Chanc. 382.

#### (E) PROOF.

##### (a) Damages.

1.—A contract with a stakeholder of bills of exchange to indemnify him against all damages, proceedings, &c., in consequence of his delivering the bills to the party:—Held, not to contain any warranty of the title of such party to the bills, nor any undertaking by him to pay the amount as soon as a valid claim was made against the stakeholder: and such party having, down to the time of the execution by him of a deed of inspectorship, defended an action brought against the stakeholder in respect of the bills:—Held, that down to that time the contract had not been broken, and that the stakeholder had no right of proof under the above section. *Ex parte Wiseman*; *In re Kelson, Tritton & Co.*, Law Rep. 7 Chanc. 35.

2.—Where there was a breach by a vendor of a contract by him to deliver iron by monthly instalments, and the vendees bought iron in the market to supply the deficiency, but there was no evidence of forbearance by the vendees at the

request of the vendor:—Held, distinguishing *Ogle v. Earl Vane* (37 Law J. Rep. (N.S.) Chanc. 77; Law Rep. 3 Q.B. 272), that the vendees could prove in the liquidation of the vendor only for the differences between the contract price and the prices of the days when the instalments ought to have been but were not delivered. *Ex parte Llansamlet Tin Plate Co.; In re Voss*, Law Rep. 16 Eq. 155.

3.—The plaintiff in an action for the wrongful detention of a lease recovered judgment for 100*l.*, to be reduced to nothing if the lease was returned. Execution was afterwards stayed for a month, to give the defendant time to search for the lease, which had been mislaid. Before the month had expired, the defendant filed a liquidation petition. The first meeting of the creditors was held after the expiration of the month, but the plaintiff had not then levied execution for the 100*l.* The lease was subsequently found, and was tendered to the plaintiff, who refused to accept it:—Held, that the 100*l.* was not a debt proveable under the petition. *Ex parte Scarth; In re Scarth*, 44 Law J. Rep. (N.S.) Bankr. 29; Law Rep. 10 Chanc. 234.

(b) *Contingent liability.*

4.—A bond for 1,000*l.*—after reciting that the obligor had assigned to the obligee 1,100*l.* consols, to which the obligor's wife was entitled upon the death of her mother E. P.; and that the obligor's wife might survive her husband and might refuse to confirm the assignment, or the obligee might, through the obligor's default or otherwise, never realize the benefit of the assignment—was conditioned for avoidance if, within six months after E. P.'s death, the obligee should obtain the transfer of the consols, or the trustees thereof should transfer the consols to the obligee. E. P. died, and more than six months after the obligee sued the obligor on the bond. The defendant pleaded his bankruptcy and discharge under the Act of 1861, obtained before any breach of the condition and before six months after E. P.'s death:—Held, that the action was not barred by the bankruptcy and discharge, since the obligee could not have proved under the bankruptcy, either for "a debt payable on a contingency" within 12 & 13 Vict. c. 106, s. 177, or for "a liability to pay money on a contingency" within section 178. *Kent v. Thomas*, 40 Law J. Rep. (N.S.) Exch. 186; Law Rep. 6 Exch. 312.

5.—A contract with a stakeholder of bills of exchange on delivery of the bills by him to the party, to indemnify the stakeholder against all costs, damages and proceedings in respect of the bills:—Held, not a contract to pay money upon a contingency, within 12 & 13 Vict. c. 106, s. 178. *Ex parte Wiseman; In re Kelson, Tritton & Co.*, Law Rep. 7 Chanc. 35.

(c) *Debt capable of being estimated.*

6.—Agreement not under seal by A. to supply steam-power to any number of looms in B.'s mill, during twenty-one years, at an annual rent for each loom, payable quarterly in advance:—Held,

that although the agreement might have been determined by B. ceasing to have any looms to work, yet, as the rent was payable in advance, it was not void for want of mutuality. The agreement having been carried out for fourteen years, when mortgagees from A., who had entered into possession, refused to go on with it:—Held, in the subsequent bankruptcy of A., that damages for the breach were capable of being fairly estimated within section 31, and could be proved for. *Ex parte Waters; In re Hoyle*, Law Rep. 8 Chanc. 562.

7.—W. went through the ceremony of marriage with S., his deceased wife's sister. In 1858 a deed of separation was executed, under which W. covenanted to pay to trustees for S. an annuity of 40*l.*; the deed described S. as the wife of W., and contained a proviso that if they came together again the annuity should cease. W. married again, and S. married and became a widow. In 1871 W. became bankrupt, and in the bankruptcy a proof was presented for the value of the annuity. The County Court Judge refused to admit the proof, because, it being impossible to say what was the probability of the parties coming together again, the value of the annuity was incapable of being fairly estimated:—Held (reversing the decision of the County Court Judge), that as the parties could never come together lawfully, that proviso ought to be disregarded, and the value of the annuity estimated in the usual way. *Ex parte Naden; In re Wood*, 43 Law J. Rep. (N.S.) Bankr. 121; Law Rep. 9 Chanc. 670.

(d) *Injury occasioned by disclaimer of lease.*

8.—The effect of sections 23 and 31 of the Bankruptcy Act, 1869, is that the bankrupt is absolutely relieved from every liability by contract, which he has ever entered into, and that the person who is in that way deprived of his right of action against the bankrupt and of the benefit of any contract which has been made with him, becomes a creditor against his estate in respect of what he would have been entitled to recover against the bankrupt if he had remained solvent, and can prove for that amount. *Ex parte Llynvi Coal and Iron Co.; In re Hide*, 41 Law J. Rep. (N.S.) Bankr. 5; Law Rep. 7 Chanc. 28.

A bankrupt was lessee of premises for a term of ten years, at an annual rent of 500*l.* The trustee disclaimed the lease. The landlord was unable to relet the premises at so high a rent:—Held, that the landlord was entitled to prove in the bankruptcy for the difference between the present value of the 500*l.* per annum agreed to be paid by the bankrupt for the residue of the term, and the present value for the same period of the letting value of the premises. *Ibid.*

(e) *Transferor of shares.*

9.—A claim by the transferor of shares in a limited company, to be indemnified out of the estate of his bankrupt transferee against calls made on the transferor after the transfer, is not a debt proveable under the Bankruptcy Act

1861, ss. 153 and 154; and a plea of the effect of an inspectorship deed under section 192 of that Act is no defence to a creditors' suit in equity to administer the estate of the transferee. *Holmes v. Symons*, 41 Law J. Rep. (N.S.) Chanc. 59; Law Rep. 13 Eq. 66.

(f) *Official liquidator.*

10.—The official liquidator under the winding-up of an unregistered association, may prove under section 95, sub-section 5, of the Companies Act, 1862, in the liquidation of a contributory for all sums due from his estate, as a separate debt, in the same way as in the case of a registered company. *Ex parte Ball*; *In re Adams*, Law Rep. 10 Chanc. 48.

(g) *Proof by executors of partner against co-partner.*

11.—A firm of five partners carried on business under a deed which provided that in case any partner should die his shares in the capital should be taken by the surviving partners at their value, according to the stock-taking immediately preceding his death, with interest thereon, and that the amount found due to the deceased partner should be paid by the surviving partners to the executors or administrators of the deceased partner by fourteen equal annual instalments with interest until payment, and that the punctual payment of the instalments and interest should be secured by the joint and several bond of the surviving partners. One of the partners died in April, 1866, having by his will appointed executors, whom he authorised to permit his share of the capital to remain in the hands of his partners at interest. The executors allowed their testator's share to remain at interest; its value was duly ascertained at the stock-taking preceding his death, but no bond was given to the executors by the surviving partners. In July, 1868, another partner retired. In July, 1870, two Chancery suits were instituted to administer the testator's separate estate. In July, 1872, the three remaining partners filed a liquidation petition. On the 30th of July, 1872, the executors of the deceased partner tendered a proof in the liquidation for the amount of his share in the capital, as ascertained at the stock-taking preceding his death. The trustee admitted the proof, but afterwards applied to have it expunged on the ground that some of the debts due by the firm when the testator was a member of it were still unpaid. The Chief Judge held (reversing the decision of the County Court Judge), that the value of the testator's share was a mere debt due from the surviving partners to his executors, and that the proof ought to be retained; but upon appeal to the Lords Justices this decision was reversed and the proof expunged, their Lordships being of opinion that the case was governed by the rule which forbids a person to prove in competition with his own creditors. *Ex parte Gordon*; *In re Dixon*, 44 Law J. Rep. (N.S.) Bankr. 17; Law Rep. 10 Chanc. 160.

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[Affirmed on appeal to the House of Lords, 45 Law J. Rep. (N.S.) Bankr. 89; Law Rep. 1 App. Cas. 195, *nom. Nanson v. Gordon*.]

(h) *Advances to trader: share of profits.*

12.—Where a person lends money to a trader under an agreement stipulating that the lender is to receive a share of the profits of the business, and afterwards terminates the agreement, the lender cannot prove, in the bankruptcy of the trader, for sums advanced under the agreement, even in competition with creditors whose debts were incurred subsequently to the termination of the agreement; but the lender can prove for any further sums advanced by him at interest without stipulating as to profits, even though such further sums were so advanced during the continuance of the agreement. *Ex parte Mills*; *In re Tew*, Law Rep. 8 Chanc. 569.

(i) *Double insolvency: bill of exchange.*

13.—L., a shipbuilder, contracted with M. & Co. to build a ship for 7,600*l.*, payable by instalments, and it was stipulated that the vessel and the materials should from the time of giving or paying the first instalment be deemed in every respect and for all purposes to be the property of M. & Co. to the extent of their advances, subject, nevertheless, to the builder's lien for unpaid advances. Payment was to be made as to 100*l.* in cash, and the rest in bills of exchange, to be given from time to time during and according to the progress of the work; and all bills given during construction to be retired by M. & Co. at completion and transfer. Accordingly bills were from time to time during the progress of the work drawn by L. upon and accepted by M. & Co. to the amount of 2,700*l.*, "for value received in iron screw steamer now building," and discounted with his bankers, Messrs. M. & Co. Before the ship was completed, M. & Co. compounded with their creditors, and L. became bankrupt. M. & Co. then gave notice of abandoning the contract for the ship, which was completed by the trustee in L.'s bankruptcy. The bills having been dishonoured at maturity, Messrs. L. & Co., the holders of the bills, claimed a lien upon the ship, on the ground that it was a security to M. & Co. for indemnifying them against the payment of the bills, and the claim was allowed in the County Court. But upon appeal the decision was reversed by the Chief Judge, and the reversal was upheld by the Lords Justices. *Ex parte Greener*, *In re Lindsay*; and *Ex parte Lambton*, *In re Lindsay* 44 Law J. Rep. (N.S.) Bankr. 81; Law Rep. 10 Chanc. 405.

(j) *Double proof: joint and separate estates.*

14.—Messrs. C. being indebted to P. for money advanced on account of contracts for the delivery of goods which they were unable to perform, accepted bills for a portion of the money due, and such bills were endorsed by P. to third parties. Other bills had been given by P. to Messrs. C. on

account of other contracts for goods never delivered, and these bills were also in the hands of third parties. Messrs C. & P. having both become bankrupt,—Held, affirming the decision of the Chief Judge, that the estate of P. was not entitled to prove against the estate of Messrs. C. for the whole of the cash advances, but only for the balance after deducting the amount of the bills accepted by them. *Ex parte Walker* (4 Ves. 393) distinguished. *Ex parte Macredie*; *In re Charles*, 42 Law J. Rep. (n.s.) Bankr. 90; Law Rep. 8 Chanc. 535.

Per Mellish, L.J.—The rule that where there are cross-acceptances between two houses, both of which become bankrupt, there can be no proof as between the two estates in respect of the bad paper, only applies where the acceptances given by the one party are the consideration for the acceptances given by the other. *Ibid*.

15.—Section 37 of the Bankruptcy Act, 1869, allowing a double proof where a person is liable as a sole contractor and also as member of a firm, applies in the case of a joint and several covenant, though the joint covenant was not expressed to be made by the covenantors as partners, the covenant being, as a matter of fact, to secure an advance made for partnership purposes. *Ex parte Stone*; *In re Welch*, 42 Law J. Rep. (n.s.) Bankr. 73; Law Rep. 8 Chanc. 914.

Where a proof is made by the trustee of a settlement under which the bankrupt is himself interested, his interest cannot be made available to the estate by way of set-off, but proof must be allowed for the whole amount. *Ibid*.

16.—D. carried on business in England under the style of D. & Co., and in Brazil under that of D., L. & Co. Bills for 1,900*l*. were drawn by D., L. & Co. upon and accepted by D. & Co. in favour of B. & Co. D. & Co. executed and registered a deed of assignment under the Bankruptcy Act, 1861. D., L. & Co.'s assets in Brazil were administered there according to the laws of Brazil, and B. & Co. received part payment of the 1,900*l*. there. B. & Co., notwithstanding the part payment, carried in their claim to prove and receive dividends for the whole 1,900*l*. under the deed of assignment:—Held (reversing the decision of a County Court Judge), that although they might be admitted to prove for the amount, they were not to receive any dividend until after the other creditors had received a dividend equal to that received by B. & Co. in Brazil. *Ex parte Wilson*; *In re Douglas*, 41 Law J. Rep. (n.s.) Bankr. 46; Law Rep. 7 Chanc. 490.

The 152nd section of the Bankruptcy Act, 1861, did not apply to this case, there being only one estate, that of William Douglas, to be wound up in bankruptcy, and not two "distinct estates" within the meaning of that section. *Ibid*.

17.—A liquidating debtor, at the date of filing his petition, was carrying on a trade at Brighton in his own name, and a completely distinct trade under another name in London. Three-fourths of the profits of the London business were settled upon A.'s wife for her separate use free from his debts. The other fourth of the profits belonged to

A. The Brighton business was hopelessly insolvent:—Held, that the assets of the two businesses constituted distinct estates, the one the separate estate of the debtor, the other the joint estate of him and the trustee of the settlement, and that accordingly the ordinary rule in bankruptcy for the payment of the joint and separate creditors out of the debtor's joint and separate estates respectively would apply, and the London creditors were entitled to be paid the full amount of their debts out of the assets of the London business before the separate creditors of the debtor received anything out of that estate. *Ex parte New*; *In re Childs*, 43 Law J. Rep. (n.s.) Bankr. 89; Law Rep. 9 Chanc. 508.

18.—H. lent money to W., a member of a firm, on the security of a joint and several promissory note given by W., the firm, and four other persons:—Held, on the bankruptcy of the firm, that H. might prove against and receive dividends from the joint estate of the firm and also the separate estate of W. *Ex parte Honey*; *In re Jeffery*, 41 Law J. Rep. (n.s.) Bankr. 9; Law Rep. 7 Chanc. 178.

19.—A father and his son carried on business in partnership. The whole capital belonged to the father, the son having only an interest in the profits. The father died, and thereupon under the provisions of the partnership deed the partnership was dissolved, and all the profits became the property of the father. The father appointed the son his executor, and the son in that character received moneys belonging to the father's separate estate and employed them without any authority in the business. A suit was afterwards instituted to administer the father's estate, and the son filed a liquidation petition:—Held, that the receiver appointed in the suit could prove in the son's liquidation for the moneys thus received by the son as executor and misapplied. *Ex parte Westcott*; *In re White*, 43 Law J. Rep. (n.s.) Bankr. 119; Law Rep. 9 Chanc. 626.

20.—A firm of five partners carried on business under a deed which provided that in case any partner should die his shares in the capital should be taken by the surviving partners, at their value, according to the stocktaking immediately preceding his death, with interest thereon, and that the amount found due to the deceased partner should be paid by the surviving partners to the executors or administrators of the deceased partner by fourteen equal annual instalments, with interest until payment, and that the punctual payment of the instalments and interest should be secured by the joint and several bonds of the surviving partners. One of the partners died in April, 1866, having by his will appointed executors, whom he authorised to permit his share of the capital to remain in the hands of his partners at interest. The executors allowed their testator's share to remain at interest. Its value was duly ascertained at the stock-taking preceding his death, but no bond was given to the executors by the surviving partners. In July, 1868, another partner retired. In July, 1870, two Chancery suits were instituted to administer the testator's separate estate. In July, 1872, the three remaining partners filed a



liquidation petition. On the 30th of July, 1872, the executors of the deceased partner tendered a proof in the liquidation for the amount of his share in the capital as ascertained at the stock-taking preceding his death. The trustee admitted the proof, but afterwards applied to have it expunged, on the ground that some of the debts due by the firm when the testator was a member of it were still unpaid:—Held (reversing the decision of the County Court Judge), that the value of the testator's share was a mere debt due from the surviving partner to his executors, and that the proof ought to be retained. *Ex parte Nanson; In re Dixon*, 43 Law J. Rep. (N.S.) Bankr. 133.

*Joint and separate assets: construction of partnership deed.* [See PARTNERSHIP, 5.]

*Joint and separate assets: death of partner: continuation of business by surviving partners.* [See PARTNERSHIP, 22.]

(k) Secured creditor.

21.—T. commenced an action against K. on a bill of exchange. K. obtained leave to defend upon terms of paying 880*l.* into Court to abide the event. The matter was submitted to arbitration, but before any award was made K. became bankrupt. On the application of the trustee in bankruptcy, the County Court Judge ordered the 880*l.* to be paid to him for distribution amongst the creditors:—Held, on appeal (reversing the decision of the County Court), that T. was a creditor holding a security. *Ex parte Tate; In re Keyworth*, 43 Law J. Rep. (N.S.) Bankr. 55; Law Rep. 9 Chanc. 379, *nom. Ex parte Banner*.

22.—A debt was claimed as due from a bankrupt to the estate of a deceased person whose estate was being administered by the Court of Chancery. That Court appointed a person to prove the debt in the bankruptcy and to vote at the meetings of the creditors:—Held, that the person so appointed was a *quasi* receiver, and was entitled to prove the debt and to vote. *Ex parte Hare; In re England*, 44 Law J. Rep. (N.S.) Bankr. 9; Law Rep. 10 Chanc. 218.

The amount of the proof was larger than that of all the other proofs together, but it was disputed:—Held, that the proof must be investigated by the registrar, and that the choice of a trustee by the creditors must be postponed until after the investigation had been made. *Ibid.*

23.—A garnishee's order and an attachment issued under the Common Law Procedure Act, 1854, unless followed by seizure and sale before the presentation of a petition for liquidation does not make the creditor a "secured creditor" within the meaning of the Bankruptcy Act, 1869. The order of the County Court Judge, directing the amount levied under such an order to be repaid to the trustee in the liquidation, was confirmed. *Ex parte Greenway; In re Adams*, 42 Law J. Rep. (N.S.) Bankr. 110; Law Rep. 16 Eq. 619.

24.—On the 20th of April, 1870, E. obtained a judgment against B. for 45*l.* 15*s.* 10*d.* On the

22nd of the same month he obtained a garnishee order served on the 23rd, attaching a debt due from R. to B. of 55*l.* The order was made absolute on the 2nd of May, and the usual order was made to levy as much as was sufficient to satisfy the judgment debt, and a *fi. fa.* was delivered to the sheriff. B. was adjudicated bankrupt on the 3rd of May. The sheriff seized certain goods as the goods of R. on the 4th of May, but they were on the 11th claimed by the trustee of B., and, upon an interpleader, the goods were sold and 31*l.* paid into Court. On the 21st of May, 1869, R. had executed a bill of sale to B. of the same goods to secure the repayment of a loan of 147*l.* The bill of sale was registered and the goods remained in the house of R. By the bill of sale B. had the right in case R. failed in payment of certain instalments to enter and seize the goods and either hold them or sell them, repaying himself and paying the balance, if any, to R. On the 22nd of April, 1870, the day on which the garnishee order was made, B. instructed an auctioneer to seize the goods and sell them in order to repay the sum then due, that is, 55*l.* This was done. On the 26th of April, when neither the auctioneer nor B. had any notice of the attachment, the former advanced to the latter 50*l.*, and was authorised to retain it out of the proceeds of the intended sale. On the 30th the goods were advertised for sale on the 2nd of May, as being the goods of R., sold under a bill of sale, and on the same day the auctioneer received notice of the attachment. The sale did not take place owing to R. obtaining an interim injunction to restrain the sale, and on the 4th of May the sheriff seized the goods:—Held, that the garnishee order constituted E. a creditor holding security on the property of the bankrupt within section 12 of the Bankruptcy Act, 1869, and a charge on a part of the estate of B. within section 16, sub-section 5. *Emanuel v. Bridger*, 43 Law J. Rep. (N.S.) Q.B. 96; Law Rep. 9 Q.B. 286.

Held, also, that the auctioneer was entitled to 9*l.* 4*s.* 2*d.*, and that E. was entitled to the rest. *Ibid.*

Held, also, that the Bills of Sale Act did not apply, inasmuch as the acts of the auctioneer were sufficient to take the goods out of the possession of R. at the time of the seizure. *Ibid.*

25.—F. & H. were partners. They filed a joint petition, and F. also filed a separate petition. The bankers of the firm held securities on the separate estate of F. for moneys due to them from the firm or from F., and on the separate estate of H. for moneys due from the firm. The County Court Judge considered that the right of the bank was to take a dividend on the amount owing to them on the joint account, to apply the proceeds of the security in payment of the balance due on the joint account, then to apply the balance of the proceeds of the security towards payment of the amount due on the separate account, and to prove for the balance due upon the separate account, and that to enable them to exercise their right he ought to exercise his discretion under section 104, and order the trustee to declare a dividend on the

joint estate before declaring the dividend on the separate estate:—Held (affirming the decision of the County Court Judge), that the bank had a right to apportion the proceeds of their securities in whatever way was most to their advantage, and that to enable them to elect they were entitled to an order that the dividend on the joint estate should be declared first. *Ex parte Dickinson; In re Foster*, 44 Law J. Rep. (n.s.) Bankr. 113; Law Rep. 20 Eq. 767.

26.—P., being indebted to K., gave him a policy of insurance on his own life as security. Six years after, P. filed his petition for liquidation. K. estimated the value of his security at 200*l.*, and proved for the balance of his debt. The trustee was satisfied with the value put upon the security, and he did not offer to redeem, and it was admitted that he had no intention of doing so. K. intended to retain the policy, and continue to pay the premiums. Before any premium was paid, P. died. On the question whether K. or the trustee was entitled to the balance produced by the policy, after deducting the 200*l.*,—Held (affirming the decision of the County Court Judge), that the balance of the fund, after deducting the estimated value of the security, must be paid to the trustee. *Ex parte King; In re Palethorpe*, 44 Law J. Rep. (n.s.) Bankr. 92; Law Rep. 20 Eq. 273.

27.—H. accepted bills of exchange to meet goods consigned to him. The acceptances were made payable "on delivery of the bills of lading." The bills of lading remained, with the bills of exchange, in the possession of the bank who had discounted the latter for the drawers:—Held, on the bankruptcy of the acceptor, that the goods were part of his estate which the bank held as security for their debt, and therefore that the bank could only prove for the amount due on the bills of exchange after deducting the value of the goods. *Ex parte Brett; In re Howe*, 40 Law J. Rep. (n.s.) Bankr. 54; Law Rep. 6 Chanc. 838.

(I) *Preferential debt: payment in full.*

28.—A music master, attending a school twice a week, and paid at the rate of 2*s.* 6*d.* an hour for the time during which he was occupied; and a drill sergeant attending twice a week, and paid at the rate of four shillings a lesson,—Held not to be clerks or servants, labourers or workmen, within the meaning of section 32 of the Bankruptcy Act, 1869, so as to be entitled to payment of their salary or wages in full. Held also, that even if they were, the section would not apply in the case of a composition. *Ex parte Walter; In re Heath*, 42 Law J. Rep. (n.s.) Bankr. 49; Law Rep. 15 Eq. 412.

29.—Under the liquidation of B., five workmen claimed debts of less than 50*l.* each. The County Court Judge, after several adjournments, ordered the trustee to pay these debts. The trustee appealed on the ground that if he paid the debts, he should have no funds to investigate the affairs of the debtor:—Held (dismissing the appeal), that the claimants were entitled to have their debts paid at once in full. *Ex parte Powis; In re Bowen*,

43 Law J. Rep. (n.s.) Bankr. 24; Law Rep. 17 Eq. 130.

*Trust and trustee: following trust-moneys into hands of consignee.* [See SALE OF GOODS, 24.]

(m) *Procedure and evidence.*

[And see *infra* PRACTICE.]

30.—Where an order has been made by the registrar for the stay of proceedings on application for adjudication, upon the debtor giving security for what shall be recovered in an action at law, and the security is not given, the registrar must investigate the debt himself. The debt being claimed as the balance of an account, he should go through the account with vouchers, as a Chief Clerk in Chancery would do. *Ex parte Harris; In re Harris*, 44 Law J. Rep. (n.s.) Bankr. 33; Law Rep. 10 Chanc. 264.

Where a negotiation for a compromise is commenced by one letter written "without prejudice," the whole is protected. *Ibid.*

31.—P., a creditor, proved under proceedings for the liquidation by arrangement of the affairs of R., the proof being made prior to the appointment of the trustee. Subsequently to the proof being made, the trustee caused P. to be summoned for examination under section 96. The course of the examination was such as to shew that the trustee was not satisfied with the proof, and the registrar ordered P. to furnish further accounts. These further accounts never were furnished, although demanded in writing by the trustee. After a lapse of two years, the trustee having taken no further step with respect to P.'s proof, declared a dividend, which he paid to all the creditors except P. Upon motion by P. for an order under Rule 313, a registrar ordered the trustee to pay the dividend to P. On appeal against this order,—Held, that the notice to P. from the course of the examination was not a sufficient notice under Rule 72 that the trustee required further evidence in support of the proof, and that, two years having elapsed without such notice or notice of rejection having been given, the trustee must be taken to have admitted the proof. Order of registrar to be affirmed, but the objection to the proof appearing to be substantial, order to be suspended for fourteen days, to enable the trustee to apply under Rule 73 to expunge the proof. *Ex parte Kemp; In re Russell*, 42 Law J. Rep. (n.s.) Bankr. 26.

Semble—that an application for payment of a dividend may be made by motion where it is certain to be opposed, instead of by Form 50 of the schedule to the Bankruptcy Rules, 1870, under Rule 135. *Ibid.*

Whether proof of a debt under section 16, sub-sec. 2 of the Act, and Rule 67, for the purpose of entitling the creditor to vote, is different from the proof under section 26, sub-sec. 1, section 41 and Rule 72, which entitles him to a dividend—*quære. Ibid.*

32.—W. tendered a proof of a debt, and voted at a first meeting in favour of a composition. At

the second meeting being advised that his proof might prejudice a security he held, he desired to withdraw it. The composition fell through, and therefore the vote at the first meeting had no effect. The registrar declined to allow the proof to be taken off the file:—Held, that under the circumstances the proof might be taken off the file. *Ex parte Williams; In re Williams*, 43 Law J. Rep. (n.s.) Bankr. 105; Law Rep. 18 Eq. 373.

33.—Where a creditor of a bankrupt tenders proof of a debt due to him on bills of exchange, the bills must, unless there be some special reason to the contrary, be produced before the proof can be admitted. In case of their non-production, the creditor will not be entitled to vote as to the appointment of a trustee. *Ex parte Jacobs; In re Carter*, 43 Law J. Rep. (n.s.) Bankr. 46; Law Rep. 17 Eq. 575.

#### (F) MUTUAL CREDIT.

1.—The mutual credit clauses in the Bankruptcy Acts apply only to a winding up of the estate as between the bankrupt and a creditor. *De Matos v. Saunders*, Law Rep. 7 C. P. 571.

2.—An adjudication in bankruptcy under the Act of 1869 having been made against the defendant, his trustee in bankruptcy sold part of the estate, and paid the proceeds into a bank to an account which he kept as such trustee. The bank knew the circumstances, and also that an appeal against the adjudication was pending. The bank afterwards became bankrupt, and subsequently the adjudication against the defendant was annulled by the Court of Appeal, on the ground that no act of bankruptcy had been committed. The Court made no order under section 81 as to the vesting of the defendant's property. The trustee in bankruptcy of the bank having brought an action against the defendant for a debt due to the bank before the defendant's bankruptcy:—Held, affirming the judgment of the Court below (40 Law J. Rep. (n.s.) Exch. 189; Law Rep. 6 Exch. 279), that the defendant could set off equitably the money paid by his trustee into the bank. *Bailey v. Johnson* (Ex. Ch.), 41 Law J. Rep. (n.s.) Exch. 211; Law Rep. 7 Exch. 263.

3.—The plaintiff, as trustee under the Bankruptcy Act, 1869, of K. & Co., bankers, sued the defendant for money lent, the balance due upon his private account. The defendant had another account with the bank as executor of A., and at the time of the bankruptcy the balance on this account was in his favour. Under the will of A. the defendant was both executor and residuary legatee, and at the time of the bankruptcy he had assets in his hands, exclusive of the balance in the bank, more than sufficient to provide for all bequests which remained unpaid, and to leave a balance due to him as residuary legatee:—Held, that he was entitled to set off the balance due to him on the executorship account, since the bank might have sued him in his own name if he had overdrawn the account due to him as executor, and the only effect of opening the account as executor was to give notice that there might be equitable rights as against the person opening the account,

though in the present case there was no suggestion of any equity against the defendant. *Bailey v. Finch*, 41 Law J. Rep. (n.s.) Q. B. 83; Law Rep. 7 Q. B. 34.

4.—The separate assignments by partners of their separate estates to trustees for the benefit of their creditors, one of which assignments is registered under the Bankruptcy Act of 1861, and the other not, do not operate as a bankruptcy of the firm, so as to bring into operation the provision of section 171 of the Bankruptcy Act of 1849 as to set-off for mutual credits. *The London, Bombay and Mediterranean Bank v. Narraway*, 42 Law J. Rep. (n.s.) Chanc. 329; Law Rep. 15 Eq. 93.

Semble—where, previously to the date of winding up of a bank, it had indorsed for value certain acceptances of a firm to which it was liable, the bank cannot subsequently restore the right of set-off by a conditional agreement under which the indorsees re-indorsed the bills to the bank for the purpose of establishing the right, the bank and such indorsees to share in the benefit to be obtained by the set-off. *Ibid.*

5.—Under the 39th section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), the right of set-off in cases of mutual credits, mutual debts and other mutual dealings extends to unliquidated damages. The word "liability," as defined by the 31st section of the same Act, includes rents. *Booth v. Hutchinson*, 42 Law J. Rep. (n.s.) Chanc. 492; Law Rep. 15 Eq. 30.

At the date of a creditors' deed, G., the bankrupt, was under a liability for unascertained damages to B. in respect of a breach of covenant, and B. was indebted to G. 40% for rent. After the date of the deed, but before complete distribution of the estate, B. brought his action, and the amount of the damages was fixed at 50%:—Held, that these were "mutual dealings" between G. and B., within the meaning of the 39th section of the Bankruptcy Act, 1869, so as to entitle B. to set off the damages recovered by him in the action, although unliquidated at the date of the deed against all rent due from him, not only at the date of the deed, but down to the "close of the bankruptcy," i.e. to the analogous period of the complete distribution of the estate under the creditors' deed. *Ibid.*

6.—R., on the 14th of December, 1869, held a bill accepted by D., which would arrive at maturity on the 22nd of January, 1870. On the 14th of December D. executed a deed in favour of his creditors, assigning his property to be administered as if he had been adjudicated bankrupt at the date thereof. On the 15th of December a bill, drawn on R. and held by D., was presented for acceptance, and was afterwards, on the 17th of January, 1870, accepted as from the 15th of December. R. was one of the trustees of the deed, and executed it on the 22nd of December; and the deed was registered under the Bankruptcy Act, 1861, on the 30th of December. The two bills were of the same amount:—Held, that the two bills could not be set off one against the other. *Selby v. Greaves* (37 Law J. Rep. (n.s.) C.P. 251) followed. *Ex parte Ryder; In re Douglas*, 40 Law

J. Rep. (N.S.) Bankr. 63; Law Rep. 6 Chanc. 413.

7.—Section 39 of the Bankruptcy Act, 1869, enacting that where there have been mutual credits, &c., between the bankrupt and any other person claiming to prove under the bankruptcy, the sum due from one party shall be set off against any sum due from the other party and the balance only shall be claimed or paid, establishes an absolute statutory rule, and the fact that one party holds a lien or security for his debt will not affect the operation of the rule. *Ex parte Barnett; In re Devezze*, 43 Law J. Rep. (N.S.) Bankr. 87; Law Rep. 9 Chanc. 293.

8.—A sum at which a policy of insurance has been valued in the winding up of an insolvent insurance company is not a debt due within sec. 39 of 32 & 33 Vict. c. 71, and cannot be set off under the bankruptcy of the policy holder against a loan to him by the insurance company on the security of the policy. *Ex parte Price; In re Lankester*, Law Rep. 10 Chanc. 648.

#### (G) TRUSTEE.

##### (a) Appointment of trustee.

1.—The adjudication of bankruptcy was obtained upon the petition of a creditor for 3,232*l.* There were only two other unsecured creditors, for 67*l.* and 42*l.* respectively, and a very few secured creditors. At the first meeting of creditors the large creditor alone appeared, and no trustee could be appointed:—Held, that it was a proper case under section 84 to carry on the bankruptcy with the aid of the registrar as trustee. *In re Finney; Ex parte English Joint Stock Bank*, 40 Law J. Rep. (N.S.) Bankr. 43; Law Rep. 6 Chanc. 79.

##### (b) Property in reputed ownership of bankrupt.

##### (1) General scope of order and disposition clauses.

2.—A railway company not authorised by its statutes to invest in stock or shares of other companies, purchased stock of another company, and had it transferred to a trustee for them. The trustee was registered as owner of the stock, and notice of the trust was given to the company, whose shares were purchased. The trustees became bankrupt:—Held (reversing the decision of the Master of the Rolls, 41 Law J. Rep. (N.S.) Chanc. 634), that the shares did not pass to his assignees. *The Great Eastern Rail. Co. v. Turner*, 42 Law J. Rep. (N.S.) Chanc. 83; Law Rep. 8 Chanc. 149.

3.—Clause 5 of section 15 of the Bankruptcy Act, 1869, by which the property of a bankrupt divisible among his creditors is to comprise "all goods and chattels, being at the commencement of the bankruptcy in the possession, &c. of the bankrupt, being a trader, by the consent and permission of the true owner," applies only where the bankrupt is in the sole possession of the goods as the sole reputed owner. Therefore, where goods were held under a lease by two partners, one of them being an infant, who both joined in com-

mitting an act of bankruptcy, but of whom the adult partner only was adjudicated a bankrupt,—Held, that the clause did not apply. *Ex parte Dorman; In re Lake*, 42 Law J. Rep. (N.S.) Bankr. 20; Law Rep. 8 Chanc. 51.

Goods in the possession of a trader were taken in execution by the sheriff: whilst the goods were in the possession of the sheriff the true owners gave him notice that they claimed the goods:—Held, that such notice was not a contract or dealing with the bankrupt within the meaning of section 94, clause 3, of the Bankruptcy Act, and was inoperative to take the goods out of the possession of the bankrupt. *Ibid.*

4.—A trader hired household furniture under a written agreement, whereby he was to pay a weekly rent for the use thereof, and was to insure the same, and the owner was empowered to repossess himself of the same upon the hirer becoming bankrupt. The hirer became bankrupt. At the time of the bankruptcy the furniture remained in his house, in his apparently uncontrolled possession. Although no evidence was adduced of the existence of a custom of hiring furniture,—Held, that the Court must take notice of such custom, and that the goods were not in the order and disposition of the bankrupt. *Ex parte Emerson; In re Hawkins*, 40 Law J. Rep. (N.S.) Bankr. 20.

5.—A trader, in July, 1869, sold all his household furniture for 192*l.* and at the same time agreed with the purchaser to hire it back for 12*s.* 6*d.* per week. Under this agreement the trader remained in possession of the furniture until November, 1873, when he filed a liquidation petition:—Held, that the debtor was the reputed owner of the furniture, and that it belonged to the trustee under the liquidation. *Lingham v. Biggs* (1 Bos. & P. 82) and *Lingard v. Messiter* (1 B. & C. 308; s. c. 1 Law J. Rep. (O.S.) K. B. 121) are still binding authorities. *Ex parte Lovering; In re Jones* (No. 2), 43 Law J. Rep. (N.S.) Bankr. 50; Law Rep. 9 Chanc. 621.

6.—Where, under the decree of the Court, one of two partners purchased a business as a going concern, and was let into possession, but did not pay the purchase-money or interest, and ultimately became bankrupt,—Held, that the Court had parted with the control of the partnership property, and that the business and property were therefore in the order and disposition of the bankrupt, with the consent of the true owner. *Graham v. McCulloch*, Law Rep. 20 Eq. 397.

##### (2) Custom of trade.

7.—By the custom of the spirit trade at Liverpool it was the practice of the purchaser, after buying goods, to leave them in the vendor's bonded warehouse, or in a neutral bonded warehouse, subject to the vendor's order in the vendor's name till the purchaser should require the goods, he paying a rent for the use of the warehouse. The custom being well known,—Held, reversing the decision of the Chief Judge in Bankruptcy, and affirming that of the County Court Judge, that goods so left were not in the

possession, order, or disposition of the vendors as reputed owners. *Ex parte Watkins; In re Coulston*, 42 Law J. Rep. (N.S.) Bankr. 50; Law Rep. 8 Chanc. 520.

8.—At the commencement of the liquidation of certain wine and spirit merchants, some whisky which they had sold was lying in the bonded warehouse of a third party to the order of the vendors. The delivery order was not sent to the purchaser till after the liquidation petition had been filed. It was shown that it is the well-known custom in the wine and spirit trade for goods after sale to remain in the bonded warehouse of the vendor, or of that of a third party to his order, till the purchaser requires them for use:—Held (reversing a decision of Bacon, C.J.), that the custom excluded reputation of ownership in the vendors, and that the purchaser was entitled to the whisky, the giving of the delivery order being immaterial. Held, also, that it was immaterial that the goods were in the warehouse of a third party, instead of being in the vendor's own warehouse, as in *Ex parte Watkins* (see last case). *Ex parte Vaux; In re Coulston*, 43 Law J. Rep. (N.S.) Bankr. 113; Law Rep. 9 Chanc. 602.

### (3) Consent of true owner.

9.—A trader debtor assigned goods to his creditor as security for the payment of his debt on a certain day, by a bill of sale which authorised the creditor to enter the house at any time, take possession of the goods, and, if refused admission, break into the house. The debtor retained possession, without interference by the creditor, till the day when payment was due. On that evening and the next morning the creditor's agents kicked at the gates and tried for hours to get in, intending to take possession. The gates were kept closed, and they were refused admission till the debtor had filed a petition in liquidation under the Bankruptcy Act, 1869, and thereby committed an act of bankruptcy. A trustee was afterwards appointed, who claimed the goods as being, at the commencement of the bankruptcy, in the possession of the debtor, as reputed owner, by the consent of the true owner:—Held, that, though the creditor had made no actual demand of possession, yet, as he had done all in his power to take possession short of a forcible entry, there was no consent of the true owner within the meaning of section 15, sub-section 5, and that the creditor was entitled to his security. *Ex parte Cohen; In re Sparke*, 40 Law J. Rep. (N.S.) Bankr. 14.

10.—Where before the commencement of a bankruptcy the owner of goods in the possession or under the control of the bankrupt demands the goods, *bonâ fide*, with the object of obtaining delivery of them, his consent to their remaining in or under the bankrupt's possession or control is determined by the demand. Accordingly where a publican purchased of spirit merchants certain hogsheads of whisky, stored in the bonded warehouse of a third party, subject to the vendor's control, and the purchaser paid to the vendor the

price of the goods and also the sum required to clear a particular hogshead of the whisky and demanded delivery thereof, although the vendor filed a petition for liquidation before any steps were taken for delivering the hogshead, the purchaser was held to be entitled to the hogshead as against the trustee in liquidation. *Ex parte Ward; In re Coulston*, 42 Law J. Rep. (N.S.) Bankr. 17; Law Rep. 8 Chanc. 144.

11.—Upon the death of an intestate his administratrix continued his business on her own account and took possession of certain furniture forming part of his estate, but which had been mortgaged by him to plaintiffs under an unregistered bill of sale. She remained in possession of the furniture for fourteen months, ostensibly as absolute owner, no steps having been taken by the plaintiffs to enforce their bill of sale. She then became bankrupt; whereupon the plaintiffs instituted a creditors' suit against her for the administration of the intestate's estate, and claimed the furniture as part of his estate:—Held, that the furniture was at the time of the bankruptcy of the administratrix in her order and disposition with the consent of the plaintiffs as true owners, and therefore passed to her creditors and not to the creditors of the intestate. *Kitchen v. Ibbetson*, 43 Law J. Rep. (N.S.) Chanc. 52; Law Rep. 17 Eq. 46.

12.—C. was the holder of a registered bill of sale of goods. The sheriff seized these goods on behalf of an execution creditor. Two days after the sheriff seized, the debtor filed his petition, and the trustee in the liquidation took possession of the goods, before possession was either demanded or taken by the holder of the bill of sale:—Held (affirming the decision of the County Court Judge), that the wrongful seizure by the sheriff did not prevent the goods from being in the order and disposition of the debtor, with the consent of the true owner, when he filed his petition, and that they therefore passed to the trustee. *Ex parte Edey; In re Cuthbertson*, 44 Law J. Rep. (N.S.) Bankr. 55; Law Rep. 19 Eq. 264.

### (4) Things in action.

13.—F. became indebted to B. in 1,690*l.*, and gave him a letter in which he promised to hold some shares in trust for him, subject, however, to a debt for which they were pledged to the Bank of Ireland. The shares were registered in the name of an officer of the bank. F. filed a liquidation petition:—Held (reversing the decision of the County Court), that the interest in the shares was a thing in action, and that the order and disposition clause did not apply. B. was therefore entitled to security, subject to the interest of the bank. *Ex parte The Union Bank of Manchester* (40 Law J. Rep. (N.S.) Bankr. 57; No. 15 *infra*) distinguished. *Ex parte Barry; In re Fox*, 43 Law J. Rep. (N.S.) Bankr. 18; Law Rep. 17 Eq. 113.

14.—The word "debts" in section 15, sub-section 5, of the Bankruptcy Act, 1869 (the reputed ownership clause), which is not to include "things in action other than debts due to the bankrupt in the course of his trade or business" (though it would

include debts payable in future), does not include debts depending on a contingency. *Ex parte Kampe; In re Fastledge*, 43 Law J. Rep. Bankr. 50; Law Rep. 9 Chanc. 383.

On discounting bills of a firm of merchants drawn on their consignees, the banker's gave (according to the usual custom) marginal notes to represent the balance of the price of the bills which was retained by them till the bills were paid, and which was to be then paid over, subject to any claim by the bankers. These notes were deposited by the merchants as security, and were so held when the merchants went into liquidation, the bills of exchange not having then been paid:—Held, that the notes did not represent "debts" within the meaning of the above clause, but that they were excepted from the operation of the clause as choses in action. *Ibid*.

15.—Shares in a gas company registered under 7 & 8 Vict. c. 110, were held not to be "things in action" within the proviso of section 15, subsection 5, of the Bankruptcy Act, 1869, and therefore where the certificates of such shares had been deposited as a security for advances, without notice to the gas company, the shares were property distributable among the creditors of the registered owner. *In re Jackson; Ex parte the Union Bank of Manchester*, 40 Law J. Rep. (N.S.) Bankr. 57; Law Rep. 12 Eq. 354.

16.—Assignees of policies gave no notice to the insurance offices till after the bankruptcy and subsequent death of the assignor whose life the policies insured. The assignee in bankruptcy had not then given notice:—Held, that the policies belonged to the estate of the bankrupt. *In re Currie*, 41 Law J. Rep. (N.S.) Bankr. 55; Law Rep. 13 Eq. 188.

17.—A policy of insurance on the life of A. was assigned to B. in 1845, and in 1858, before the passing of 30 & 31 Vict. c. 144, s. 3 (which requires notice to the insurance company of assignment of a policy made after that Act to be in writing), B.'s attorney wrote to N., who was secretary of the insurance company liable under the policy, stating that as he would have to call on him on a day then named to pay the premium on this policy, the number of which he gave, he would take that opportunity of conferring with him on the subject of a loan from the company to a local board of health, in which he was interested. He accordingly called on that day, and paid the premium, when, during his interview with N., he informed him of the policy having been assigned to B. In 1862, A., the assured, became bankrupt:—Held, upon a case on which the Court was to draw inferences of fact, and in which it was stated that N. had no recollection of having been so informed, that there was sufficient notice to the insurance office of the assignment of the policy to take the policy out of the order and disposition of the bankrupt. *Alletson v. Chichester; Wake, claimant*, 44 Law J. Rep. (N.S.) C.P. 153; Law Rep. 10 C.P. 319.

#### (5) Effect of bill of sale.

18.—A registered bill of sale does not take goods thereby assigned out of the reputed owner-

ship of the assignor if they remain in his possession, though the possession may be in accordance with the terms of the instrument. *Ashton v. Blackshaw* (39 Law J. Rep. (N.S.) Chanc. 205; Law Rep. 9 Eq. 510) remarked on. *Ex parte Homan; In re Broadbent* (Law Rep. 12 Eq. 598) explained. *Ex parte Harding; In re Fairbrother*, 42 Law J. Rep. (N.S.) Bankr. 30; Law Rep. 15 Eq. 223.

19.—P., a trader, on the 23rd of September, in consideration of H. discounting some acceptances which would fall due within twenty-one days, gave H. a bill of sale on his furniture. It was arranged that the bill of sale should not be registered before the acceptances became due and were dishonoured. They were so dishonoured on the 12th of October. On that day P. gave H. fresh acceptances in lieu of the old ones, and a second bill of sale of the furniture. The same arrangement as before was made respecting the registration of this bill of sale. On the 30th of October the last-mentioned acceptances were dishonoured, and H. instructed his broker to take possession of the furniture. On the 31st of October H. registered the bill of sale, and P. committed an act of bankruptcy. On the same day the broker attempted to obtain possession of the goods, but was refused admission to the house until next day, when he took possession:—Held, that the second bill of sale having been made upon a new arrangement and for a fresh consideration, and having been duly registered within twenty-one days, was valid, and that since the creditor before the bankruptcy had done all he could to obtain possession of the goods, the order and disposition clause did not apply. *Ex parte Harris; In re Pulling*, 42 Law J. Rep. (N.S.) Bankr. 9; Law Rep. 8 Chanc. 48.

#### (6) Apparent possession under Bills of Sale Act.

[See BILL of SALE.]

#### (c) Proceeds of sale and seizure of goods.

[See also *infra* L 9, 10.]

#### (1) Creditor holding security.

20.—When a warrant has been issued from a County Court against the goods of a debtor for a sum less than 50*l.*, or a writ from a Superior Court delivered to the sheriff for a like sum previous to an act of bankruptcy being committed by the debtor, but no seizure has been made until after the act of bankruptcy, the execution creditor is not a "creditor holding security upon the property of the bankrupt" within the meaning of the 12th section of the Bankruptcy Act, 1869, and therefore has no title to the goods of the debtor as against the trustee under the bankruptcy. *Ex parte Williams; In re Davies*, 41 Law J. Rep. (N.S.) Bankr. 38; Law Rep. 7 Chanc. 314.

#### (2) Trader; who is.

21.—The sheriff seized in execution of a writ of *fi. fa.* goods of a non-trader. Before sale the sheriff was served with notice of a petition for liquidation, and an injunction to restrain the sale:—Held, that the judgment creditor was entitled

to have his debts satisfied out of the proceeds of the goods. *Ex parte Bailey*; *In re Jecks*, 41 Law J. Rep. (n.s.) Bankr. 1; Law Rep. 13 Eq. 314.

The debt for which the goods were seized was contracted by the debtor while trading, but he had ceased to carry on trade:—Held, that he was not a trader within the meaning of section 87 of the Bankruptcy Act, 1869. *Ibid.*

(3) "*Judgment for sum exceeding 50l.*"

**22.**—The true construction of the 87th section of the Bankruptcy Act, 1869, which enacts that, "Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding 50*l.*" and sold, the proceeds of sale are to be paid to the trustee in bankruptcy, is that the proceeds of sale are to be paid "where the goods, &c., have been taken in execution for a sum exceeding 50*l.* in respect of a judgment." Therefore where goods of a trader were taken in respect of a judgment debt of less than 50*l.* but the debt and costs of execution together exceeded 50*l.* the proceeds of the sale of the goods must be paid to the trustee in bankruptcy. *Ex parte Liverpool Loan Co.*; *In re Bullen*, 42 Law J. Rep. (n.s.) Bankr. 14; Law Rep. 7 Chanc. 732.

(4) *Proceeds of sale.*

**23.**—Money paid by a trader to a sheriff's officer in part payment of the execution creditor's debt and in order to prevent the levying of execution is not within the 87th section of the Bankruptcy Act, 1869, relating to proceeds of sale of goods taken in execution, and if accepted by the creditor, may be retained by him notwithstanding the bankruptcy of the debtor within fourteen days. Decision below (43 Law J. Rep. (n.s.) Bankr. 35) overruled. *Ex parte Brooke*; *In re Hassall*, 43 Law J. Rep. (n.s.) Bankr. 49; Law Rep. 9 Chanc. 301.

**24.**—Goods of a trader debtor were seized under a *fi. fa.*, for an amount exceeding 50*l.* He paid the sheriff two sums on account of the judgment debt, and the execution creditors assented to those payments. Within fourteen days of the seizure the debtor filed a petition for liquidation, and the sheriff was restrained. No sale was made. Trustees were afterwards appointed. They claimed the sums which had been paid to and were in the hands of the sheriff:—Held (following *Ex parte Brooke*; *In re Hassall*, 43 Law J. Rep. (n.s.) Bankr. 49), that the money belonged to the execution creditors, since it could not be deemed the proceeds of a sale within the terms of section 87 of the Bankruptcy Act, 1869. *Stoek v. Holland*, 43 Law J. Rep. (n.s.) Exch. 112; Law Rep. 9 Exch. 147.

(5) *Notice of act of bankruptcy.*

**25.**—By section 95 of the Bankruptcy Act, 1869, it is provided that any execution against the goods of a bankrupt executed in good faith, by seizure and sale, before the date of the order of adjudication, shall be valid, notwithstanding any prior act of bankruptcy, if the person on whose account such execution was issued had not at the

time of the same being executed by seizure and sale, notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication. Goods in the possession of B. were seized under an execution against him on the 26th of February. On the next day, his attorneys wrote to the attorneys of the execution creditors, that B. "made an assignment of what goods he had, and it was arranged that his daughter should raise the money, but this we find was never finally arrived at." This assignment was in fact to a trustee for the benefit of his creditors. On the 1st of March a petition for adjudication was presented, and on the 10th of March B. was adjudicated a bankrupt. On the 9th the sheriff sold the goods under the execution:—Held, that the execution was protected, as the letter of the 27th of February did not amount to a notice that B. had committed an act of bankruptcy. *Evans v. Hallam*, 40 Law J. Rep. (n.s.) Q.B. 229; Law Rep. 6 Q.B. 713.

**26.**—The goods of M. having been seized and sold under an execution, notice was duly served on the sheriff under section 87 of 32 & 33 Vict. c. 71, of a petition in bankruptcy against M. This petition was, under the above statute, preferred in the G. County Court against M., as a gentleman residing within the district of that Court, and not residing or carrying on business in the London district, and alleged an act of bankruptcy which would render even a non-trader liable to be made bankrupt. No opposition was offered, and M. was adjudged bankrupt, and a trustee appointed. In an interpleader issue between the trustee and the execution creditor, to try whether the former was entitled to the proceeds of the sale as trustee of a bankrupt trader,—Held, by the majority (Bovill, C.J., Byles, J., and Grove, J.) of the Court (*dissentiente* Brett, J.), that the trustee might rely on the copy adjudication in the "Gazette" as conclusive evidence of the bankruptcy, and also give evidence that M. was a trader in London, in order to shew that the goods were the goods of a bankrupt trader within the above section of the statute. *Revell v. Blake*, 41 Law J. Rep. (n.s.) C.P. 129; Law Rep. 7 C.P. 300. [See next case.]

**27.**—Where a petition in bankruptcy is preferred under 32 & 33 Vict. c. 71 in a County Court against a person as residing within its district, and he is adjudicated bankrupt thereon, such adjudication not being rescinded or appealed against, is final and conclusive, though it turns out that he traded within the London district; and the trustee in bankruptcy is entitled to the proceeds of an execution on such trader's goods which are retained in the sheriff's hands under section 87, due notice of the petition having been given under that section, as it is not necessary that the adjudication should be against such person as a trader, and it is sufficient if there be an adjudication against him and he be in fact a trader. *Revell v. Blake* (Ex. Ch.), 42 Law J. Rep. (n.s.) C.P. 165; Law Rep. 8 C.P. 533.

**28.**—In 32 & 33 Vict. c. 71, s. 15, sub-sec. 3, "act of bankruptcy" means an act which has been

committed prior to the time of seizure. The onus is on the execution creditor to prove that he had no notice of any prior act of bankruptcy. Notice to the sheriff's officer in possession is not notice to the execution creditor. *Ex parte Schulte*; *In re Matanlić*, Law Rep. 9 Chanc. 409.

**29.**—A creditor obtained two judgments against a trader. Under one judgment, which was for over 50*l.*, the goods of the debtor were seized by the sheriff on the 5th of September, and sold on the 17th. Under the second judgment other goods of the debtor were seized on the 23rd of September, and sold on the 29th. The proceeds of the goods seized under the first execution were paid to the creditor on the 13th of October; those seized under the second on the 15th. On the 21st of October a bankruptcy petition was presented against the debtor, the act of bankruptcy alleged being the first execution. On the 5th of November he was adjudicated bankrupt. The trustee claimed the amount paid under the second execution:—Held, that when the second execution was issued, the creditor must have had notice of the act of bankruptcy by the seizure and sale under the first execution, and that he was therefore not entitled to hold the proceeds of the goods seized under the second execution against the other creditors, but must refund them to the trustee. *Ex parte Dave*; *In re Husband*, 44 Law J. Rep. (n.s.) Bankr. 62; Law Rep. 19 Eq. 438.

**30.**—The debtor was a farmer, but had at one time sold a medicine invented by himself for the cure of the cattle disease. The sheriff levied execution on his goods, and not knowing that he was a trader, paid the amount levied to the execution creditor. After payment, but before fourteen days had elapsed, the debtor filed his petition for liquidation, and a notice was served on the sheriff; but the notice was entitled in an action, and did not state that the debtor was a trader. The County Court Judge ordered the sheriff to pay the amount levied to the trustee in liquidation:—Held (discharging the order of the County Court Judge), that it would be unreasonable to cast upon the sheriff the duty of ascertaining whether a debtor had been engaged in any transactions amounting to trading, and that it was the duty of the persons prosecuting the petition to give the sheriff a proper notice. *Ex parte Spooner*; *In re Smith*, 44 Law J. Rep. (n.s.) Bankr. 24; Law Rep. 10 Chanc. 7: affirming the decision of the Chief Judge, 44 Law J. Rep. (n.s.) Bankr. 7.

#### (6) Refunding proceeds.

**31.**—Where the sheriff has paid to the execution creditor the proceeds of an execution for a sum of more than 50*l.* against the goods of a trader, after retaining the same for fourteen days, according to the provisions of section 87 of the Bankruptcy Act, 1869, the creditor is entitled to retain the amount, notwithstanding the bankruptcy of the debtor within a year from the seizure and sale. *Ex parte Villars*; *In re Rogers*, 43 Law J. Rep. (n.s.) Bankr. 76; Law Rep. 9 Chanc. 432.

#### (7) Execution under 50*l.*

**32.**—The sheriff seized under a writ for a judgment debt exceeding 50*l.* Subsequently he seized under another writ for a judgment debt under 50*l.* No sale was made under either. The debtor presented his petition for liquidation, and the trustee applied for an injunction to restrain the judgment creditors from proceeding to execute their writs:—Held, that no injunction could be granted against the creditor whose debt was under 50*l.* *Ex parte Lovering*; *In re Peacock*, 43 Law J. Rep. (n.s.) Bankr. 58; Law Rep. 17 Eq. 452.

**33.**—Section 184 of the repealed Bankrupt Law Consolidation Act, 1849, is not re-enacted directly or indirectly in the Bankruptcy Act, 1869. Therefore under the latter Act, when the sheriff has, under an execution for less than 50*l.*, seized a debtor's goods before any act of bankruptcy, the judgment creditor's claim to be paid out of the goods is not defeated by the debtor's subsequent bankruptcy, though the sheriff do not sell till after the adjudication. Such an execution does not require the protection of section 95, sub sec. 3, which applies only where the act of bankruptcy has been committed prior to the seizure. *Slater v. Pinder*, 40 Law J. Rep. (n.s.) Exch. 146; Law Rep. 6 Exch. 228.

Semble (per Kelly, C.B. and Martin, B.)—A judgment creditor, under whose *f. fa.* the sheriff has seized, but not sold, a debtor's goods, is a "creditor holding a security" within the meaning of section 12. *Ibid.*

Affirmed on appeal by the Exchequer Chamber, 41 Law J. Rep. (n.s.) Exch. 66; Law Rep. 7 Exch. 95.

#### (8) After-acquired property of bankrupt allowed to trade.

[And see *infra* ORDER OF DISCHARGE.]

**34.**—On an interpleader issue a Common Law Court can take notice of equitable rights, and determine which party is to be preferred to the other according to such rights. *Engelbach v. Nixon*, 44 Law J. Rep. (n.s.) C. P. 396; Law Rep. 10 C. P. 645.

A bankrupt who had not obtained his discharge, being allowed by his trustee in bankruptcy to trade, for the purpose of enabling him to pay his creditors, incurred a debt in the course of such trading with a new creditor, who afterwards obtained a judgment against the bankrupt for such debt, and seized in execution goods of the bankrupt acquired since his bankruptcy, but which had been taken possession of by the trustee a few days before such seizure:—Held, on an interpleader issue, that as in equity the right of the new creditor would be preferred to that of the trustee, the latter was not entitled to the goods so seized as against such new creditor. *Ibid.*

#### (d) Avoidance of voluntary settlement.

**35.**—A covenant in a trader's marriage settlement to pay a sum of money to the trustee at a future time is not a covenant for the future settle-



ment of money or property wherein the covenantor "had not, at the date of the marriage, any estate or interest," within the meaning of section 91 of the Bankruptcy Act, 1869. *Ex parte Bishop*; *In re Tonnies*, 42 Law J. Rep. (n.s.) Bankr. 107; Law Rep. 8 Chanc. 718.

**36.**—A voluntary settlement was executed, in 1865, by a trader who, in 1874, filed his petition for liquidation:—Held, that the settlement was governed by the 91st section of the Bankruptcy Act, 1869, and that, as the trader was unable to shew that he was solvent at the time it was executed, it was void as against the trustee. *Ex parte Dawson*; *In re Dawson*, 44 Law J. Rep. (n.s.) Bankr. 49; Law Rep. 19 Eq. 433.

**37.**—C., by a settlement made before his marriage, assigned a policy and some furniture to trustees for the benefit of his wife and the children of the marriage, and also covenanted that all other real or personal estate of which he should become seized, possessed or entitled during the coverture, should be transferred to the trustees upon trusts thereby declared. No trusts of the after-acquired property were declared in the settlement. After the marriage, and when C. was still solvent, he purchased some shares; the shares were registered in his name, and he held the certificates. Subsequently he filed a petition for liquidation, and the trustee in the liquidation claimed these shares as against the trustees of the settlement:—Held (reversing the decision of the County Court Judge), that C. could not be allowed in this way to withdraw the whole of his property from his creditors, and that the shares must be handed to the trustee in the liquidation. *Ex parte Bolland*; *In re Clint*, 43 Law J. Rep. (n.s.) Bankr. 16; Law Rep. 17 Eq. 115.

*Hardey v. Green* (12 Beav. 182; 18 Law J. Rep. (n.s.) Chanc. 480), and *Lewis v. Madocks* (8 Ves. 150 and 17 Ves. 48), considered. *Ibid.*

**38.**—A voluntary settlement executed by a man on the eve of going into trade, and whether at the time actually contemplating trade or not, is void as against those who may become his creditors in the course of his trade. *Mackay v. Douglas*, 41 Law J. Rep. (n.s.) Chanc. 539; Law Rep. 13 Eq. 106.

(e) *Avoidance of fraudulent preference.* [See *supra* B (a).]

(f) *Disclaimer of leaseholds.*

[See r. 28 of General Rules, 7th of July, 1871, r. 28, 40 Law J. Rep. (n.s.) Bankr. 2.]

**39.**—The Court of Bankruptcy will exercise its discretion in allowing a trustee in bankruptcy to disclaim leasehold interests. *In re Wilson*, Law Rep. 13 Eq. 186.

**40.**—Where an extension of the twenty-eight days after request, within which a trustee must (under section 24 of the Bankruptcy Act, 1869), declare his option of disclaiming a lease, is required in order to obtain the sanction of the Court under the Rules of 1871 (rule 28), the practice of the Court is to grant the extension if the application is made within the twenty-eight days, but not

otherwise. *Ex parte Lovering*; *In re Jones*, 43 Law J. Rep. (n.s.) Bankr. 94; Law Rep. 9 Chanc. 586.

The Court can extend the time afterwards. *Semble*; but it would only do so under very special circumstances. *Ibid.*

Circumstances under which such an order was refused. *Ibid.*

*Disclaimer of lease: liability of lessee.* [See LANDLORD AND TENANT, 28.]

(g) *Other property devolving on trustee.*

**41.**—In an action against attorneys for breach of duty in failing to procure the best price for the equity of redemption of the plaintiff's premises which had been entrusted to them for sale, the declaration alleged as special damage that the defendants "well knew that if the plaintiff did not obtain a reasonable price, the bankruptcy of the plaintiff would be the necessary and inevitable consequence," and further, that in consequence of the breach of duty alleged, the plaintiff was adjudicated bankrupt. The defendants pleaded the bankruptcy of the plaintiff:—Held, on demurrer, by Blackburn, J., Mellor, J., and Lush, J., on the authority of *Hodgson v. Sidney* (35 Law J. Rep. (n.s.) Exch. 182), that the plea was good, that the cause of action passed to the assignees in bankruptcy, and that the defendant's knowledge that the plaintiff's bankruptcy would follow from their breach of duty made no difference; Hannen, J., doubting whether *Hodgson v. Sidney* was not distinguishable on that ground. *Morgan v. Steble*, 41 Law J. Rep. (n.s.) Q.B. 260; Law Rep. 7 Q.B. 611.

**42.**—The defendants in an action upon a bill of exchange paid a sum of money into Court to abide the event. The matters in dispute were subsequently referred to arbitration; and before any award had been made by the arbitrator, the defendants went into liquidation of their affairs by arrangement. The trustee in the liquidation claimed the money in Court:—Held, that the plaintiff in the action was entitled to be paid thereout the amount of his debt and costs, and there must be an inquiry to ascertain this amount. *Ex parte Tate*; *In re Keyworth*, 43 Law J. Rep. (n.s.) Bankr. 102; Law Rep. 9 Chanc. 379, *nom.* *Ex parte Banner*.

**43.**—A trader bought goods at an auction after he had committed an act of bankruptcy, and he obtained possession of the goods without paying for them, and before the act of bankruptcy was known to the vendor. Two days after he had received the goods he was adjudicated bankrupt. The vendor applied to the trustee in the bankruptcy for the return of the goods, on the ground that the purchase by the bankrupt was fraudulent:—Held (reversing the decision of the County Court Judge), that no case of fraud had been proved, and that the goods passed to the trustee. *Ex parte Rhodes*; *In re Shackleton*, 44 Law J. Rep. (n.s.) Bankr. 52; affirmed on appeal *sub nom. Ex parte Whitaker*; *In re Shackleton*, 44 Law J. Rep. (n.s.) Bankr. 91; Law Rep. 10 Chanc. 446.

*Fixtures: right of mortgagee as against trustee.* [See FIXTURES, 3, 4, 6.]

*Bankrupt's property: permanent building society: advanced member: sale of mortgaged property: application of proceeds: future instalments.* [See FRIENDLY SOCIETY, 3.]

(h) *Joint and separate estate: property devolving on trustees of joint estate.*

44.—On the appointment of a trustee of the joint estate of two debtors, the separate estate of each also vests by law in such trustee, and resolutions of the separate creditors appointing a trustee and assigning the separate estate to him are invalid. *Ex parte Philips; In re Moore*, 44 Law J. Rep. (N.S.) Bankr. 40; Law Rep. 19 Eq. 257.

The trustee of the joint estate has a right to be heard on all matters connected with the separate estate. *Ibid.*

The proceedings having been transferred to the London Court, no further proceedings, either as to the joint or separate estate, ought to have been taken in the local Court. *Ibid.*

#### (i) Powers and liabilities.

45.—Under section 15, sub-section 3, of the Bankruptcy Act, 1869, the trustee of a liquidation may sell to the bankrupt, and property so sold will not revert in the trustee, but the bankrupt will be entitled to sue in his own name under section 111. *Kitson v. Hardwick*, Law Rep. 7 C.P. 473.

46.—A trustee in bankruptcy cannot be compelled to allow, and ought not to allow the use of his name to impeach a dealing with property as a fraudulent preference, for the benefit not of the creditors generally, but of a particular creditor holding a security on the property dealt with. *Ex parte Cooper; In re Zucco*, 44 Law J. Rep. (N.S.) Bankr. 121; Law Rep. 10 Chanc. 510.

47.—The trustee of an assignment for the benefit of creditors under the Bankruptcy Act, 1861, acting on a view of the law as to the time of proof which subsequent decisions shewed to be erroneous, allowed a creditor to prove for a larger amount than he was entitled to prove for:—Held, that the trustee was not liable to make good to the estate the overpaid dividend. Such a trustee occupies a quasi-judicial position for the purpose of deciding on claims against the estate, and is not responsible for an error made in the *bonâ fide* exercise of his judgment. *Ex parte Ogle, and ex parte Smith; In re Pilling*, 42 Law J. Rep. (N.S.) Bankr. 99; Law Rep. 8 Chanc. 711.

The debtor having in his possession certain wine belonging to the estate, the trustee gave instructions for proceedings to recover it, but did not insist on their being carried out, and consequently the wine was consumed and lost to the estate:—Held, that the trustee was liable to make good its value, with interest at five per cent. *Ibid.*

The proceedings having been transferred to the London Court, no further proceedings, either as to the joint or separate estate, ought to have been taken in the local Court. *Ibid.*

48.—On the appointment of a trustee of the joint estate of two debtors, the separate estate of

each also vests by law in such trustee, and resolutions of the separate creditors appointing a trustee and assigning the separate estate to him are invalid. *Ex parte Philips; In re Moore*, 44 Law J. Rep. (N.S.) Bankr. 40; Law Rep. 19 Eq. 257.

The trustee of the joint estate has a right to be heard on all matters connected with the separate estate. *Ibid.*

*Powers of assignee under Bankrupt Consolidation Act as to sale of book debts.*  
[See *supra* A 5.]

#### (H) PUBLIC EXAMINATION OF BANKRUPT.

The filing of an affidavit by the bankrupt as to the truth of his statement of affairs in the terms of form No. 45 in the Schedule of Forms to the General Rules is a condition precedent to the order being made for the bankrupt to pass his public examination. Accordingly, a conditional order that a bankrupt, who had given an insufficient statement of his affairs, should pass his public examination upon amending the same was overruled. *Ex parte Smith; In re Angerstein*, 41 Law J. Rep. (N.S.) Bankr. 44; Law Rep. 7 Chanc. 662.

#### (I) ORDER OF DISCHARGE.

##### (a) Effect of, in general.

1.—A creditor under an insolvency is not at liberty to take after-acquired property of the insolvent as security for his scheduled debt. After the discharge of the insolvent the old debt cannot be revived. *Peakman v. Harrison*, Law Rep. 14 Eq. 484.

2.—Sections 49 and 50 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), which relate to the effect of an order of discharge, apply to discharges under proceedings in liquidation under sections 125 and 126, and the rules and forms relative to them; and consequently an order of discharge in all these cases releases only the debtor in whose favour it is given, and not his solvent co-debtor. *Megrath v. Gray and Gray v. Megrath*, 43 Law J. Rep. (N.S.) C.P. 63; Law Rep. 9 C.P. 216.

M. and H., who were partners, were jointly liable to G. on a bill of exchange accepted by them for goods sold to them by G. They dissolved partnership, and after their acceptance had been dishonoured H. filed his petition for liquidation by arrangement under the Bankruptcy Act, 1869, and a composition was accepted by his creditors, and duly paid; B. to whom G. had endorsed the bill, proving under the liquidation, and receiving the composition. G. himself afterwards filed his petition for liquidation by arrangement under the Bankruptcy Act, 1869, and a composition was agreed to and paid, the trustee being authorised by the creditors to transfer to G. the debts which were set forth in a schedule annexed, but which did not include the liability of M. in respect of the acceptances given by him and H.; and the reason for such omission being that B. was at that time the holder of the bill, and the debt was considered by the trustee of G.'s estate of no value, and not from any intention of reserving to the trustee any right

in respect of it. The bill was afterwards given by B. to G., and in an action against G. by M. for a debt due to him separately, G. set off what was due to him on the said acceptance of M. and H. in an equitable plea of set-off:—Held, that the discharge of H. under the liquidation by composition under the Bankruptcy Act, 1869, did not release M., but left him liable to G., who, whether the right to sue for it was legally in him or in his trustee in trust for him, might maintain such equitable plea of set-off. *Ibid.*

Held also, that in order to establish the trust for G., evidence was admissible as to the reasons why M.'s liability in respect of the bill had not been inserted in the schedule to the resolution of G.'s creditors to accept the composition, and also that such resolution had been founded on a proposal by G. to pay such composition in consideration that the trustee should be authorised to transfer to G. any debts vested in him which had not been realised. *Ibid.*

3.—The trustee appointed under a liquidation by arrangement is bound to realise and distribute *pari passu* among the joint creditors the bankrupt's property in his joint estate, and therefore a joint adjudication against two debtors, one of whom has, since the debt was contracted, obtained an order of discharge under his separate liquidation, cannot as against the latter be supported. An order of discharge under the Bankruptcy Act, 1869, has the same effect as one granted under the former Bankruptcy Acts. *Ex parte Hammond*, 42 Law J. Rep. (N.S.) Bankr. 97; Law Rep. 16 Eq. 614.

[And see next case.]

(b) *Benevolent motives towards debtor.*

4.—The test whether liquidation proceedings are still pending or not is whether the debtor's future-acquired property remains liable to the creditors under the liquidation or not. *Ex parte Russell*; *In re Russell*, 44 Law J. Rep. (N.S.) Bankr. 42; Law Rep. 10 Chanc. 255.

Resolutions provided that if default should be made in payment of any instalments of 5,000*l.*, the whole unpaid balance should at once become due, and that the trustee, on being required by any creditor, should institute and prosecute proceedings in Bankruptcy against the debtor in respect of the unpaid balance. A committee of inspection was also appointed. The debtor went into business again and contracted fresh debts. He paid two of the annual instalments of the 5,000*l.*, but failed to pay any more of it. He afterwards filed a second liquidation petition. His statement of affairs shewed that he was largely indebted, and that his assets were practically worthless. He was, however, entitled to 200*l.* a year, half-pay as an officer in the army. The creditors resolved on a liquidation by arrangement; that, until full payment of all the debts provable under the liquidation, the debtor should pay to the trustee the surplus of his income above 600*l.* a year; that as soon as the debtor should have executed a deed to give effect to the resolutions, he should be discharged from all debts provable under the liquidation, but

the discharge was to be void if the debtor should fail to perform any of the stipulations in the deed, and the trustee should certify that in his opinion such failure had been wilful. The trustee under the first liquidation proved in the second liquidation for the unpaid 3,000*l.*, and voted in favour of these resolutions, which would not have been carried without his vote. He had not obtained the sanction of the committee of inspection under the first liquidation for so voting, but no creditor had required him to take proceedings in bankruptcy against the debtor:—Held, that the proceedings under the first liquidation, being no longer pending, could not affect the validity of the resolutions under the second petition. Also that the first trustee was, under the circumstances, at liberty to prove and vote without the sanction of the committee of inspection. But that, under the circumstances, the majority of the creditors could not have passed the resolutions under the second petition *bonâ fide* for the benefit of the creditors, but that they must have voted as they did solely by reason of motives of kindness to the debtor. And that resolutions thus passed could not bind the dissentient minority of the creditors, and were invalid, and could not be registered. *Ibid.*

5.—All the creditors of H., except one, agreed to accept a composition, and, having the necessary majority, gave the debtor his discharge. The dissentient creditor applied to the County Court to have the order of discharge rescinded, on the ground that it had been granted without proper care and from motives of benevolence. From the evidence it appeared that the creditors did not wish to see the debtor ruined, and also that the main part of the debtor's property consisted of an equity of redemption which might have taken time to realise. No case of fraud having been proved the County Court Judge refused the application, and this decision was affirmed both by the Chief Judge (42 Law J. Rep. (N.S.) Bankr. 109), and on appeal by the full Court. *Ex parte Linsley*; *In re Harper*, 43 Law J. Rep. (N.S.) Bankr. 84; Law Rep. 9 Chanc. 290.

(c) *Liability incurred by fraud.*

6.—Where an attorney brought an action, knowing he had no authority from the plaintiff, and on judgment for the defendant a rule was granted ordering him, the attorney, to pay the defendant's costs, and then such attorney, under 32 & 33 Vict. c. 71, entered into a composition with his creditors:—Held, that he was not discharged from such payment, as the case was one of fraud within 32 & 33 Vict. c. 71. s. 49. *Jenkins v. Feraaday*, 41 Law J. Rep. (N.S.) C. P. 152; Law Rep. 7 C. P. 358.

(d) *Debtor allowed to resume business.*

7.—The creditors of a trader resolved on a liquidation, and also that, on the debtor's entering into a covenant to pay the trustee 5,000*l.* by ten half-yearly instalments, the trustee should assign to the debtor his household furniture, and allow him to carry on his business, accounting to the

trustee for the then stock in hand, and that within a month after the execution of the covenant by the debtor and the registration of the resolution, the discharge of the debtor should be granted to him. The deed of covenant was executed and the debtor was thereupon let into possession of the stock-in-trade and business, which he carried on for more than two years. His discharge was also granted to him. Ultimately the creditors resolved that the business and stock should be sold, and an offer to buy them for 3,000*l.* was accepted. The debtor joined in the sale. The 3,000*l.* having been paid to the trustee, and the debtor having died:—Held, that a creditor whose debt was contracted after the debtor had resumed his business was not entitled to any lien upon the 3,000*l.* or any part thereof. *Ex parte Robinson*; *In re Magnus*, 42 Law J. Rep. (N.S.) Bankr. 85; Law Rep. 8 Chanc. 962, *nom. Ex parte Robertson*.

8.—Creditors agreed to dispose of the whole of a debtor's estate to a purchaser in consideration of a sum agreed to be paid by the purchaser by instalments, the debtor himself agreeing to pay a small part of such sum out of his future earnings. The debtor's business was then continued by the purchaser and himself. All the instalments were duly paid, but the creditors having become hostile to the debtor, refused to grant him his order of discharge, and attempted to possess themselves of the profits he had acquired in his business since the agreement:—Held (affirming the decision of the County Court Judge), that it would be inequitable to allow the creditors to claim the profits of the business merely because the order of discharge had not been formally granted. *Ex parte Tinker*; *In re France*, 43 Law J. Rep. (N.S.) Bankr. n, 147; Law Rep. 9 Chanc. 716.

*Bill given for debt discharged by bankruptcy: action on, not maintainable.* [See BILL OF EXCHANGE, 5.]

#### (K) PERSONS HAVING PRIVILEGE OF PARLIAMENT.

1.—The provisions of the Bankruptcy Act, 1869 (secs. 121 and 122), relating to the vacating of his seat in Parliament by a member of the House of Commons who has been adjudged bankrupt do not apply to the case of a member whose affairs are in liquidation by arrangement. *Ex parte Pooley*; *In re Russell*, 41 Law J. Rep. (N.S.) Bankr. 67; Law Rep. 7 Chanc. 519.

The duty cast upon the Court of Bankruptcy by the 122nd section of certifying a member's bankruptcy to the Speaker, is an *ex officio* duty as between the Court and the House of Commons, and application for such a certificate should not be made by a creditor. *Ibid*.

2.—A peer of Parliament, whether trader or non-trader, is capable of being adjudicated a bankrupt under the Act of 1861, and no privilege exists exempting a member of Parliament from liability to be made a bankrupt. The privilege which such persons have at common law of freedom from arrest is not affected by the Bankruptcy Acts. *Duke of Newcastle v. Morris* (H.L.), 40 Law J. Rep. (N.S.) Bankr. 4; Law Rep. 4 E. & I. App. 661.

#### (L) LIQUIDATION BY ARRANGEMENT.

##### (a) Proof.

1.—A creditor sought to prove in liquidation proceedings, in order to vote against a composition, by an affidavit that an amount was due to him on a judgment, and also 200*l.* which he "estimated" as the amount of his costs. His vote being objected to as to the 200*l.*:—Held, that the objection was valid, and that he should have stated that so much "at least" was due. *Ex parte Ruffle*; *In re Dummelow*, 42 Law J. Rep. (N.S.) Bankr. 82; Law Rep. 8 Chanc. 997.

##### (b) First meeting: statement of affairs.

2.—In a petition for liquidation it is the duty of the debtor in his statement of affairs to distinguish between his joint and separate assets and liabilities. In this case the debtor had not so distinguished his assets and debts, and the registrar in consequence refused to register a special resolution for liquidation by arrangement:—Held, that the decision of the registrar was correct. *Ex parte Cockayne*; *In re Cockayne*, 42 Law J. Rep. (N.S.) Bankr. 71; Law Rep. 16 Eq. 218.

3.—A liquidating debtor attending at the first meeting of his creditors to answer enquiries, under s. 125, sub-sec. 4, of the Bankruptcy Act, 1869, is entitled to the advice of his solicitor as to whether a question is material. *Ex parte Mackenzie*; *In re Helliwell*, 44 Law J. Rep. (N.S.) Bankr. 14; Law Rep. 10 Chanc. 88.

A refusal to answer proper questions would be a ground of objection to the registration of the resolutions. *Ibid*.

Where a paper was put into the debtor's hand, and he was asked the question whether it was written by his authority; but the paper was not read to the meeting, nor was his solicitor allowed to see it, and, by his solicitor's advice, he refused to answer the question:—Held, that this was no ground for refusing the registration of the resolutions, though the question put was really material. *Per James, L.J.*—Any questions should be put so that the meeting generally may see their materiality. *Ibid*.

##### (c) Resolution: registration: signature.

4.—At a meeting of creditors, called in pursuance of a petition for liquidation by arrangement, certain resolutions were proposed. They were opposed, and on a show of hands several creditors, including a principal creditor, voted against the resolution. This creditor afterwards signed the resolutions, and a requisite majority of assents was thus obtained, which would not have been the case if this creditor had been dissentient:—Held, that the resolutions ought to be registered, the evidence afforded by the signature being conclusive, whatever might have been the conduct of the voters at a show of hands. *Ex parte Pooley*; *In re Russell*, 40 Law J. Rep. (N.S.) Bankr. 41; Law Rep. 5 Chanc. 722.

Resolutions to the effect that the affairs of the debtor should be liquidated by arrangement and not by bankruptcy, that if the bankrupt should

within a month pay 4,000*l.*, and give a bond to the trustee under the liquidation for a further sum of 5,000*l.*, he should have a discharge, and that the 4,000*l.* was to be deemed a satisfaction of the creditors' rights to apply to the Court in reference to the pay or half-pay of the debtor:—Held, proper resolutions under section 125 of the Act. *Ibid.*

5.—S. entered into a contract to purchase certain premises. He was unable to complete the contract, and, being threatened with a suit for specific performance, filed a petition for liquidation, stating his debts at 640*l.* and his assets at 2*l.* 8*s.* in cash, and 30*l.* in furniture. Resolutions for liquidation were duly passed, but the registrar refused to register them:—Held, that the proceedings were a mere abuse of the machinery of the Bankruptcy Court, and that the appeal must be dismissed with costs. *Ex parte Staff; In re Staff*, 44 Law J. Rep. (n.s.) Bankr. 137; Law Rep. 20 Eq. 775.

6.—In liquidation by arrangement a resolution to adjourn a meeting is an "ordinary resolution," and therefore must be decided by a majority in value of the creditors present personally or by proxy, at the meeting and voting on such resolution. All creditors present, personally or by proxy, are to be considered as voting on every resolution so long as their proofs are in the hands of the chairman. The assent of each such creditor must be evidenced by his signing the resolution when reduced to writing, and, if he does not sign it, he must be taken to have voted in the negative. A creditor who does not wish to vote on any resolution must, before the resolution is put, withdraw his proof. *Ex parte Orde; In re Horsley*, 40 Law J. Rep. (n.s.) Bankr. 60; Law Rep. 6 Chanc. 881.

7.—Rule 275 of the Bankruptcy Rules of 1870 provides that creditors may subscribe a resolution for a liquidation or composition after the meeting, "but prior to the filing or registration of the resolution":—Held, reversing the decision of the Chief Judge, that the registrar could not allow signature after the filing, but before registration. *Ex parte Thorne; In re Butlin*, 42 Law J. Rep. (n.s.) Bankr. 60; Law Rep. 8 Chanc. 722.

8.—An extraordinary resolution presented to the registrar under the 126th section of the Bankruptcy Act, 1869, must be properly stamped and also verified by affidavit before the registrar can receive the same for the purpose of registering or filing it. *Ex parte Davis; In re Davis*, 41 Law J. Rep. (n.s.) Bankr. 69; Law Rep. 7 Chanc. 526.

Under the 288th section of the General Rules in Bankruptcy, 1870, the direction that the proceeding shall be transferred to another Court than that in which they were originated, must be treated as part of the special or extraordinary resolution in which it is by that rule to be included, so that such direction will have no effect until the resolution has been duly registered. *Ibid.*

#### (d) Seizure and sale.

9.—Where the goods of a trader have been seized under an execution, and the sheriff is prevented from selling by an injunction granted in liquidation proceedings which afterwards prove

abortive, and the debtor is afterwards adjudicated a bankrupt upon a petition presented within fourteen days after the failure of the liquidation proceedings, the creditor has no right to enforce his execution. *Ex parte Harper; In re Bremner*, 44 Law J. Rep. (n.s.) Bankr. 57; Law Rep. 10 Chanc. 379.

10.—The sheriff seized in execution under a judgment for more than 50*l.* goods of a trader. Before sale, and whilst the sheriff was in possession, the debtor presented a petition for liquidation by arrangement, and the trustee appointed under the liquidation obtained an order restraining further proceedings in the execution:—Held, that the trustee was entitled to the goods as part of the debtor's estate, and that the sheriff must give up possession to him. *Ex parte Rayner; In re Johnson*, 41 Law J. Rep. (n.s.) Bankr. 26; Law Rep. 7 Chanc. 325.

#### (e) Reservation of rights against sureties.

[See PRINCIPAL AND SURETY, 12, 13, 18.]

#### (f) Title of trustee: relation back.

11.—When a debtor's estate is under liquidation by arrangement, the title of the trustee in the liquidation relates back to a previous act of bankruptcy. *Ex parte Eyles; In re Edwards*, 42 Law J. Rep. (n.s.) Bankr. 55; Law Rep. 15 Eq. 99.

On the 16th of January a debtor committed an act of bankruptcy, by giving a bill of sale over all his property, in consideration of a past debt. On the 8th of February a creditor issued execution. On the 10th of February the debtor filed a petition for liquidation, under which a trustee was afterwards appointed:—Held, that the title of the trustee related back to the previous act of bankruptcy; and that the trustee, and not the execution creditor, was entitled to the goods seized.

12.—The filing of a petition for arrangement is an act of bankruptcy, and the title of the trustee in the liquidation relates back to such filing. So held by the full Court of Appeal, affirming the order of Bacon, C.J. (40 Law J. Rep. (n.s.) Bankr. 33; Law Rep. 11 Eq. 604). *Ex parte Duignan; In re Bissell*, 40 Law J. Rep. (n.s.) Bankr. 68; Law Rep. 6 Chanc. 605.

#### (g) Prescription of bank by creditors.

13.—Creditors at a first meeting resolved on liquidation and appointed O. trustee. At the same meeting O. stated to the creditors that he should open an account in his own name, as trustee of the debtor, at the P. Bank, of which he was manager, and should pay into that account all moneys received by him from the debtor's estate. The creditors assented to this arrangement, but no formal resolution was passed confirming it:—Held (reversing the decision of the County Court Judge), that the estate being under liquidation, the creditors had sufficiently prescribed the bank into which the money was to be paid, and that the trustee could not be charged with interest for not having paid it into the Bank of England. *Ex parte*

*Old*; *In re Bright*, 43 Law J. Rep. (N.S.) Bankr. 47; Law Rep. 17 Eq. 457.

Held, also, that it is the duty of an inspector to see that accounts are filed by the trustee every three months. *Ibid*.

(h) *Close of liquidation.*

14.—Under a liquidation by arrangement creditors resolved that the debtor should be discharged from a certain date. The certificate of discharge was not granted by the registrar till after that date. *Semble*—The certificate related back to that date. *In re Bennett's Trusts*, 44 Law J. Rep. (N.S.) Chanc. 244; Law Rep. 19 Eq. 245: reversed, on appeal, Law Rep. 10 Chanc. 490.

Property which came to the debtor after his discharge, but before the close of the liquidation, vested in the trustee. *Ibid*.

15.—M. filed his petition for liquidation and a receiver was appointed. At the first meeting of creditors the principal debtor, T., was not allowed to vote, because M. stated that T. was indebted to him in a larger sum than he owed to T. The registrar refused to register the resolution passed at this meeting, because T. had not been allowed to vote. M. then brought an action against T. for the amount of his debt. T. applied to the County Court to restrain the action, but the application was refused because the liquidation proceedings were at an end. T. appealed:—Held, that, as the receiver had not been discharged, the proceedings were still pending. Held, also, that the injunction to restrain the action would be granted, but only on T.'s undertaking to revive the proceedings. *Ex parte Taylor*; *In re Morrissey*, 43 Law J. Rep. (N.S.) Bankr. 103; Law Rep. 18 Eq. 256.

16.—Execution for a debt above 50*l.* was levied on the goods of a trader on the 17th of November. On the 18th of November the debtor filed a liquidation petition. On the 22nd of November the sheriff sold, and the same day notice of the petition was served on him. On the 16th of December the creditors met, and separated without passing any resolutions. On the 17th of December the sheriff paid the proceeds of the sale to the execution creditor. On the 19th of December a petition in bankruptcy was presented against the debtor, stating the filing of the liquidation petition and the proceedings thereunder, and on the 10th of January an adjudication was made:—Held, that the proceedings under the liquidation petition came to an end on the 16th of December, and that, consequently, the execution creditor was entitled to the proceeds of the sale. *Ex parte James*; *In re Condon*, 43 Law J. Rep. (N.S.) Bankr. 107; Law Rep. 9 Chanc. 609.

On the 23rd of February the execution creditor, upon the authority of a decision of the Court of Appeal, which was afterwards reversed, paid the proceeds of the sale to the trustee under the bankruptcy:—Held that though this was a voluntary payment made under a mistake of law, yet the trustee, being an officer of the Court, was bound to repay the money to the person properly entitled to it. *Ibid*.

An application for an adjudication under rule 267 ought to be made by petition. *Ibid*.

17.—The test whether liquidation proceedings are still pending or not is this: whether the debtor's future-acquired property remains liable to the creditors under the liquidation or not. *Ex parte Sir W. Russell*; *In re Sir W. Russell*, 44 Law J. Rep. (N.S.) Bankr. 42; Law Rep. 10 Chanc. 255.

The creditors of a liquidating debtor at their first meeting resolved to grant him his discharge, upon payment being made on his behalf to the trustee of 4,000*l.* within a month after registration of the resolutions, and upon his executing within the same period a covenant to pay the trustee 5,000*l.* in five equal annual instalments. The 4,000*l.* was paid, and the covenant executed within the time fixed:—Held, that this arrangement amounted to a purchase by the debtor of his after-acquired property, and that the liquidation proceedings, though not formally closed, were still no longer pending so as to give the creditors any right to the debtor's after-acquired property. *Ibid*.

The resolutions further provided that if default should be made in payment of any of the instalments of the 5,000*l.*, the whole unpaid balance should at once become due, and that the trustee, on being required by any creditor, should institute and prosecute proceedings in Bankruptcy against the debtor, in respect of the unpaid balance. A committee of inspection was also appointed. The debtor went into business again, and contracted fresh debts. He paid two of the annual instalments of the 5,000*l.*, but failed to pay any more of it. He afterwards filed a second liquidation petition. His statement of affairs shewed that he was largely indebted, and that his assets were practically worthless. He was, however, entitled to 200*l.* a year, half-pay as an officer in the army. The creditors resolved on a liquidation by arrangement; that, until full payment of all the debts provable under the liquidation, the debtor should pay to the trustee the surplus of his income above 600*l.* a year; that, as soon as the debtor should have executed a deed to give effect to the resolutions, he should be discharged from all debts provable under the liquidation, but the discharge was to be void if the debtor should fail to perform any of the stipulations in the deed, and the trustee should certify that in his opinion such failure had been wilful. The trustee under the first liquidation proved in the second liquidation for the unpaid 3,000*l.*, and voted in favour of these resolutions, which would not have been carried without his vote. He had not obtained the sanction of the committee of inspection under the first liquidation for so voting, but no creditor had required him to take proceedings in bankruptcy against the debtor. Held, that the proceedings under the first liquidation, being no longer pending, could not affect the validity of the resolutions under the second petition. Held also, that the first trustee was, under the circumstances, at liberty to prove and vote without the sanction of the committee of inspection; but that, under the circumstances, the majority of the creditors could

not have passed the resolutions under the second petition *bond fide* for the benefit of the creditors, but must have voted as they did solely by reason of motives of kindness to the debtor. And that resolutions thus passed could not bind the dissentient minority of the creditors, and were invalid, and could not be registered. *Ibid*.

(i) *After-acquired property.*

**18.**—The discharge of a debtor in a liquidation by arrangement under the provisions of the Bankruptcy Act, 1869, duly certified by the registrar, in compliance with Rule 303 of the General Rules in Bankruptcy, releases the debtor and all his after-acquired property, although the liquidation has not been closed by a resolution of the creditors. *In re Bennett's Trusts* (44 Law J. Rep. (n.s.) Chanc. 244; Law Rep. 19 Eq. 245) overruled. *Ebbs v. Boulmois*, 44 Law J. Rep. (n.s.) Chanc. 691; Law Rep. 10 Chanc. 479.

(k) *Where liquidation cannot proceed without injustice.*

**19.**—Where the Court is satisfied that proceedings in liquidation cannot proceed without injustice and undue delay of creditors, it may at once adjudicate the debtor bankrupt, without the presentation of any petition for adjudication, or notice to the creditors. *Ex parte Marland*; *In re Ashton*, 44 Law J. Rep. (n.s.) Chanc. 116; Law Rep. 20 Eq. 777.

(l) *Removal of trustee and committee of inspection.*

**20.**—In a liquidation by arrangement a meeting of creditors, for the purpose of removing the trustee and any member of the committee of inspection, and for appointing others, is properly summoned under rules 304 or 305 of the General Rules in Bankruptcy, 1870, and rule 120 is not applicable to such a case, but relates to cases of bankruptcy only. *Ex parte Hopkins*; *In re Hart*, 43 Law J. Rep. (n.s.) Bankr. 127; Law Rep. 9 Chanc. 506.

The General Rules in Bankruptcy, 1870, comprise two distinct sets of rules; the one set relating to cases of bankruptcy, the other to cases of liquidation by arrangement. *Ibid*.

(m) *Costs: pending proceedings.*

**21.**—For the purposes of the 292nd Rule in Bankruptcy, whereby if bankruptcy occurs "pending proceedings for or towards liquidation by arrangement," the costs in relation to such proceedings are made payable out of the debtor's estate, the proceedings will be deemed to be pending so long as the Court can make any order thereunder, and the creditors under the subsequent bankruptcy can derive a benefit from them. Therefore, where upon a petition for liquidation, the creditors refused to pass a resolution for liquidation, and bankruptcy ensued next day, but the receiver, who had taken possession under the liquidation, had not been discharged before the trustee in bankruptcy was appointed, it was held  
Digest, 1870—1875.

that the proceedings in liquidation were for the purposes of the above rule pending when the bankruptcy occurred. *Ex parte Jeffrey*; *In re Hawes*, 43 Law J. Rep. (n.s.) Bankr. 27; Law Rep. 9 Chanc. 144.

The decision below (43 Law J. Rep. (n.s.) Bankr. 1; Law Rep. 17 Eq. 61) affirmed.

(M) COMPOSITION WITH CREDITORS.

(a) *Resolution for composition.*

**1.**—At a first meeting of creditors a composition was offered, but in consequence of the debtor's solicitor finding that the majority of the creditors present would vote against it, no formal resolution on the matter was proposed. Instead, a resolution for adjournment was put and carried. At the adjourned meeting a resolution for the same composition was again proposed and then carried:—Held, that when the sense of the first meeting had been taken and found adverse to the acceptance of the composition, there was no power to adjourn the meeting for the purpose of bringing the question before the creditors at such adjourned meeting, and that therefore the resolution for a composition was invalid, and ought not to be registered. *Ex parte Till*; *In re Ratcliffe*, 44 Law J. Rep. (n.s.) Bankr. 103; Law Rep. 10 Chanc. 631.

The 275th rule applies only to resolutions adopting a liquidation or a composition, and not to resolutions generally. *Ibid*.

**2.**—A composition to be binding on a majority must be *bond fide* voted by the majority for the benefit of the creditors. Where, therefore, a resolution for a composition was passed through the vote of a creditor whose debt had been bought up by a friend of the debtor for more than its value,—Held, that the resolution ought not to be registered. *Ex parte Cobb*; *In re Sedley*, 42 Law J. Rep. (n.s.) Bankr. 63; Law Rep. 8 Chanc. 727.

The purchase of the debt was in this case open, but semble (per James, L.J.), that if it had been secret, the resolution could not have stood, even if carried by an independent majority, as other creditors might have been influenced by the vote. *Ibid*.

Semble—though where no regular first meeting of the creditors under a liquidation has been held, in pursuance of rule 275 of the Bankruptcy Rules of 1870, for want of due advertisement for example, another may be ordered, yet the failure to pass a resolution for liquidation or composition is no ground for such an order. *Ibid*.

(b) *Statement and examination of debtor.*

**3.**—In the statement of debts produced by a debtor at the meetings of creditors, at which resolutions for accepting a composition were passed, the debtor had inserted the amount becoming due on two bills of exchange, and the name and address of the drawer as the creditor, believing the drawer to be the holder of the bills. The bills had, in fact, been negotiated:—Held, that the actual holder, having had no notice of the meeting of creditors, was not bound by the resolutions to accept a composition. *Ex parte Matthews*; *In*  
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*re Angel*, 44 Law J. Rep. (N.S.) Bankr. 128; Law Rep. 10 Chanc. 804.

A mistake made inadvertently by a debtor in the statement of his debts will not be allowed to be corrected, unless he takes steps for doing so within a reasonable time after finding out the mistake. *Ibid.*

4.—Although a resolution for a composition has been registered, the Court has power to order a debtor to be examined as to his affairs, if a *prima facie* case of fraud be made against him. *Ex parte Jones*; *In re Jones*, Law Rep. 16 Eq. 386.

(c) *Registration of resolution.*

5.—Where all the requirements of the Act and the rules have been complied with, resolutions in favour of a composition must be registered, even though, as in this case, the assets were only 7*l.*, and the proposed composition 3*d.* in the pound. *Ex parte Elworthy*; *In re Elworthy*, 44 Law J. Rep. (N.S.) Bankr. 123; Law Rep. 20 Eq. 742.

6.—When a resolution for a composition is presented to the registrar for registration under the Bankruptcy Act, 1869, section 126, he may refuse to register it if he is not satisfied that the debtor's statement of his assets and debts is true, or that the other requirements of the statute have been complied with; but he has no power to examine the debtor or witnesses. *Ex parte Levy*; *In re Varbetian*, 40 Law J. Rep. (N.S.) Bankr. 40; Law Rep. 11 Eq. 619.

(d) *Effect of composition.*

(1) *As regards creditors.*

7.—The rights of a debtor and his creditors are wholly different in the two cases of liquidation by arrangement under section 125, and composition under section 126 of the Bankruptcy Act, 1869, though both proceedings are begun by the debtor filing a petition and a declaration of his inability to pay his debts. *Ex parte The Birmingham Gaslight and Coke Co.*; *In re Adams*, 40 Law J. Rep. (N.S.) Bankr. 1; Law Rep. 11 Eq. 204.

When a resolution to accept a composition has been duly passed and registered, the property of the debtor is not taken from him, nor vested in a trustee, nor distributed in the same manner as in Bankruptcy; and there is no power to deprive secured creditors of their securities. *Ibid.*

Under a statutory power to levy money due by distress and sale a creditor seized his debtor's goods. The debtor then filed in the County Court a petition for liquidation under section 125, and obtained an injunction restraining the creditor from selling. A resolution to accept a composition under section 126, was afterwards duly passed by the requisite majority of creditors and registered. The County Court having made an order on the creditor to deliver the goods to the respondent,—Held, on appeal, that the order must be discharged. *Ibid.*

8.—An execution issued after petition, but before resolution for a composition, is not affected by the composition. *Ex parte Jones*; *In re Jones*, 44

Law J. Rep. (N.S.) Chanc. 124; Law Rep. 10 Chanc. 663.

9.—A bank allowed T. and J., partners, to overdraw their account, having good security from deposit of deeds relating to separate property of T. The two partners presented their petition, and the bank voted in favour of resolutions for composition, the resolutions saying nothing about their security. Afterwards, in accordance with the resolutions, a deed was executed, and this distinctly reserved to the bank their collateral security. The composition was paid to all the creditors, including the bank. On the application of T. the County Court Judge declared the securities forfeited, and directed the bank to deliver them up to T.:—Held, on appeal (reversing the decision of the County Court Judge), that in a composition the County Court Judge had no jurisdiction to make such an order, and that the bank were entitled to retain their securities. *Ex parte The Manchester and Liverpool District Banking Co.*; *In re Littler*, 43 Law J. Rep. (N.S.) Bankr. 73; Law Rep. 18 Eq. 249.

*Discharge of surety by composition with principal creditor.* [See PRINCIPAL AND SURETY, 15–18.]

[And see *infra* Nos. 15, 16.]

(2) *As regards debtor.*

10.—Goods were seized by the sheriff under a writ of *fi. fa.* The debtor was adjudicated bankrupt. His creditors resolved to accept a composition:—Held, that the resolution did not revest the title to the goods in the debtor; but that the execution creditor was restored to his position. The Court of Bankruptcy enjoined the debtor from prosecuting an action for trespass against the sheriff for not delivering up the goods that had been seized. *In re England*; *Ex parte The Sheriff of Middlesex*, 40 Law J. Rep. (N.S.) Bankr. 65; Law Rep. 12 Eq. 207.

11.—In 1870 W. mortgaged a lease of certain premises to H. to secure 600*l.* In November, 1872, W. filed a petition for liquidation, and in December the creditors passed a resolution for composition, which was duly confirmed and registered, but the composition was not paid. In March, 1873, W. again mortgaged the lease to H. to secure 700*l.*, which included the 600*l.*, &c., then owing to H. In May, 1873, W. was adjudicated bankrupt, the act of bankruptcy alleged being the presentation of the above petition. An application by H. to the County Court to have the mortgage declared a valid security, and for an account, was dismissed:—Held, on appeal, that the debtor having been left master of his affairs by the composition, the second mortgage, which was merely in substitution of the first, was not invalidated by the petition for liquidation, and the order of the County Court was discharged. *Ex parte Hoare*; *In re Walton*, 43 Law J. Rep. (N.S.) Bankr. 38.

12.—A debtor cannot, pending one composition arrangement, effect a fresh composition under a second petition, though the first composition has failed through non-compliance with its provisions.



*Ex parte Sydney*; *In re Sydney*, 44 Law J. Rep. (N.S.) Bankr. 21; Law Rep. 10 Chanc. 208.

(e) *Proof.*

13.—Where a compounding debtor puts in his statement an amount (by estimate) for an unascertained debt he must tender the composition on such amount. The creditor is not bound to prove his debt if he is content with the amount set down, unless he desires to vote. *Ex parte Peacock*; *In re Duffield*, 42 Law J. Rep. (N.S.) Bankr. 78; Law Rep. 8 Chanc. 682.

Semble—a claim for untaxed costs in an action is a proveable debt under section 31 (Act 1869), and is within section 126. *Ibid.*

14.—The trustee under a composition has no right peremptorily to reject the proof of a creditor, but it is his duty to ascertain what is the amount of the debt actually due. *Ex parte Botting*; *In re Bostel*, 44 Law J. Rep. (N.S.) Bankr. 47; Law Rep. 19 Eq. 261.

(f) *Trustee: surplus.*

15.—Resolutions were passed in favour of composition; all the estate of the debtor was to be assigned to D., he becoming surety for the payment of the composition and being appointed trustee. Afterwards a deed was executed by the debtor, the creditors and D. embodying these resolutions, but not declaring any trusts:—Held, that D. was absolutely entitled to the surplus of the estate after the payment of the composition and costs, and that there was no resulting trust in favour of the debtor. *Ex parte Wilcocks*; *In re Wilcocks*, 44 Law J. Rep. (N.S.) Bankr. 12.

16.—When the creditors of a compounding debtor appoint, under rule 279 of 1870, a trustee for the receipt and distribution of the composition, and a sum of money is given by the debtor to the trustee for the purpose of paying the composition, if, when all the creditors have been paid, there remains a surplus in the hands of the trustee, the Court of Bankruptcy has jurisdiction to take an account between the trustee and the debtor, and to order the former to pay to the latter the balance that may be found due from him. And when, under similar circumstances, there is a surplus in the hands of the trustee, a creditor who is not bound by the composition is entitled, if he pleases, to claim the benefit of it as against the debtor. And if the amount of that creditor's claim is the subject of litigation in a suit in the Court of Chancery, the Court of Bankruptcy will make no order for the trustee to pay over any surplus to the debtor until a decree has been made in the Chancery suit. But a creditor, who is not bound by the composition, by reason of his name and address and debt not having been sufficiently inserted in the debtor's statement, and who has not given notice of his claim to the other creditors by attending the meetings and proving his debt, though he is entitled to the benefit of the composition as against the debtor, yet he cannot interfere with the rights of the other creditors. *Ex parte Carew*; *In re Carew*, 44 Law J. Rep. (N.S.) Bankr. 67; Law Rep. 10 Chanc. 308.

(g) *Default in payment of composition.*

(1) *Revival of original debt.*

17.—Where by an extraordinary resolution under section 126 of the Bankruptcy Act, 1869, creditors resolve to accept a composition in satisfaction of their debts, but the debtor fails to pay the said composition, the creditors are entitled to bring actions for their original debts. *Edwards v. Coombe*, 41 Law J. Rep. (N.S.) C.P. 202; Law Rep. 7 C.P. 519.

18.—Where by an extraordinary resolution under the 126th section of the Bankruptcy Act, 1869, creditors had resolved to accept a composition payable by certain instalments in satisfaction of their debts, and the debtor made default in payment of an instalment,—Held, that the creditors could maintain actions for the whole unpaid balance of their original debts, and the Court of Bankruptcy would not restrain such actions. *In re Hutton*, 42 Law J. Rep. (N.S.) Bankr. 12; Law Rep. 7 Chanc. 723.

19.—When under a composition arrangement a trustee is appointed by the creditors, the debtor is not liable for any default of the trustee in paying the composition. *Ex parte Waterer*; *In re Taylor*, 43 Law J. Rep. (N.S.) Bankr. 25.

A creditor holding a security of uncertain value, was inserted in the debtor's statement for an estimated balance. The trustee did not pay or tender the composition on the amount, but (wrongly) required the creditor to prove his debt. The creditor having commenced an action for his original debt against the debtor,—Held, that it ought to be restrained. *Ibid.*

The trustee under a composition is not bound to tender the composition, *semble*. *Ibid.*

20.—In February, 1871, H. effected a composition with his creditors. The proof of one of the creditors, K., was disputed, and was only settled by the Judge on the 29th of July, 1873. The composition on the amount as settled was not then paid at once, but the solicitors of both parties waited till the order was drawn up and signed by the registrar. On the 22nd of August, 1873, the debtors asked to be allowed to pay the composition partly in cash and partly in bills at two and four months. This request was refused, and K. then said that the composition not having been paid he should commence an action for the whole debt. On the 27th of August the registrar signed the order, and on the same day the debtors tendered payment of the composition in cash. This was refused, and an action for the original debt commenced on the 29th of August:—Held (affirming the decision of the County Court Judge), that it would be inequitable to allow K. to proceed with the action. *Ex parte King*; *In re Harper*, 43 Law J. Rep. (N.S.) Bankr. 41; Law Rep. 17 Eq. 332.

(2) *Power of Court over surety.*

21.—On a motion by a creditor against a trustee and a surety to compel payment from the trustee, and in default from the surety of the composition on his debt,—Held, dismissing the application, that the Court had no authority over the

surety, and that the application ought to have been against the trustee alone, whose duty it was, if necessary, to enforce it against the surety. *Ex parte Mirabita*; *In re Dale*, 44 Law J. Rep. (N.S.) Bankr. 119; Law Rep. 20 Eq. 772.

(h) *Power of creditors to reduce composition.*

22.—Creditors have power by means of an extraordinary resolution to reduce the amount payable under a composition; and creditors who had agreed to the original resolution, but dissented from the resolution for the reduction, are nevertheless bound by the latter resolution when duly passed. *Ex parte The Radcliffe Investment Co.*; *In re Glover*, 43 Law J. Rep. (N.S.) Bankr. 4; Law Rep. 17 Eq. 121.

The word "persons" in the 126th section of the Bankruptcy Act, 1869, does not include creditors. *Ibid.*

(i) *Pleading composition at law.*

23.—To an action to recover a debt of 50*l.*, the defendant pleaded, as to 27*l.* 16*s.* 10*d.*, that it was the balance remaining due on a joint and several promissory note of the defendant and H., carrying on business as co-partners, to secure a partnership debt due from them to the plaintiffs; that the defendants instituted proceedings under sections 126 and 127 of the Bankruptcy Act, 1869, and that an extraordinary resolution of the creditors was passed for accepting a composition payable by instalments, to be secured by joint and several notes. The plea contained the usual averments that all the requirements of the statute had been complied with:—Held, by Brett, J., Archibald, J., Pollock, B., and Amphlett, B., that assuming the plaintiffs were not parties to the resolution, and had not adopted it or received any instalment under it, the plea afforded no answer to the action; by Kelly, C.B., that the action, so far as related to the sum of 27*l.* 16*s.* 10*d.*, was answered by the plea. *Simpson v. Henning* (Exch. Ch.), 44 Law J. Rep. (N.S.) Q. B. 143; Law Rep. 10 Q. B. 406.

24.—If, after an extraordinary resolution to accept a composition, payable at a future time or by instalments, in satisfaction of the debts due to creditors by their debtors, has been duly passed, confirmed and registered under section 126 of the Bankruptcy Act, 1869, a creditor who is bound by the resolution sues for his original debt before default in payment of the composition, or of any instalment, the resolution is pleadable in bar of the action. *Slater v. Jones, and Capes v. Ball*, 42 Law J. Rep. (N.S.) Exch. 122; Law Rep. 8 Exch. 186.

25.—In accordance with the provisions of section 126 of the Bankruptcy Act, 1869, an extraordinary resolution was passed by the proper majority in number and value of the creditors of the defendant, a debtor, that a composition should be accepted, payable by three instalments, and that the second and third instalments should be secured by the promissory notes of the defendant and a third person:—Held, in an action by a creditor, who did not attend or vote on the resolution, that such

resolution, although duly passed and registered, did not constitute any defence, there being no proof that the defendant had paid or tendered the two instalments which had become due before action, or that he had delivered the promissory notes. *Goldney v. Lording*, 42 Law J. Rep. (N.S.) Q. B. 103; Law Rep. 8 Q. B. 182.

(N) PRACTICE.

(a) *Abandoning debtor.*

1.—Rule 65 of the Bankruptcy Rules, 1870, only applies where a debtor is keeping out of the way so that he cannot be proceeded against by the regular process; and if he appears, he can insist on the proceedings being conducted in the regular way. *Ex parte Lopez*; *In re Brelaz*, Law Rep. 6 Chanc. 894.

(b) *Accounts.*

[See General Rules, 7th July, 1871, rr. 9–27. 40 Law J. Rep. (N.S.) Bankr. 2.]

(c) *Appeals and rehearings.*

2.—A joint adjudication in bankruptcy was made against three partners. Two of them appealed. The third did not appeal within the twenty-one days allowed by the General Rules:—Held, that he might be heard on the appeal, but on the terms of presenting a separate petition of appeal, and making the usual deposit to meet costs:—Held also, that as the case of the three partners was the same, the adjudication must be annulled against all three. *Ex parte Hayward and Batten*; *In re Hayward & Co.* 40 Law J. Rep. (N.S.) Bankr. 40; Law Rep. 5 Chanc. 546.

3.—A registrar sitting as Chief Judge has a discretion to rehear a case, even after an appeal from his decision, if the point upon which a rehearing is desired is unaffected by the appeal. But an application for a rehearing ought, in ordinary cases, to be made within the time fixed by the 143rd of the Bankruptcy Rules of 1870 for entering an appeal; and where a long delay is unaccounted for a rehearing will not be granted. *Ex parte Mackay*; *In re Jeavons*, and *Ex parte Brown*; *In re Jeavons*, 43 Law J. Rep. (N.S.) Bankr. 105; Law Rep. 9 Chanc. 127, 304.

4.—The jurisdiction given to every Court of Bankruptcy, by the 71st section of the Bankruptcy Act, 1869, to review, rescind or vary any order made by it, is almost without limit in proper cases, and the fact that an appeal from an order is pending will not prevent the rehearing of the case by the Court below. *Ex parte Keighley*; *In re Wike*, 44 Law J. Rep. (N.S.) Bankr. 13; Law Rep. 9 Chanc. 667.

Where additional evidence was necessary to enable the Court of Appeal to dispose of a case satisfactorily, such evidence was taken *visà voce* on the hearing of the appeal. *Ibid.*

5.—Where an issue of facts has been tried before a Judge, the Court of Appeal is not bound to accept as conclusive the finding on such an issue. *Ex parte Gillebrand*; *In re Sidebotham*, Law Rep. 10 Chanc. 52.

6.—After the appeal has been lodged, and the usual deposit made of 20*l.*, the amount prescribed by the Bankruptcy Rules, 1870 (145), in the absence of any other direction, the Court will not entertain an application for a larger deposit; and *semble*, the proper time to make such an application is at the original hearing. *Ex parte Lovering*; *In re Thorpe*, 42 Law J. Rep. (N.S.) Bankr. 39; Law Rep. 15 Eq. 291.

7.—Upon an appeal in bankruptcy from part of an order so much only of the case as is covered by the appeal is open to the respondent, and unless he presents a cross appeal he cannot go into the whole case, as he might do upon an appeal in Chancery, which is in the nature of a rehearing. *Ex parte Kiveton Coal Company*; *In re Phillips*, 42 Law J. Rep. (N.S.) Bankr. 11; Law Rep. 7 Chanc. 730.

The Court has jurisdiction to give leave to appeal after the expiration of the twenty-one days within which, under rule 143 of the Bankruptcy Rules, 1870, the notice of appeal is to be given. *Ibid.*

8.—An appeal in bankruptcy must be brought within twenty-one days from the day on which the decision or order is pronounced. An appeal which was brought within twenty-one days from the day on which the order was drawn up, but not within twenty-one days from the day on which it was pronounced, was therefore held to be too late. *Ex parte Hinton*; *In re Hinton*, 44 Law J. Rep. (N.S.) Bankr. 36; Law Rep. 19 Eq. 266.

[And see *infra* Nos. 33-35 and *supra* B 28.]

#### (d) Contempt of Court.

9.—Debtors were employed by trustees in a liquidation to realise the stock and collect the book debts, and it appeared that one of them had, after they had received their order of discharge, applied some of the partnership assets obtained in this way in payment of his private creditors:—Held, on appeal, that the County Court Judge had authority to commit him for contempt of Court. *Ex parte Waters*; *In re Waters*, 43 Law J. Rep. (N.S.) Bankr. 128; Law Rep. 18 Eq. 701.

#### (e) Debtor summons.

[See also B 33 *supra*.]

#### (1) By secretary of company.

10.—A debtor summons taken out in the name of the secretary of a company for a debt due to the company is irregular. *Ex parte Leathley*; *In re Hodges*, 42 Law J. Rep. (N.S.) Bankr. 56; Law Rep. 8 Chanc. 204.

#### (2) Affidavit in support.

11.—B. filed an affidavit, on which a debtor's summons was issued, and therein stated that he was the public registered officer of a company, and that he was duly authorised by the company to make the affidavit, but he did not say that he was authorised to sue out the summons; an objection was taken to this, but the Court held that rule 15 of the Bankruptcy Rules, 1870, had been sufficiently complied with, and dismissed the appeal.

*Ex parte Lowenthal*; *In re Lowenthal*, 43 Law J. Rep. (N.S.) Bankr. 132; Law Rep. 9 Chanc. 324.

12.—An affidavit by a public officer of a company in support of a debtor's summons must contain an express statement that he is such public officer and authorised to sue out the summons, it is not enough that he is merely described as public officer. An affidavit after it is filed cannot be objected to on account of the omission of the words "make oath and say." A debtor may object to a debtor's summons for irregularity, although he has not in his affidavit distinctly denied the debt. *Ex parte Torkington*; *In re Torkington*, Law Rep. 9 Chanc. 298.

#### (3) Security.

13.—Where a debtor's summons is ordered to stand over for an action to be brought, the Court will not require the alleged debtor to give security where there is as much probability of the defendant as of the plaintiff succeeding in the action. *Ex parte Turner*; *In re Turner*, 44 Law J. Rep. (N.S.) Chanc. 112; Law Rep. 10 Chanc. 175.

14.—The Court of Appeal discharged an order directing a debtor to give security where the probability of the claim against him being established appeared very small, although it was admitted that the debtor was in very poor circumstances. *Ex parte Wier*; *In re Wier*, Law Rep. 7 Chanc. 319.

#### (4) Dismissal: affidavit.

15.—When the person summoned by a debtor's summons merely denies by his affidavit that he is indebted to the summoning creditor in the amount claimed, but it appears that he admits a debt of more than 50*l.*, there being a *bonâ fide* dispute as to the amount, the summons ought not to be dismissed, but the proceedings upon it ought to be stayed pending the trial of the validity of the debt claimed. *Ex parte Rowan*; *In re Kiddell*, 43 Law J. Rep. (N.S.) Bankr. 96; Law Rep. 9 Chanc. 617.

An affidavit in the above form, though not strictly in accordance with the provisions of section 7 of the Bankruptcy Act, 1869, yet, as it is in accordance with No. 8 of the Bankruptcy Forms, 1870, is sufficient to give the person summoned a *locus standi* upon an application to dismiss the summons. *Ibid.*

16.—Creditors in partnership, residing abroad, issued a debtor's summons against an Englishman. The affidavit in support of the summons was made by their agent in England. The debtor denied the debt and applied to the Court to dismiss the summons, and he gave notice to the creditors that he required them to attend on the hearing of his application, for the purpose of being examined as to the alleged debt:—Held (reversing the decision of one of the registrars), that the debtor had, under the circumstances, no absolute right to require the presence of the summoning creditors on the hearing of his application. *Ex parte Barron*; *In re Irving*, 44 Law J. Rep. (N.S.) Bankr. 66; Law Rep. 10 Chanc. 269.

#### (f) Evidence: Judge's notes.

17.—Where the Judge's notes purporting to contain a full record of what took place at the trial of

an issue before him are produced to the Court of Appeal, they are conclusive as to the evidence adduced before him, and, unless the parties consent, the Court will not receive the notes of a shorthand writer. *Ex parte Gillebrand*; *In re Sidebotham*, Law Rep. 10 Chanc. 52.

*Additional evidence on appeal.* [See supra No. 4 and infra O 9.]

(g) *Examination of trustee.*

18.—The Court has power under the 96th section of the Bankruptcy Act, 1869, to order the examination of the trustee in bankruptcy, and where such examination is necessary, will make the order for it upon the application of a creditor. *Ex parte Crossley*; *In re Taylor*, 41 Law J. Rep. (n.s.) Bankr. 35; Law Rep. 13 Eq. 409.

(h) *Hearing.*

19.—A petition to adjudicate P. bankrupt was fixed for hearing before the registrar, on the 2nd of November, at twelve o'clock. P.'s counsel sent a telegram to the registrar stating that he was on his way to attend the hearing, and asking that the matter might stand for a few minutes. The registrar waited till 12.20, and then at the request of the petitioners proceeded to hear the matter, and adjudicated P. bankrupt. P.'s counsel arrived at 12.32, but the case was then over. On application that the matter might be sent back to the County Court for rehearing:—Held, that the proceedings had been too hasty, and that the petition must be reheard in the County Court. *Ex parte Phillips*; *In re Phillips*, 44 Law J. Rep. (n.s.) Bankr. 11.

(i) *Issue.*

20.—In this case the County Court Judge decided that the fraudulent preference alleged had not been proved. On the trial before him the evidence had been taken on affidavits and depositions, and neither party had asked for a trial by jury. The Chief Judge on appeal, being doubtful whether the decision of the County Court Judge was justified by the evidence, and considering that the matter required further investigation, ordered an issue to be tried by a jury, before himself. *Ex parte Brown*; *In re Hooker*, 44 Law J. Rep. (n.s.) Chanc. 56.

*Finding not conclusive on Court of Appeal.*  
[See supra N 5.]

(k) *New trial.*

21.—Where a Judge had directed a trial by jury, but being dissatisfied with the verdict had made no order thereon, and thirty-three days after the trial, a motion was made for a new trial, it was held, that the application was in good time. *Ex parte Reader*; *In re Wrigley*, 44 Law J. Rep. (n.s.) Bankr. 139; Law Rep. 20 Eq. 763.

(l) *Petition: when sustainable.*

22.—L. took out a debtor's summons and filed a petition to adjudicate J. bankrupt. J. promised to pay L. fifteen shillings in the pound and to

satisfy his other creditors, and on this understanding the petition was, with the consent of all parties, dismissed. J. made no payment, and L. obtained special leave from the registrar of the County Court to file a second petition founded on the same act of bankruptcy. This petition was heard before the County Court Judge, and by him dismissed on the ground that a debtor could not be adjudicated a bankrupt upon an act of bankruptcy on which a former petition had been founded:—Held (discharging the order appealed from), that the second petition was properly filed, and that the creditor was entitled to have it heard upon the merits. *Ex parte Love*; *In re Jagger*, 43 Law J. Rep. (n.s.) Bankr. 37; Law Rep. 17 Eq. 454.

23.—A petition for adjudication may be presented by the assignee of a debt without joining the assignor as a co-petitioner. *Ex parte Cooper*; *In re Baillie*, 44 Law J. Rep. (n.s.) Bankr. 125; Law Rep. 29 Eq. 763.

(m) *Res judicata.*

24.—The right of an execution creditor to enforce an execution against the estate of a bankrupt depended on whether the bankrupt had or had not been a trader. In an action at law by the creditor against the sheriff for wrongfully withdrawing from possession of the goods which he had seized under the execution, judgment went for the sheriff, on the ground that the bankrupt was a trader, and that therefore the goods belonged to the trustees in bankruptcy:—Held, that the creditor was precluded from raising the question of the validity of his execution in an application against the trustee in the Court of Bankruptcy. *Ex parte Harper*; *In re Bremner*, 44 Law J. Rep. (n.s.) Bankr. 57; Law Rep. 10 Chanc. 379.

(n) *Registrar.*

25.—A registrar presided at the first meeting of creditors, at which only one creditor appeared, and reported the fact to the Court. The same registrar afterwards sat as Chief Judge to receive his own report, and thereupon annulled the bankruptcy. The Court said: It is to be regretted that the personal opinion of the Chief Judge was not taken, and it is inconvenient that important points of practice should be settled by the registrars. The intention of the legislature in permitting the delegation of the Chief Judge's duties to the registrars was that they should deal with such matters as are governed by previous decisions of the Chief Judge or of this Court. *In re Finney*; *Ex parte English Joint-Stock Bank*, 40 Law J. Rep. (n.s.) Bankr. 43; Law Rep. 6 Chanc. 79.

*Rehearing by registrar.* [See supra No. 3.]

(o) *Service.*

26.—A debtor who had resided and carried on business in Staffordshire, went away into Yorkshire for the purpose of avoiding service of a trader-debtor summons. Thereupon substituted service of a summons and a bankruptcy petition was made in Staffordshire, and adjudication fol-

lowed:—Held, that the adjudication could not be set aside on the ground that the debtor was not residing within the jurisdiction of the Court at the time of service and adjudication; and that under the circumstances, the debtor could not be heard to complain that the orders for substituted service had been improperly obtained upon misleading affidavits. *Ex parte Williams; In re Williams*, 42 Law J. Rep. (n.s.) Bankr. 28; Law Rep. 8 Chanc. 690.

27.—A clause in the articles of association of a joint-stock company providing that notices may be served on members by leaving the same at their registered place of abode, will not extend to legal proceedings, and an order for substituted service of a debtor summons at such address, that not being his last known place of abode, is bad. *Ex parte Chatteris; In re Studer*, 40 Law J. Rep. (n.s.) Bankr. 90; Law Rep. 10 Chanc. 227.

28.—It is a matter in the discretion of the County Court Judge whether summonses under the 96th section of the Bankruptcy Act, 1869, shall be served by the high bailiff of the Court or by the solicitors to the trustee; and, on appeal, the Chief Judge declined to interfere with such discretion. *Ex parte Bolland; In re Holden*, 41 Law J. Rep. (n.s.) Bankr. 9; Law Rep. 19 Eq. 131.

29.—Trustees in a liquidation alleged that R., who was a domiciled Scotchman, had received a payment of 120*l.* by way of fraudulent preference. R. had come in under the liquidation and proved for the balance of his debt, and received a dividend. The trustees served personally on R. in Scotland notice of motion for an order for repayment of the 120*l.* R. appeared by his solicitor, who objected to the jurisdiction, and when his objection was overruled, asked, and obtained, time to meet the case on the merits. The County Court Judge subsequently ordered R. to repay the 120*l.* to the trustees, and on appeal from that decision it was held that R., by proving his debt had entered into a compact that the assets of the debtors should be duly distributed in the English Court, and could not afterwards object to the jurisdiction; also, that the service was merely defective in regularity, and that the objection had been waived by R.'s appearance by his solicitor. *Ex parte Robertson; In re Morton*, 44 Law J. Rep. (n.s.) Bankr. 99; Law Rep. 20 Eq. 733.

(p) *Stay of proceedings.*

30.—Where a debtor summons was obtained for 517*l.*, but on the petition for adjudication only 110*l.* was shewn to be due, it was ordered that the adjudication should not be published for a fortnight, and that if during that time the 110*l.* was paid, all proceedings should be stayed, leaving each party to bear his own costs. *Ex parte Harris; In re Harris*, 44 Law J. Rep. (n.s.) Chanc. 77; Law Rep. 10 Chanc. 458.

31.—When at the hearing of a bankruptcy petition there is also pending a liquidation petition filed by the debtor, the Court has a discretion whether it will postpone proceeding with the bankruptcy petition until after the meeting of the creditors under the liquidation petition, or make

adjudication, and at the same time stay the proceedings under it till after the meeting, or make a simple adjudication, and if the Court can see that the debtor's petition is not a *bonâ fide* one, the latter course ought to be adopted. *Ex parte Walton; In re Dando*, 44 Law J. Rep. (n.s.) Bankr. 37; Law Rep. 10 Chanc. 215.

The circumstance that a debtor does not file his liquidation petition till just before the day fixed for the hearing of a bankruptcy petition presented against him some time before is strong *prima facie* evidence that his petition is only intended for the purpose of delay. *Ibid.*

32.—Under a building contract K. had possession of E.'s land, and E. made advances to him upon the security of the buildings. In January, 1870, K. brought an action against E. for breach of the contract. In July E. brought ejectment against K., and in January, 1861, recovered judgment with costs, which were taxed at 59*l.* In February he took out a debtor's summons against K. in respect of these costs. K. applied to dismiss the summons and stay proceedings pending his action, upon the ground that his claim in the action greatly exceeded the 59*l.*—Held, reversing the decision of the registrar, that no order to stay proceedings ought to be made, there being no case for such stay of proceedings within section 7 of the Bankruptcy Act, 1869. *Ex parte Ellis; In re Kain*, 40 Law J. Rep. (n.s.) Bankr. 77; Law Rep. 6 Chanc. 602.

(q) *Time.*

33.—In computing the three days' notice of a motion to commit required by rule 176, Sundays must not be reckoned. *Ex parte Ferrige; In re Ferrige*, 44 Law J. Rep. (n.s.) Bankr. 96; Law Rep. 20 Eq. 289.

34.—In reckoning the twenty-one days within which an appeal must be entered under rule 143, the computation must be made exclusive of Sundays. *Ex parte Hicks; In re Ball*, 44 Law J. Rep. (n.s.) Bankr. 106; Law Rep. 20 Eq. 143.

35.—Where a Judge had directed a trial by jury, but being dissatisfied with the verdict had made no order thereon, and, thirty-three days after the trial, a motion was made for a new trial, it was held that the application was in good time. *Ex parte Reader; In re Wrigley*, 44 Law J. Rep. (n.s.) Bankr. 139; Law Rep. 20 Eq. 763.

(r) *Transfer of proceedings.*

36.—Liquidation proceedings were begun by mistake in a County Court, when the debtor lived beyond the limits of its district. The mistake was not discovered till just before the second meeting of creditors, and thereupon they passed (amongst others) a resolution to transfer the proceedings to the proper Court. The registrar refused to register the resolutions, on the ground that all the proceedings were a mere nullity. On appeal he was directed to register the resolutions, and the proceedings were transferred. *Ex parte Buckland; In re Buckland*, 42 Law J. Rep. (n.s.) Bankr. 32; Law Rep. 15 Eq. 221.

## (O) INJUNCTION.

## (a) "Execution or other legal process."

1.—A writ of sequestration issued to enforce an order in a suit in Chancery for payment of money is a legal process against the debtor within the meaning of the 13th section of the Bankruptcy Act, 1869, and seizure of property under such a writ does not divest it out of the debtor. Accordingly, where a debtor's goods have been seized but not sold under such a writ, at the date of his bankruptcy, the Court of Bankruptcy will restrain further proceedings under the sequestration. *In re Browne*, 40 Law J. Rep. (N.S.) Bankr. 46; Law Rep. 12 Eq. 137, *nom. Ex parte Hughes*.

2.—A landlord's distress for rent is not liable to be restrained as "an execution or other legal process" within the Bankruptcy Act, 1869, section 13. *Ex parte The Birmingham and Staffordshire Gaslight Co.*; *In re Fanshaw and Yorston*, 40 Law J. Rep. (N.S.) Bankr. 52; Law Rep. 11 Eq. 615.

Under a local statute, as construed by the Court, a gas company had the same rights with respect to recovering "the rent or charge" due for the supply of gas, as landlords have with respect to recovering rent. The company, after notice that a certain firm indebted to them for a supply of gas had filed a petition under section 125 of the Bankruptcy Act, 1869, distrained in pursuance of their statutory rights upon the petitioners' goods. The creditors of the petitioners afterwards resolved on liquidation, and a trustee was appointed:—Held, that the distress was not liable to be restrained as "an execution or other legal process" within section 13; and that, assuming the filing of the petition to be equivalent to the commencement of a bankruptcy, the company were entitled under section 34 to distrain, after the filing, for one year's supply of gas. *Ibid*.

## (b) Proceedings against debtor: fraud.

3.—The Court of Bankruptcy has no jurisdiction to restrain an action for false representation or fraud. Therefore, when an action had been commenced against a debtor for damages for breach of contract and for tort by reason of a false representation, both grounds of complaint having arisen out of the same transaction, the Court of Bankruptcy in proceedings under a composition under the provisions of the Bankruptcy Act, 1869, restrained the plaintiff in the action from proceeding therewith only so far as concerned the breach of contract, but did not restrain him from proceeding in respect of the tort. But held that the claimant was put to his election between his remedies, and if he proceeded with his action upon the tort he could not also prove under the composition. *Ex parte Baum*; *In re Edwards*, 44 Law J. Rep. (N.S.) Bankr. 25; Law Rep. 9 Chanc. 673.

4.—Where before the commencement of a liquidation by arrangement, a suit has been instituted against the debtor to enforce a claim arising out of an alleged fraud, so that if the allegation is proved, the debtor would remain personally liable, notwithstanding an order of discharge on the close

of the liquidation, the Court of Bankruptcy ought not to restrain the proceedings in the suit. *Ex parte Coker*; *In re Blake*, 44 Law J. Rep. (N.S.) Bankr. 126; Law Rep. 10 Chanc. 652.

5.—Where a bill of sale has been given by a debtor, the validity of which is disputed by the trustee under a liquidation of the debtor's affairs, the Court of Bankruptcy has jurisdiction to restrain the holder of the bill of sale from bringing an action upon it against the trustee. *Ex parte Cohen*; *In re Sparke*, 41 Law J. Rep. (N.S.) Bankr. 17; Law Rep. 7 Chanc. 20.

6.—A creditor holding a security of uncertain value, was inserted in the debtor's statement for an estimated balance. The trustee did not pay or tender the composition on the amount, but (wrongly) required the creditor to prove his debt. The creditor having commenced an action for his original debt against the debtor,—Held, that it ought to be restrained. *Ex parte Waterer*; *In re Taylor*, 43 Law J. Rep. (N.S.) Bankr. 25.

The trustee under a composition is not bound to tender the composition, *semble*.

7.—A debtor entered into a composition with his creditors. One of the creditors had assented to the composition merely by proving the debt and receiving dividends, and then, on the ground that the debtor had obtained forbearance by fraud, brought an action against him for the balance of the debt due. The County Court Judge restrained the action:—Held, that the County Court Judge had no authority to restrain the action, and that the creditor had a right, under the 15th section of the Debtors Act, 1869, to have his case tried before a jury. *Ex parte Halford*; *In re Jacobs*, 44 Law J. Rep. (N.S.) Bankr. 53; Law Rep. 19 Eq. 436.

*Default in payment of composition: creditor restrained from suing for original debt.*

[See *supra* M, 17–20.]

*Injunction to restrain action by creditor who disputes validity of composition.* [See *supra* A, 8.]

## (c) Creditor objecting to composition on personal grounds.

8.—A creditor who objects to a resolution for a composition on grounds personal to himself and not common to the other creditors, will not be restrained from trying the question in an action at law. *Ex parte Paper Staining Co.*; *In re Bishop*, Law Rep. 8 Chanc. 595.

## (d) Chancery proceedings against trustee.

9.—Some years after a testator's death, a suit was instituted by beneficiaries under his will against his partners in business and his trustee, praying a winding up of the business, and raising the question whether his capital had been properly left in it. Of the partners (four in number) one had retired since the testator's death. The other three went into liquidation shortly after the bill was filed, and on their trustee being made a party by revivor, he moved in the liquidation to stay the

Chancery proceedings against him. The Chief Judge (affirming the order of the County Court) refused the application, on the ground that the plaintiffs could obtain no relief in the liquidation against the retired partner. On appeal, evidence was tendered that the retired partner had gone into liquidation since the Chief Judge's order. The Lords Justices admitted this evidence, and stayed the suit against the trustee; but expressed their opinion that otherwise they could not have made the order. *Ex parte Gordon; In re Dixon*, 42 Law J. Rep. (n.s.) Bankr. 41; Law Rep. 8 Chanc. 555.

[And see *supra* A, 11.]

(e) *Joint debtors.*

10.—It is a matter for the exercise of judicial discretion whether or not an injunction shall be granted under rule 260. *Ex parte Mills; In re Manning*, 40 Law J. Rep. (n.s.) Bankr. 89; Law Rep. 6 Chanc. 594.

M. & B. jointly accepted a bill; before the bill matured M. petitioned for arrangement of his affairs by liquidation. The creditors resolved upon liquidation, and a trustee was appointed. Afterwards, the holder of the bill, which had been meanwhile dishonoured, sued M. & B. upon it. They pleaded non-acceptance. Notice of trial was then given; subsequently to which an injunction was granted by the registrar, restraining further proceedings in the trial against M.:—Held, on appeal, that the application for an injunction ought to have been made at once before pleading in the action; and that the proper order now was merely to restrain execution against M. *Ibid.*

11.—Where a creditors of joint debtors is proceeding against them jointly, and one of them takes proceedings for liquidation of his affairs, the Court of Bankruptcy will not restrain the proceedings of the creditor against his joint creditors. *In re De Veechj; Ex parte Isaac*, 40 Law J. Rep. (n.s.) Bankr. 19; Law Rep. 6 Chanc. 58.

(f) *Foreign action.*

12.—There must be special circumstances to induce the Court to restrain a foreign creditor of a bankrupt from suing abroad. *In re Chapman*, 42 Law J. Rep. (n.s.) Bankr. 38; Law Rep. 15 Eq. 75.

Actions were commenced in New York against a debtor in London known to be in difficulties, by creditors on bills of exchange drawn in New York but accepted and payable, and dishonoured, in London. Thereupon a petition in liquidation was filed by the debtor, and an application made for a receiver and for an injunction to stay the actions. A receiver was appointed, but it was held, that the creditors not having come in under the liquidation, and there being no means of rendering an injunction effectual, it could not be granted. *Ibid.*

*Semble*, also, that in such a case the appointment of a receiver protects the foreign assets so far as the Court can protect them, and that an injunction is therefore unnecessary. *Ibid.*

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(g) *As affecting rights of creditors.*

13.—The sheriff having seized goods of a debtor under an execution, the debtor filed his petition for liquidation by arrangement, and an injunction restraining the proceedings in the action was obtained under the 260th General Rule, 1869, and served upon the sheriff, who nevertheless proceeded to a sale and afterwards paid the balance of the purchase money into Court:—Held, reversing the decision of the Chief Judge, that the execution creditor and not the trustee under the liquidation was entitled to it. *Ex parte Rock & Co.; In re Hall*, 40 Law J. Rep. (n.s.) Bankr. 70; Law Rep. 6 Chanc. 795.

The 13th section of the Bankruptcy Act, 1869, was not intended to alter the rights of the creditors *inter se*. *Ibid.*

(P) RECEIVER.

[See General Rules, 7th July, 1871, rr. 1, 2, 40 Law J. Rep. (n.s.) Bankr. 1.]

1.—A landlord distrained for one year's arrear of rent on goods of a debtor in the hands of a receiver appointed by the Court of Bankruptcy. On an application by the receiver to the County Court Judge for an injunction, the landlord was restrained from proceeding with the distress, and was also committed for contempt of Court. On appeal,—Held, that the landlord could distrain as against the receiver without the leave of the Court, and further that the position of a receiver in Bankruptcy is not the same as that of a receiver in Chancery. *Ex parte Till; In re Mayhew*, 42 Law J. Rep. (n.s.) Bankr. 84; Law Rep. 16 Eq. 97.

2.—A petition for adjudication of bankruptcy in default of compliance with a debtor's summons having been presented by the summoning creditor, and a receiver appointed under the 13th section of the Bankruptcy Act, 1869, such receiver is an officer of the Court, and has no power to authorise the payment of any money of the debtor except under the authority of the Court. Therefore, where under such circumstances the debtor, with the knowledge and consent of the receiver, paid a sum of money to the summoning creditor and the petition for adjudication was dismissed, but before such dismissal the debtor had been adjudicated bankrupt upon the petition of another creditor,—Held, affirming the decision of the registrar, that the payment to the summoning creditor was a fraud upon the rights of the trustee in bankruptcy, and he was ordered to pay to such trustee the money he had received, with interest at 4½ per cent. *Ex parte Jay; In re Powis*, 43 Law J. Rep. (n.s.) Bankr. 54; Law Rep. 9 Chanc. 133.

3.—Where a receiver under a liquidation, by order of the Court took possession of the debtor's business premises, and an injunction to restrain a mortgagee from intermeddling was granted on an undertaking by the receiver to be answerable for damages:—Held, that the receiver was the agent of the creditors, and not of the mortgagee, and could not charge the mortgagee with the expense of carrying on the business, but was liable under

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his undertaking for deterioration of the property, and for rent for fixtures and stock-in-trade comprised in the mortgage. *Ex parte Warren*; *In re Joyce*, Law Rep. 10 Chanc. 222.

4.—A farmer filed his petition for liquidation, and a receiver was appointed, and took possession at once. Five days after, namely, on the 23rd of March, the holder of a registered bill of sale of live and dead stock forcibly took some horses of the debtor's out of the possession of the receiver. An injunction was then granted restraining further proceedings by sale or otherwise under the bill of sale until the 7th of May, "in order to give an opportunity to purge the contempt which had been committed." The holder of the bill of sale appealed:—Held that, however good the title of the holder of the bill of sale may have been, he had no right to remove the horses from the possession of the receiver without the leave of the Court. *Ex parte Till*; *In re Mayhew* (No. 1 supra) discussed. *Ex parte Cochrane*; *In re Mead*, 44 Law J. Rep. (N.S.) Bankr. 87; Law Rep. 20 Eq. 282.

Semble—that the position of a receiver in Bankruptcy does not differ from that of a receiver in Chancery. *Ibid*.

5.—A receiver who was appointed by the Court on the application of the debtors, gave orders for the valuation of the debtor's assets, which were over 20,000*l.*, and the charge of such valuation amounted to 300*l.* The County Court Judge allowed the charge, and the Chief Judge refused, on appeal, to interfere with the discretion of the Court below. *Ex parte Gordon*; *In re Gomersall*, 44 Law J. Rep. (N.S.) Bankr. 97; Law Rep. 20 Eq. 291.

The receiver also appointed the two debtors managers of the estate, and allowed them as a salary 15*l.* a week between them. The County Court Judge allowed the payment, and in this case also the Chief Judge refused to interfere with his discretion. *Ibid*.

#### (Q) Costs.

[See General Rules, 7th July, 1871, rr. 4–8, 40 Law J. Rep. (N.S.) Bankr. 1.]

##### (a) Of appeal.

1.—A successful appellant from the County Court was not allowed costs of appeal. *In re Cherry*; *Ex parte Matthews*, 40 Law J. Rep. (N.S.) Bankr. 90; Law Rep. 12 Eq. 596.

2.—Where an appeal and cross-appeal both fail, the appellants pay costs of the appeal as if no cross-appeal had been presented, and the respondents only pay any extra costs which the cross-appeal may have caused. *Ex parte Ogle*, and *Ex parte Smith*; *In re Pilling*, 42 Law J. Rep. (N.S.) Bankr. 99; Law Rep. 8 Chanc. 711.

3.—An appeal from the registrar to the Judge, under rule 295, is not an appeal within the rule of practice, that a successful appellant is not generally entitled to the costs of the appeal. It is rather an application to the Judge to set right an irregularity committed by the registrar. *Ex*

*parte Thorne*; *In re Butlin*, 42 Law J. Rep. (N.S.) Bankr. 60; Law Rep. 8 Chanc. 722.

4.—No personal order can be made against a bankrupt for payment of costs of an unsuccessful appeal. *Ex parte Jacobs*; *In re Jacobs*, 44 Law J. Rep. (N.S.) Bankr. 34; Law Rep. 8 Chanc. 211.

*Costs of appeal by trustee.* [See supra B, 16.]

##### (b) Of trustee.

5.—A trustee in bankruptcy making an unsuccessful application to the Court will, in the absence of special circumstances, be ordered to pay the costs of it; and if the assets are insufficient, he will have to pay such costs personally, unless he has obtained an indemnity from the creditors. *Ex parte Angerstein*; *In re Angerstein*, 43 Law J. Rep. (N.S.) Bankr. 131; Law Rep. 8 Chanc. 479.

6.—A trustee in bankruptcy is entitled to have out of the estate all expenses properly incurred by him which are not ordered to be paid by other parties; but it is not necessary or proper for any order to that effect to be made by the Court. *Ex parte Lückes*; *In re Wood*, 41 Law J. Rep. (N.S.) Bankr. 21; Law Rep. 7 Chanc. 304.

##### (c) Of receiver.

7.—Costs of receiver in a liquidation come next after costs of realising assets, and have priority over costs of debtor's solicitor; and a trustee who paid the solicitor first was ordered personally to pay the costs of the receiver. *Ex parte Royle*; *In re Johnson*, Law Rep. 20 Eq. 780.

##### (d) Stamp duty.

8.—In a liquidation by arrangement, where the assets of a debtor exceed the debts, the stamp duty payable under Table A. of the Bankruptcy Rules, 1870, on the registration of the resolution, is determined according to the amount of assets which the trustee in his affidavit states is to be distributed among the creditors, and not according to the estimate of assets made by the debtor. *Ex parte Murray*; *In re Forrest*, 42 Law J. Rep. (N.S.) Bankr. 96; Law Rep. 16 Eq. 215.

9.—The stamp duty payable under Table A. of the Order of the 10th of August, 1871, is to be calculated upon the amount of assets as estimated by the debtor in his statement of affairs, and not upon the amount which the trustee in his affidavit states that he believes the assets will realise. *Ex parte Murray*; *In re Forrest* (last case) distinguished. *In re Berger*, 42 Law J. Rep. (N.S.) Bankr. 97; Law Rep. 16 Eq. 623.

## BARON AND FEME.

[See DIVORCE; MARRIAGE SETTLEMENT; PARENT AND CHILD.]

(A) CELEBRATION OF MARRIAGE.

(B) AUTHORITY OF WIFE TO PLEDGE HUSBAND'S CREDIT.

(C) ADVANCEMENT BY HUSBAND.



D) PROPERTY OF WIFE GENERALLY.

- (a) *Joint dealings by husband and wife.*
- (b) *Reduction into possession by husband.*
- (c) *Survivorship.*
- (d) *Acknowledgment of deed by wife.*
- (e) *Will of married woman.*
- (f) *Equity to a settlement.*

(E) SEPARATE ESTATE OF WIFE.

- (a) *Liability of.*
- (b) *Restraint on anticipation.*
- (c) *Power to devise.*

(F) MARRIED WOMAN'S PROPERTY ACT.

- (a) *Debts contracted before marriage.*
- (b) *Protection of wife's earnings.*
- (c) *Transfer into name of married woman.*

(G) DOWER AND FREEBENCH.

(H) SEPARATION DEEDS.

[The law relating to the marriages of Quakers amended. 35 Vict. c. 10.]

(A) CELEBRATION OF MARRIAGE.

[See MARRIAGE.]

(B) AUTHORITY OF WIFE TO PLEDGE HUSBAND'S CREDIT.

1.—A wife has only an implied authority to buy such goods on her husband's credit as ordinarily come within the domestic department under her control, and are suitable to the position in life which he allows her to assume, unless the goods are had by her in the way of a trade which she separately carries on with her husband's concurrence. *Phillipson v. Hayter*, 40 Law J. Rep. (N.S.) C.P. 14; Law Rep. 6 C.P. 38.

(C) ADVANCEMENT BY HUSBAND.

2.—A husband, whose wife was the executrix and residuary legatee of her father, opened an account at his bankers in the name of his wife as such executrix. He afterwards closed his separate account, but moneys belonging to him were from time to time paid into the wife's account, and the wife drew against it cheques for the payment of the husband's debts and of household expenses. The account remained for six years, when the husband died. The wife died shortly afterwards:—Held, that the mere circumstance of the account having been opened in the wife's name did not raise any presumption that the husband intended to give her the balance; that the account was a mere agency account, and the balance belonged to the husband's estate. Held also, varying the order of one of the Vice-Chancellors, Law Rep. 14 Eq. 241, that the representative of the husband and the wife must have his costs of two suits for administering their respective estates, in priority to the costs of the other parties, for the right of priority rested upon principle, and was not within the discretion of the Judge. *Lloyd v. Pughe*; *Evans v. Pughe*, 42 Law J. Rep. (N.S.) Chanc. 282; Law Rep. 8 Chanc. 88.

3.—Testator, who was in failing health, opened a new banking account in the joint names of himself and wife, authorising the bank to cash cheques

drawn by either of them, and telling the bank manager that the balance of the account would belong to the survivor of himself and his wife. Cheques were thenceforward drawn by the wife only, and were applied by her in payment of household and other expenses, the testator paying in sums of money from time to time to the credit of the account. At the time of his death there was a large sum standing to the credit of the account, which the wife claimed to be entitled to for her own use:—Held, that the evidence of circumstances was not sufficient to rebut the presumption of a resulting trust for the testator. *Marshal v. Cruttwell*, 44 Law J. Rep. (N.S.) Chanc. 504; Law Rep. 20 Eq. 328.

(D) PROPERTY OF WIFE GENERALLY.

(a) *Joint dealings by husband and wife.*

4.—Where a married woman entitled to a rent-charge on property concurs in a mortgage of the property, her equity of redemption as to such rent-charge is not released in the absence of express contract on her part. *In re Betton's Trust Estates*, Law Rep. 12 Eq. 533.

5.—A testator by a codicil made in 1861 directed that after the death of his widow a legacy of 350*l.* should be paid to one of his daughters who was then a married woman. The daughter's husband being indebted to the testator's estate, the daughter and her husband, during the widow's life, assigned the legacy to a purchaser for value by a deed executed under 20 & 21 Vict. c. 57. On the death of the widow, the testator's executors claimed to set off the debt due from the husband against the legacy to his wife:—Held, that under the Act, the purchaser got a good title clear from any set-off in respect of the husband's debt. *Sloper v. Oliver*, 43 Law J. Rep. (N.S.) Chanc. 101; Law Rep. 16 Eq. 481.

Semble—if the husband had previously assigned his interest the case would have been different. *Ibid.*

(b) *Reduction into possession by husband.*

6.—The receipt of a married woman who was deserted by her husband and had obtained a protection order, held a good discharge for a legacy which the husband had not reduced into possession prior to the protection order, so as to give a good title to the purchaser of the estate whereon the legacy was charged. *In re Coward and Adam's Purchase*, 44 Law J. Rep. (N.S.) Chanc. 384; Law Rep. 20 Eq. 179.

The Court ordered each party to bear his own costs of an application under the Vendors and Purchasers Act, 1874, s. 9, respecting a requisition on title. *Ibid.*

7.—A married woman entitled to property for her separate use was desirous of raising money for the improvement of her estate, while her husband also wished to raise money to discharge a debt. They accordingly arranged through the defendant, their solicitor, to borrow money upon mortgage of the separate estate, and upon policies upon the lives of each of them respectively. The money

was to be advanced by instalments, and when the first instalment was due the husband and wife signed a joint authority for the defendant to receive it for them. The defendant received the money, and claimed to retain part of it in respect of a separate debt due to him as solicitor of the husband:—Held, by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench (41 Law J. Rep. (n.s.) Q.B. 145; Law Rep. 7 Q.B. 218), that in an action by the husband and wife the defendant could not retain the money, or set off against it a debt due to the husband, as it was received upon the express understanding that it was to be held for the husband and wife jointly, so that there never was any reduction into possession on the part of the husband. *Jones v. Cuthbertson* (Exch. Ch.), 42 Law J. Rep. (n.s.) Q.B. 221; Law Rep. 8 Q.B. 504.

8.—By a settlement in pursuance of articles, funds were settled on the usual trusts for the wife for life, the husband for life, and their children, with a provision that if there were no children, and the husband survived, the fund should belong to him. The husband joined in transferring the fund to the trustees of the settlement and died in the wife's lifetime without leaving children:—Held, that there had been no reduction into possession. *Cogan v. Duffield*, Law Rep. 20 Eq. 789; affirmed on appeal, 45 Law J. Rep. (n.s.) Chanc. 307; Law Rep. 2 Chanc. Div. 29.

*Chose in action, not reduced into possession by husband, who survived: double administration required.* [See PROBATE, 13.]

*Husband not entitled to proportionate part of annuity without taking out administration.* [See ANNUITY, 6.]

#### (c) Survivorship.

9.—A fund belonging to a wife at her marriage and standing at her bankers in the name of a former husband, was, after her marriage, transferred by the bankers, who were also the second husband's bankers, to an account in their books in the joint names of herself and her husband, but there was no evidence that any authority for that purpose had been given by either husband or wife; they however both drew cheques on the interest of the fund. The husband and wife having both perished at sea in the same ship, a petition was presented by the wife's representatives for payment of the fund to them, on the ground that there was no evidence that the husband survived the wife, or that the husband had ever dealt with the fund so as to reduce it into possession:—Held, that the fund remained the property of the wife, and therefore passed to her representatives. *Scrutton v. Pattillo*, 44 Law J. Rep. (n.s.) Chanc. 249; Law Rep. 19 Eq. 369.

*Survivorship: evidence: husband and wife dying together.* [See PROBATE, 11.]

#### (d) Acknowledgment of deed by wife.

[See ACKNOWLEDGMENT.]

#### (e) Will of married woman.

10.—A married woman was entitled to 3,822*l.* Consols for her separate use, and, by settlement made on her marriage, she was entitled to 14,000*l.*, if she survived her husband, absolutely, and if she died in his lifetime she had a power of appointing that sum by will notwithstanding coverture. She had also a fee simple estate over which she had a power of appointment by will. Her husband, who died in her lifetime, bequeathed to her the residue of his personal estate. The married woman by will, made in the lifetime of her husband, who consented to her making a will, though it did not appear that he knew the contents of it, after disposing of her separate estate and appointing the fee simple estate, gave to her niece all the residue of her real and personal estate of which at the time of her death she should have power to dispose. The will was not republished after the husband's death:—Held, that, though the will was valid and effectual so as to pass the Consols to which she was entitled for her separate use, and so as to appoint the fee simple estate, it was not valid or effectual as an exercise of the power of appointing the 14,000*l.*, nor so as to pass the property acquired by her under her husband's will. *Willcock v. Noble* (H. L.), 44 Law J. Rep. (n.s.) Chanc. 345; Law Rep. 7 E. & Ir. App. 580.

Held, also, that the death of the husband operated as a revocation of any assent he had given to his wife's will. For section 8 of the Wills Act confers no new nor any enlarged testamentary capacity upon a married woman. And a husband's assent to his wife's will involves only the sanction which, if he survives her, he gives to it by withdrawing his claim to administer her effects. *Ibid.*

Since the Wills Act, the doctrine of adherence has no application. Only re-publication can give fresh efficacy to a will of a married woman made during coverture. *Ibid.*

Observations on the judgment in *Morwan v. Thompson* (3 Hagg. 239). *Ibid.*

For the report in the Courts below, see 42 Law J. Rep. (n.s.) Chanc. 321, 681; Law Rep. 8 Chanc. 778.

#### (f) Equity to a settlement.

11.—A married woman having an absolute interest in certain leasehold property, never reduced into possession by the husband, joined in a letter enabling her husband to charge the property:—Held, that she had no equity to a settlement out of arrears of income as against his particular assignees. *In re Carr's Trusts*, 40 Law J. Rep. (n.s.) Chanc. 353; Law Rep. 12 Eq. 609.

12.—The Court has a discretion as to enforcing a wife's equity to a settlement. Where the wife had a very competent separate maintenance secured to her, the Court declined to enforce her equity. *Giacometti v. Proders*, Law Rep. 8 Chanc. 338.

13.—In a settlement of property, out of which a married woman has an equity to a settlement, the ultimate limitation, in default of issue, ought to be for the husband, whether he survives the

wife or not. *Walsh v. Wason*, 42 Law J. Rep. (n.s.) Chanc. 676; Law Rep. 8 Chanc. 482.

14.—When the husband of a person entitled as one of the next-of-kin to a small fund was unable to support his family, the whole fund was settled. *White v. Cordwell*, 44 Law J. Rep. (n.s.) Chanc. 746; Law Rep. 20 Eq. 644.

A debt due to an intestate's estate from one of the next-of-kin, barred by the Statute of Limitations, was set off against his share in the estate. *Ibid.*

15.—A wife's equity to a settlement attaches only to property which comes to her husband's hands in his marital right. If a testator bequeaths his property to a married woman, and makes her husband his executor, and he acts, he is primarily responsible to the estate; and if largely indebted to it, his wife has no equity to a settlement out of any part of it till her husband's liabilities to it are discharged. *Knight v. Knight, and Jeph's v. Knight*, 43 Law J. Rep. (n.s.) Chanc. 611; Law Rep. 18 Eq. 487.

*Settlement on infant ward of Court.* [See INFANT, 10.]

#### (E) SEPARATE ESTATE OF WIFE.

##### (a) Liability of.

16.—A feme covert having property settled to her separate use for life, with remainder as she should, notwithstanding coverture, by deed or will appoint, with remainder to her executors or administrators, opened two accounts with her bankers, a private and an administration account, and directed the bankers by the joint letter of herself and her husband, to consider any overdraft on her private account secured by the administration account. The administration account was subject to the trusts of the settlement. At her death the private account was overdrawn:—Held, that she had contracted so as to bind her separate estate, and that the bankers had a lien on the administration account in respect of the overdrawn private account. *London Chartered Bank of Australia v. Lempriere*, 42 Law J. Rep. (n.s.) P. C. 49; Law Rep. 4 P. C. 572.

17.—A married woman, previously to her marriage, settled her property upon trust for herself during the joint lives of herself and her husband for her separate use without power of anticipation, and after the death of one of them upon trust for the survivor for life, and after the death of the survivor upon trust for the children of the marriage, with an ultimate trust, if she survived her husband, for herself absolutely, but if he survived her for such persons as she should by deed or will appoint. There being no children of the marriage, she by deed irrevocably appointed her reversionary interest to her mother, and by a second deed, not noticing the prior appointment, she appointed the same reversionary interest to her husband absolutely, as she alleged, under his coercion. The husband then deposited the second deed of appointment as a security for a debt due from him. A bill having been filed by the assignee of the debt and security, seeking to charge the wife's separate

estate:—Held, that, even assuming the second appointment to have constituted a fraud on the part of the wife, yet there was no right of impounding the income which she was restrained from anticipating. *Arnold v. Woodhams*, 42 Law J. Rep. (n.s.) Chanc. 678; Law Rep. 16 Eq. 29.

18.—A married woman's separate estate is not in general liable for her torts or breaches of trust. *Wainford v. Heyl*, Law Rep. 20 Eq. 321.

[And see TRUST, C 8.]

19.—The law presumes that by the contract of marriage all the property passes to the husband. The wife is in consequence a privileged suitor in the Court with regard to costs; but where she has separate property, she is liable, like any other unsuccessful suitor, to be condemned in costs. *Milne v. Milne*, 40 Law J. Rep. (n.s.) P. & M. 13; Law Rep. 2 P. & D. 202.

*Separate estate: liability to costs of suit as to will of married woman.* [See PROBATE, 69.]

##### (b) Restraint on anticipation.

20.—A testator by will dated the 2nd of July, 1870, gave a legacy to a married woman for her separate use without power of anticipation, and directed that "for the purpose of securing to her the separate enjoyment without power of anticipation against any husband for the time being, the trustee should settle the legacy in such manner as would carry out the said purpose." Previously to the date of the will the legatee had been judicially separated from her husband, and had ever since lived apart from him:—Held, that she was entitled to have the legacy paid to her. *Munt v. Glynes*, 41 Law J. Rep. (n.s.) Chanc. 639.

21.—A restraint on anticipation may apply as well to a personal fund producing income, to which fund a married woman is absolutely entitled, as to real estate producing rent, and will in either case prevent alienation during coverture. *In re Ellis's Trusts*, 43 Law J. Rep. (n.s.) Chanc. 44; Law Rep. 17 Eq. 409.

Testatrix by will gave 500*l.* Consols to A. B., a married woman, absolutely. By codicil she declared that all gifts, whether absolute or limited, made by her will to any female, should be for her separate use without power of anticipation. The fund was paid into Court:—Held, on petition for payment out by A. B., that the restraint on anticipation applied to the Consols, and that A. B. was only entitled to receive the income during coverture. *Ibid.*

##### (c) Power to devise.

22.—A married woman may, by a deed duly acknowledged, to which her husband is a party, acquire a power to dispose by will of her real estates. *Pride v. Bubb*, 41 Law J. Rep. (n.s.) Chanc. 105; Law Rep. 7 Chanc. 64.

#### (F) MARRIED WOMAN'S PROPERTY ACT.

[The above Act amended. Husband and wife to be liable to be jointly sued for the wife's ante-

nuptial debts, but the husband's liability to be confined to the assets (as defined by the Act) received by him in right of his wife. 37 & 38 Vict. c. 50.]

(a) *Debts contracted before marriage.*

**23.**—A woman entitled to the income of a fund settled to her separate use without power of anticipation, having contracted a debt, married on the 19th of January, 1871. On the same day judgment was signed against her for the debt, and subsequently a charging order was obtained by the creditor. On a petition by the creditor, —Held, that the judgment was binding on the woman, and a stop order was granted. *Sanger v. Sanger*, 40 Law J. Rep. (n.s.) Chanc. 372; Law Rep. 11 Eq. 470.

**24.**—A married woman having no separate estate is not liable under the 12th section of the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), to be made bankrupt in respect of debts contracted before marriage. Whether if she had separate estate she could be made bankrupt, *quære*. *Ex parte Holland*; *In re Henecage*, 43 Law J. Rep. (n.s.) Bankr. 85; Law Rep. 9 Chanc. 307.

(b) *Protection of wife's earnings.*

**25.**—In an action for breach of contract by a married woman against her bankers, the first count of the declaration was for not presenting for payment a bill of exchange deposited with them for that purpose: the second count was for not giving her notice of the dishonour of a bill of exchange entrusted to them for collection, and the third count was for dishonouring a cheque drawn by the plaintiff upon the defendants, they having at the time funds of the plaintiff to meet it. Plea, that the plaintiff was a married woman. Replication, that the causes of action arose exclusively from earnings, money, chattels, and property within the meaning of the Married Woman's Property Act, 1870 (33 & 34 Vict. c. 93), and that the defendants knew when they accepted the plaintiff's banking account that she was a married woman carrying on her business separately from her husband:—Held, on demurrer, that the replication was good, as shewing that the plaintiff was seeking a remedy for the protection of her earnings and property within the meaning of the 11th section of the Married Woman's Property Act, 1870. *Summers v. The City Bank*, 43 Law J. Rep. (n.s.) C. P. 261; Law Rep. 9 C. P. 580.

**26.**—A woman who has been deserted by her husband, and has obtained an order under 20 & 21 Vict. c. 85. s. 21, for the protection of her money and property from her husband and his creditors, may maintain an action for a libel without joining her husband. *Ramsden v. Brearley*, 44 Law J. Rep. (n.s.) Q. B. 46; Law Rep. 10 Q. B. 147.

**27.**—On payment out to a married woman, who had obtained a protection order, and was suing as a feme sole under the Married Woman's Property Act, —Held, that the affidavit of the married woman as to the continuance of the separation

and as to no settlement might be accepted as satisfactory. *Ewart v. Chubb*, Law Rep. 20 Eq. 451.

(c) *Transfer into name of married woman.*

**28.**—The Married Woman's Property Act, 1870, must be construed strictly with reference to its provisions for the recovery of things declared thereby to be a married woman's separate property, and there is nothing in that Act to say that a married woman is entitled to enjoy and recover such property in all respects as if she had been a feme sole. Therefore, where a legacy given to a woman contingently on attaining twenty-one, had been invested in stock by the executors and trustees of the will in her name and theirs jointly, and the woman married after the passing of the Married Woman's Property Act, 1870, and subsequently attained twenty-one, and a bill was filed by the trustees and the married woman asking leave to transfer the stock into the name of the married woman only:—Held, that the Court would not make a decree directing the transfer. *Howard v. The Bank of England*, 44 Law J. Rep. (n.s.) Chanc. 329; Law Rep. 19 Eq. 295.

**29.**—Upon the application of a married woman under the Married Woman's Property Act, 1870, s. 4, that shares in a joint-stock company may be registered in her name as a married woman entitled to her separate use, it is the duty of the company to investigate and recognise her title, and a mandamus to enforce the performance of this duty will be granted by the Court. *The Queen, on the prosecution of Fraser, v. The Carnatic Railway Company (Lim.)*, 42 Law J. Rep. (n.s.) Q. B. 169; Law Rep. 8 Q. B. 299.

(G) DOWER AND FREEBENCH.

**30.**—A testator by his will appointed his widow one of the guardians of his children, bequeathed her an immediate legacy of 200*l.*; the consumable stores at his mansion-house; an annuity of 700*l.* a year, charged on a specifically-devised portion of his real estate, in exoneration of all his other property; directed that his widow should (on certain terms) occupy his mansion; gave several powers to his trustees, and among others, powers of leasing and management of his estates; and added to his will four schedules, comprising freeholds, leaseholds, copyholds, and customary lands. The evidence shewed that the widow was entitled, though not in each case to the same extent, to freebench in the customary lands:—Held, that the widow was bound to elect. *Thompson v. Burra*, 42 Law J. Rep. (n.s.) Chanc. 827; Law Rep. 16 Eq. 592.

**31.**—A., being the owner of leaseholds for a term of ninety-nine years, mortgaged the property to B. for the term, less five days, and also to G. and R. for the term, less three days. He also demised to M. for the term, less ten days, in trust for G. and R. He then acquired the fee subject to the mortgages. B.'s mortgage was paid off to his executors, who assigned the term upon which it was secured to a trustee for G. and R. Then A. became bankrupt, and he an

his assigns, in consideration of a release by G. and R. of their mortgage debt, by a deed to which A.'s wife was named a party, but which she refused to execute, granted the fee of the premises to them. They sold the estate, and A. died. A.'s widow then filed her bill against the purchaser to enforce her right to dower out of the premises. The defendants demurred, but the demurrer was overruled by one of the Vice Chancellors, on the ground that upon the release by G. and R. of the mortgage debt, the mortgage terms became satisfied, and were extinguished by the Satisfied Terms Act (8 & 9 Vict. c. 112), and thereby the inchoate right of A.'s widow to dower was let in. But on appeal this decision was reversed, and it was held that the term was not satisfied within the meaning of the Act. *Anderson v. Pignet*, 42 Law J. Rep. (n.s.) Chanc. 310; Law Rep. 8 Chanc. 180.

[And see DOWER.]

(H) SEPARATION DEEDS.

**32.**—Declaration upon a covenant in a deed, whereby the defendant covenanted with the plaintiffs, as trustees, that he would, during the joint lives of himself and Lucy Holt, his wife, and during so long as they should live separate and apart, pay unto the plaintiffs, for the separate use of the said Lucy Holt, a certain annuity. Averment of the performance of conditions precedent. Breach, non-payment. Plea setting out the deed of the 13th of December, 1858, made between Richard Holt, the defendant, of the first part, "Lucy Holt, his wife" of the second part, and the plaintiffs of the third part. After a recital that differences had arisen between the husband and wife, and that they had agreed to live separate, and other recitals in which Lucy Holt was also described as the wife of the defendant, came the following covenant, viz., "that the defendant shall and will henceforth, during the joint lives of the said Richard Holt and Lucy Holt, and during so long time as they shall live separate and apart, well and truly pay or cause to be paid unto the said trustees," &c., the annuity aforesaid. Averment, that after the execution of the deed Lucy Holt committed adultery with one S. O., and thereupon the defendant instituted proceedings in the Divorce Court, and obtained a decree absolute dissolving the marriage. On demurrer,—Held, a bad plea, because the covenant was an absolute covenant for the payment of the annuity during the joint lives of the defendant and Lucy Holt, and during so long time as they lived separate, and not merely while the marriage tie subsisted. *Charlesworth v. Holt*, 43 Law J. Rep. (n.s.) Exch. 25; Law Rep. 9 Exch. 38.

**33.**—A legal and proper covenant in a separation deed may be enforced, although other covenants in the same deed are illegal. A covenant in a separation deed whereby the father divested himself of the custody of his elder children, and gave to the wife the custody of the younger children, who were under the age of seven years, enforced, there being evidence of the father's misconduct. A covenant by the husband to deliver up to the wife all her diaries, private correspon-

dence, &c., was held to preclude the husband from making or keeping copies of such diaries, &c. *Hamilton v. Hector*, Law Rep. 13 Eq. 511.

**34.**—By a deed executed on the separation of a husband and wife, after containing the usual provision for separation, a debt due to the wife before marriage on a promissory note was declared to be held by the debtor (who joined in executing the deed) upon trust for the wife and husband successively for life, and after the death of the survivor, for the then only child of the marriage absolutely. Subsequently the husband and wife resumed cohabitation, and the husband became a bankrupt. The wife then filed a bill praying the execution of the trusts of the deed, or, in the alternative, for her equity to a settlement out of the debt. A demurrer, for want of equity, by the husband's trustee in bankruptcy on the ground, first, that the deed was not a settlement but a mere separation deed annulled by the resumption of cohabitation; and secondly, that the debt, being a legal chose in action of the wife's before marriage, belonged to the husband, was overruled. *Ruffles v. Alston*, 44 Law J. Rep. (n.s.) Chanc. 308; Law Rep. 19 Eq. 539.

*Separation deed: clause that no misconduct prior to the deed should be admissible in evidence in future proceedings.* [See DIVORCE, 31.]

*Effect of suit on proceedings in divorce.* [See DIVORCE, 15, 36, 37.]

*Order on feme covert to pay debt by instalments under the Debtors Act, 1869.* [See DEBTOR'S ACT, 14.]

*Contract by married woman: copyright: license to publish.* [See COPYRIGHT, 3.]

*Grant of probate and administration to husband or wife.* [See PROBATE, 10-13.]

BARRATRY.

[See SHIPPING LAW, B 1.]

BARRISTER.

[See COUNSEL.]

Order of suspension from practice, pronounced by the High Court of the North-Western Provinces of India against a barrister and advocate, reversed on appeal, the facts proved being considered not to amount to that *mala praxis* on which penal proceedings could be fairly founded. No order as to costs. *Newton v. The Judges of the High Court of the North-Western Provinces*, Law Rep. 4 P. C. 18.

BASTARDY.

[Amendment of the laws relating to bastardy 35 & 36 Vict. c. 65.]

[35 & 36 Vict. c. 65, ss. 6, 8, sched. 2 repealed.]

Revival of rights under repealed enactments of 7 & 8 Vict. c. 101, 36 & 37 Vict. c. 9.]

1.—A bastard child was born of an English mother on board of a steamship belonging to the Cunard line of steamers, sailing on the high seas. The mother came to reside in England, and applied to justices for an order of affiliation against the father:—Held, that the birth took place in England within the meaning of 7 & 8 Vict. c. 101, which, by section 5, extends only to England and Wales, and that the justices had jurisdiction to make the order upon the putative father. *Marshall v. Murgatroyd*, 40 Law J. Rep. (N.S.) M.C. 7.

2.—A summons was issued by a justice to the putative father of a bastard child upon an application made by the mother before the birth of the child, under 7 & 8 Vict. c. 101, s. 2. No written deposition was made at the time of the application. The parties appeared at the petty sessions according to the exigency of the summons, and the case was heard without objection, when the father swore wilfully and falsely as to a material fact:—Held, that the appearance at the petty sessions and the hearing without objection raised, cured the defect in the application for the summons, if there was any, and the justices in petty sessions had jurisdiction to hear the parties before them, and that the father was rightly convicted of perjury. *Regina v. Berry* (Bell C.C. 46) followed. *Regina v. Fletcher*, 40 Law J. Rep. (N.S.) M.C. 123; Law Rep. 1 C.C.R. 320.

Semble—the deposition on oath required by 7 & 8 Vict. c. 101, s. 2, to be made on application by a mother before the birth of the child should be in writing—*Bovill, C.J., contra*, *Ibid*.

3.—Upon the hearing of an appeal to the quarter sessions against an order made by justices in petty sessions adjudicating the appellant to be the putative father of a bastard child, the respondent, the mother of the child, and witnesses on her behalf, were examined, after which the Court decided that the evidence of the respondent was not corroborated with regard to the main issue in any material point, and quashed the order:—Held, that this was a decision upon the merits and was final, so that a fresh order could not be obtained by the respondent against the appellant. *Regina v. Glynn*, 41 Law J. Rep. (N.S.) M.C. 58; Law Rep. 7 Q.B. 16.

4.—The evidence of the mother of a bastard child, who is an applicant for an affiliation order against the putative father, is necessary at the hearing of the summons before justices sitting in petty sessions under 8 & 9 Vict. c. 101, s. 3. Therefore, if the mother die after making her application for a summons, and before the hearing of the summons at petty sessions, the justices have no jurisdiction to make an order thereon. *Regina v. Armitage*, 42 Law J. Rep. (N.S.) M.C. 15.

Semble—it may be otherwise on the hearing of an appeal against an affiliation order under 8 Vict. c. 10, s. 6; if the mother die after the hearing of a summons at petty sessions, and if she has been examined in the presence of the defend-

ant and might have been cross-examined by him at the petty sessions. *Ibid*.

5.—The appellant, having been duly summoned before justices, was adjudged to be the putative father of the bastard child of the respondent, and ordered to provide for its maintenance, according to the Bastardy Law Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3. The child was born in Cornwall. The appellant was an Irishman, and the respondent an Englishwoman, and the connection which resulted in the birth of the child took place in Ireland:—Held, that, the child having become chargeable in England, the justices had jurisdiction, and the order was good. *Hampton v. Rickard*, 43 Law J. Rep. (N.S.) M.C. 133.

6.—A bastardy order on a putative father for payment of 3s. a week made after the passing of 35 & 36 Vict. c. 65, on a summons applied for before the passing of that Act:—Held, invalid, as the 7 & 8 Vict. c. 101 only authorised an order for 2s. 6d.; and Held, that the defect was not cured by 36 Vict. c. 9, s. 8. *Regina v. Kay*, Law Rep. 8 Q.B. 324.

## BENEFIT BUILDING SOCIETY.

[See FRIENDLY SOCIETY.]

## BETTING.

[See GAMING.]

## BIGAMY.

1.—To make a marriage invalid within 6 & 7 Will. 4, c. 85, s. 42, which enacts “that if any persons shall knowingly and wilfully intermarry under the provisions of this Act (*inter alia*) without due notice to the superintendent registrar, the marriage of such persons shall be null and void,” it must be contracted with a knowledge by both parties that no due notice had been given; and therefore, where one of the parties under section 4 of the Act, which requires that the notice shall state (*inter alia*) the name and surname of each of the parties intending marriage, gave a notice stating therein a false Christian name for such party, but the other party did not know that fact at the time of the marriage, the marriage was held valid; and whether or not it be necessary to constitute bigamy that the second marriage by the married person should be a valid one, a man who, being married, married a woman after stating a false name in his notice to the registrar, without it appearing that she knew of that fact at the time, was held guilty of bigamy. *Regina v. Rea*, 41 Law J. Rep. (N.S.) M.C. 92; Law Rep. 1 C.C.R. 365.

2.—By 24 & 25 Vict. c. 100, s. 57, whosoever being married shall marry any other person during the life of the former husband or wife,

shall be guilty of felony. A widower married again, and during the life of his second wife married his deceased wife's niece. By 5 & 6 Will. 4. c. 54, s. 2, all marriages between persons within the prohibited degrees of affinity are to be null and void to all intents and purposes whatsoever:—Held, that the second marriage was void within 5 & 6 Will. 4. c. 54, s. 2; but that nevertheless the man marrying was guilty of the felony under the first-mentioned statute. *Regina v. Fanning* (17 Ir. C. L. R. 289) not followed. *Regina v. Allen*, 41 Law J. Rep. (N.S.) M. C. 97; Law Rep. 1 C. C. R. 367.

## BILL OF EXCHANGE AND PROMISSORY NOTE.

- (A) FORM AND OPERATION OF.
  - (a) *When complete document.*
  - (b) *Cheque not an equitable assignment.*
- (B) STAMP.
- (C) CONSIDERATION.
- (D) ACCEPTANCE.
  - (a) *By partners.*
  - (b) *By directors.*
  - (c) *Acceptance against bill of lading.*
- (E) TRANSFER FOR VALUE.
- (F) PRESENTMENT AND NOTICE OF DISHONOUR.
  - (a) *Time for presentment.*
  - (b) *Duty of agent.*
  - (c) *Notice of dishonour.*
- (G) RENEWAL.
- (H) PAYMENT.
  - (a) *Crossed cheque.*
  - (b) *Cheque to order: forged endorsement.*
  - (c) *Payment in error.*
- (I) SPECIFIC APPROPRIATION OF REMITTANCES TO COVER BILLS.
  - (a) *Generally.*
  - (b) *Double insolvency; Ex parte Waring.*
- (K) ACTIONS AND SUITS.

[Days of grace abolished in the case of bills of exchange and promissory notes, payable at sight or on presentation. 34 & 35 Vict. c. 74.]

### (A) FORM AND OPERATION OF.

#### (a) *When complete document.*

1.—A document in the form of a bill of exchange, but accepted with the drawer's name in blank, does not exist as a bill until the drawer's name is inserted, and even then does not create a debt against the parties to it until value has been given for it. *Ex parte Hayward & Co., Batten, and Ex parte Jones; In re Hayward & Co.*, 40 Law J. Rep. (N.S.) Bankr. 69; Law Rep. 6 Chanc. 546.

The acceptance of a firm was written across such a document. The firm afterwards made an assignment for the benefit of creditors. After the assignment, and when the document had become to all appearance a complete bill by the insertion of a drawer's name, it passed into the hands of

holders for value:—Held, that it did not create a debt capable of supporting an adjudication of bankruptcy against the acceptors. *Ibid.*

#### (b) *Cheque not an equitable assignment.*

2.—A cheque does not operate as an equitable assignment by the drawer of part of his balance at his banker's. Dicta in *Keene v. Beard* (8 C. B. N.S. 372) commented on. *Hopkinson v. Forster*, Law Rep. 19 Eq. 74.

### (B) STAMP.

3.—A cheque payable to M. or order, and indorsed by M. to plaintiff, who received it on the 4th of November, is admissible as evidence in an action by plaintiff against the drawer, although it be dated the 5th of November, and although it bear a 1d. stamp only. *Bull v. Sullivan*, 40 Law J. Rep. (N.S.) Q. B. 141; Law Rep. 6 Q. B. 209.

### (C) CONSIDERATION.

4.—S., a cotton broker of New Orleans, was in the habit of sending cotton over to England, and the plaintiff was in the habit of accepting his bills in consideration of the assignment to him of bills of lading of the cotton. In 1870, in the course of this business, a bank, to whom two bills of S. on the plaintiff were endorsed, sent them for the plaintiff's acceptance, and with the bills they sent a memorandum, "The bank holds bills of lading for 504 bales of cotton." The plaintiff thereupon accepted the bills, and, retiring them before they became due, received the bills of lading, and went to the captain of the ship on his arrival and presented the bills of lading, which turned out to be forgeries:—Held, that, notwithstanding the representation contained in the memorandum sent by the bank, the plaintiff could not call on the bank to repay him the value of the bills. *Leather v. Simpson*, 40 Law J. Rep. (N.S.) Chanc. 177; Law Rep. 11 Eq. 398.

5.—No action can be maintained on a bill accepted in consideration only of a debt discharged by a bankruptcy or arrangement under the Bankruptcy Act, 1861, although such bill was given after the repeal of that Act by the Bankruptcy Repeal Act, 1869 (32 & 33 Vict. c. 83). *Rimini v. B. Van Praagh*, 42 Law J. Rep. (N.S.) Q. B. 1; Law Rep. 8 Q. B. 1.

6.—A creditor who receives a cheque, or other negotiable security, on account of a pre-existing debt, *bonâ fide* and without notice of any infirmity of title, holds it by an indefeasible title, whether the security be payable at a future time or on demand, and can sue the drawer upon it, although the consideration for which the cheque was drawn wholly fails. *Currie v. Misa*, 44 Law J. Rep. (N.S.) Exch. 94; Law Rep. 10 Exch. 158.

The defendant bought of L. foreign bills, drawn by L., which according to the usual course of business were to be paid for on the 14th of February. On the 13th of February, L. being pressed by the plaintiffs, his bankers, to whom he

was largely indebted, gave them, in partial reduction of the debt, a document signed by himself and directing the defendant to pay to the plaintiffs or bearer a sum equal to the price of the bills.

On the 14th of February, the defendant received from the plaintiffs this document, and gave them in exchange his own cheque on his bankers for the same amount payable to L. or bearer. The plaintiffs received it *bonâ fide* and without notice of any infirmity of title on the part of L., and entered it in their books to L.'s credit, and presented it at the clearing house the same day to the defendant's bankers. The latter refused payment under instructions from the defendant who had, since drawing the cheque, discovered that L. had stopped payment. The plaintiffs, on the 15th of February, entered the cheque to L.'s debit. The bills bought by the defendant were afterwards dishonoured. The plaintiffs having sued the defendant upon the cheque:—Held, by the Court of Exchequer Chamber (dissentiente Lord Coleridge, C.J.), affirming the judgment of the Court of Exchequer, that the plaintiffs were holders of the cheque for valuable consideration, and were entitled to recover. *Ibid*.

#### (D) ACCEPTANCE.

##### (a) By partners.

7.—The acceptance of a bill of exchange payable to order of a firm, drawn in the name of a firm by one of its members, without the authority of the other, does not estop the acceptor from disputing the endorsement on the ground of want of authority from such other member. *Garland v. Jacob*, Law Rep. 8 Exch. 221.

8.—Four mercantile firms, each of whom carried on a separate trading business of its own, agreed to carry on jointly a particular trade which had been theretofore carried on by F., one of the four firms, alone. The agreement between the four firms provided that the business should be carried on under the style of F., who were to keep separate books for the purpose, and that each party to the agreement should be liable in respect of the business in proportion to his share in the undertaking, and in the event of being under cash advances he should receive interest for the same; but it was "understood and agreed that the finance of the business be carried on by acceptances of the several parties interested as may from time to time be arranged." The association was known to the members as the A. company, but its name and existence were kept secret. In order to raise money for the purpose of the business a number of bills of exchange were drawn by M., one of the firms, upon each of the other three, were accepted by them respectively, and were discounted by bankers, the money thus obtained being applied to the purposes of the joint business. The bankers were ignorant of the existence of the association. An order was afterwards made to wind up the association, as an unregistered partnership consisting of more than seven members:—Held (reversing a decision of *Malins, V.C.*),

that only those of the firms whose names appeared upon the bills of exchange were liable in respect of them, and that consequently the holders of the bills could not prove upon them in the winding up. *In re the Adansonia Fibre Company; Miles's Claim*, 43 Law J. Rep. (N.S.) Chanc. 732; Law Rep. 9 Chanc. 635.

##### (b) By directors.

[See COMPANY, D 21.]

##### (c) Acceptance against bill of lading.

9.—H. accepted bills of exchange to meet goods consigned to him. The acceptances were made payable "on delivery of the bills of lading." The bills of lading remained, with the bills of exchange, in the possession of the bank who had discounted the latter for the drawers:—Held, on the bankruptcy of the acceptor, that the goods were part of his estate which the bank held as security for their debt, and therefore that the bank could only prove for the amount due on the bills of exchange after deducting the value of the goods. *Ex parte Brett; In re Howe*, 40 Law J. Rep. (N.S.) Bankr. 54; Law Rep. 6 Chanc. 838.

10.—Contract by F. with K. to ship wheat to be paid for by K.'s acceptance against bill of lading. F. shipped the wheat, and made out six bills of lading with corresponding bills drawn on K. indorsed, and delivered three of these to the C. Bank to secure an advance. By inadvertence they sent one other of the indorsed bills of lading to K., who transferred it for value to the W. Bank. The bills having not been met at maturity:—Held, that F. was entitled to transfer the bills to the C. Bank, and that the W. Bank had no priority. *Gilbert v. Guignon*, Law Rep. 8 Chanc. 16.

11.—A bill of exchange which purports to be drawn against a particular cargo does not necessarily carry a lien on that cargo into the hands of every holder of the bill. *Frith v. Forbes* (4 D. G. F. & J. 409) considered. *Robey & Co.'s Perseverance Ironworks v. Ollier*, Law Rep. 7 Chanc. 695.

*Release of acceptor reserving claims against others.* [See SCOTCH LAW, 17.]

#### (E) TRANSFER FOR VALUE.

12.—A bill of exchange was drawn in England by the defendants, English subjects, on a French house, payable in Paris on the 5th of October, 1870. Before the maturity of the bill, in consequence of foreign invasion, a law was passed in France, suspending, for a time, the presentation of current bills of exchange. The time during which this suspension was to last was extended, at different times, by laws promulgated by the *de facto* governments of France. Ultimately, in accordance with the last of such laws, the bill was presented by the holders on the 5th of September, 1871. It was dishonoured, and protest was made according to the law of France, and notice of presentment and dishonour given to the successive



indorsees and the defendants. The plaintiff, who carried on business in London, and to whom the defendants indorsed the bill for value, having paid a subsequent indorsee, sued the defendants for the amount of the bill and expenses:—Held, that, on transferring a bill for value, the true nature of the contract is that the transferee warrants that the drawer shall accept the bill, and pay it when due or presented; that the defendants were thus in the position of sureties whose liability was to be measured by that of the acceptor; that, as the obligations of the acceptor must be determined by the *lex loci* of performance, so also must those of the defendants, who were therefore liable on the bill. *Roquette v. Overmann*, 44 Law J. Rep. (N.S.) Q.B. 321; Law Rep. 10 Q.B. 525.

#### (F) PRESENTMENT AND NOTICE OF DISHONOUR.

##### (a) Time for presentment.

13.—Where a promissory note, which appeared on the evidence to have been meant to be a continuing security, was dated in February and not presented till December:—Held, that the delay was not unreasonable, and that the holders of the note were entitled to recover. *The Chartered Mercantile Bank of India, London, and China, v. Dickson*, Law Rep. 3 P.C. 574.

14.—The defendant on the 27th of January gave to the plaintiff, in payment of a debt, a cheque drawn upon a Jersey bank. On the 28th the plaintiff paid it into his bankers in London, who, as is customary with English bankers, sent it to Jersey, where it was received by the bankers on the 29th, on which day the defendant had funds in their hands. No notice was taken by them of a request for payment sent with the cheque. The plaintiff's bankers had not any agent in Jersey. They applied again for the cheque or the amount thereof on the 6th of February. In answer to this application the cheque was sent back to them with the words "refer to drawer" written upon it. The Jersey bank had stopped payment on the 1st of February:—Held, that there had been a good presentment of the cheque, that there had been no *laches* on the part of the plaintiff or his bankers, and that the receipt of the cheque by the plaintiff did not amount to payment of the amount due. *Heywood v. Pickering*, 43 Law J. Rep. (N.S.) Q.B. 145; Law Rep. 9 Q.B. 428.

##### (b) Duty of agent.

15.—The object of the transmission of a bill of exchange from principal to agent being to obtain acceptance and payment of the bill, or, if not accepted, to guard the rights of the principal against the drawer, the duty of the agent must be measured by these considerations, and the agent ought not to press unduly for acceptance, provided he obtains acceptance or refusal within the time which will preserve the rights of the principal against the drawer. *Bank of Van Diemen's Land v. Bank of Victoria*, 40 Law J. Rep. (N.S.) P.C. 28; Law Rep. 3 P.C. 256.

In an action for negligence by a principal

against an agent, it appeared that the principal transmitted to the agent a bill of exchange for acceptance. The bill was received on a Friday at 1 P.M., and was left with the drawees at 2 P.M. the same day. On Saturday, at 11.30 A.M., the agent called for the bill, and, as business closed at 12 P.M. on Saturday, was directed by the drawees to call on Monday. The agent called on Monday, and was directed to call on Tuesday. When the agent called on Tuesday, the acceptance which had been made on Saturday had been cancelled. The jury found a verdict for the principal, but with nominal damages; and the Judicial Committee refused to increase the damages. *Ibid.*

##### (c) Notice of dishonour.

16.—Where there are no effects of the drawer in the hands of the drawees of a cheque, and the drawer has no reasonable ground to expect that the cheque will be honoured, no notice of dishonour to him is necessary either by the payee or his indorsee. *Wirth v. Austin*, Law Rep. 10 C.P. 689.

17.—Though a foreign bill of exchange must be presented by a notary public and protested, to render the drawer liable, notice to the drawer that the bill has been "duly presented for payment and dishonoured," is sufficient, without specific notice of protest. *Ex parte Lowenthal*; *In re Lowenthal*, 43 Law J. Rep. (N.S.) Bankr. 83; Law Rep. 9 Chanc. 591.

#### (G) RENEWAL.

18.—Where the holder for value of a bill of exchange agreed with the drawer that the bill should be renewed, and the holder gave his cheque for the amount, which the drawer sent, together with the new bill, to the acceptor (who knew why they were sent), in order that he might meet the original bill, and accept the renewed bill:—Held, that the acceptor had no right to cash the cheque and pay the original bill, and then decline to accept the new bill:—Held, also, that the agreement to renew did not release the acceptor from his suretyship. *Torrance v. Bank of British North America*, Law Rep. 5 P.C. 246.

#### (H) PAYMENT.

##### (a) Crossed cheque.

19.—The payee of a cheque drawn on defendants' bankers, payable to him or his order, indorsed his name on it, and crossed it with two lines and the name of his bankers, the London and County Bank. The cheque was stolen, and ultimately came into the hands of a *bonâ fide* holder for value, who paid it to his bankers, the London and Westminster Bank. They presented it to the defendants, who, notwithstanding the crossing, paid the amount. In an action by the payee to recover the amount from the defendants:—Held, that although by 21 & 22 Vict. c. 79, s. 2, the defendants were bound to pay only through the London and County Bank, yet as the plaintiff had

ceased to be holder of the cheque, he could not recover either for the breach by defendants of the duty created by the statute, or an allegation that they had converted the cheque. *Smith v. The Union Bank of London*, 44 Law J. Rep. (N.S.) Q. B. 117; Law Rep. 10 Q. B. 291: affirmed on appeal, 45 Law J. Rep. (N.S.) Q. B. 149; Law Rep. 1 Q. B. Div. 31.

(b) *Cheque to order: forged endorsement.*

20.—Though the banker on whom a cheque is drawn which is payable to order, is protected by 16 & 17 Vict. c. 59, s. 19 from proving it to be indorsed by the person to whose order it is made payable, if it purports to be so indorsed, yet a third person who cashes such cheque is not so protected; and if the indorsement of the name of the payee to whose order it was made payable be a forgery, such third person will be liable to refund to the drawer the money he received on the cheque when it was honoured by the banker on whom it was drawn. *Ogden v. Benas*, 43 Law J. Rep. (N.S.) C. P. 259; Law Rep. 9 C. P. 513.

(c) *Payment in error.*

21.—The branch bank of the defendants at N. discounted a bill of exchange drawn by the plaintiffs, who were customers of the branch bank, upon H. & Co., and accepted by them, payable at the bank of L. & Co., also bankers at N. According to the practice prevailing among bankers at N., the branch bank, on the morning when the bill became due, took it to L. & Co., who marked it for payment, and gave a credit note, indicating that it, with other moneys, was in order for payment and would be paid. About 2 P.M. on the same day a clerk of the branch bank, in accordance with the practice, took all the cheques which had been received, drawn on L. & Co., together with the credit note, to the bank of L. & Co. The credit note was admitted into the total amount, and a cheque upon the branch bank was, in accordance with the practice, handed by L. & Co. to the clerk, for the amount of the balance due to the defendants. At 3 P.M. the banks at N. close to the public, but it is the practice for the bankers who keep accounts with the branch bank to attend at such bank, before it finally closes for the day at 4 P.M., for the purpose of having the day's accounts investigated, and of rectifying any mistakes or errors which may have arisen in the course of the day, and finding and striking the final balances between them. When the bank of L. & Co. closed at 3 o'clock it was ascertained that H. & Co. had stopped payment, and that their balance was not sufficient to meet the bill. Notice was at once and before 4 P.M. given to the branch bank that the bill had been paid in error, and they were requested to take it back. Before such notice was received, the account of L. & Co. had been debited with the amount in the accounts of the branch bank:—Held, that it not being shewn that the giving the cheque was provisional only, and subject to rectification upon

going over the accounts later in the day, 'such giving the cheque by L. & Co. amounted to payment of the bill to the defendants, and that the plaintiffs were entitled to have credit with them for the amount of the bill. *Pollard v. The Bank of England*, 40 Law J. Rep. (N.S.) Q. B. 233; Law Rep. 6 Q. B. 623.

*Release of holder by acceptor reserving rights does not release indorsees.* [See SCOTCH LAW, 17.]

(I) SPECIFIC APPROPRIATION OF REMITTANCES TO COVER BILLS.

(a) *Generally.*

22.—Estoppel by representations applies only where the representation is as to a fact in existence at the time, not where it is as to something yet to come, or as to a matter of future intention. *The Citizens Bank of Louisiana v. The First National Bank of New Orleans* (H.L.), 43 Law J. Rep. (N.S.) Chanc. 269; Law Rep. 6 E. & I. App. 352.

A representation or assurance given by the drawer of a bill, that the bill was drawn "specially" or "expressly" against funds remitted by him more than sufficient to meet the bill on maturity, does not amount to a specific appropriation or equitable assignment of the funds so remitted, although it be given to one who is induced thereby to purchase the bill, unless it is also represented, or the fact is, that there was a trust already constituted, by which the payer of the bill would hold funds in trust for the payment of the particular bill, or of bills of that particular class or description. *Ibid.*

The plaintiff purchased from the New Orleans Bank a bill drawn by them upon the Bank of Liverpool, and was told by the persons representing the New Orleans Bank, at the time of the purchase, that the Liverpool Bank had, or would have, funds of the New Orleans Bank sufficient and applicable to meet the bill and appropriated for the purpose. Before the bill was presented for acceptance the New Orleans Bank stopped payment, and the Liverpool Bank declined to accept the bill on presentation, or to pay it at maturity, on the ground that, although they had sufficient funds of the New Orleans Bank to meet the bill, none of such funds were specifically appropriated to the payment of it. It appeared that the course of business between the two banks was for the New Orleans Bank to remit to the Liverpool Bank bills for collection, and to draw bills against the remittances, taking care to keep them always in funds to meet the bills drawn upon them:—Held, that there was no specific appropriation of the funds of the New Orleans Bank in the hands of the Bank of Liverpool to meet the plaintiff's bill, and that the statement made to him did not amount to an equitable assignment, and was no more than a representation of the course of dealing between the two banks. *Ibid.*

23.—Where G. was in the habit of drawing

bills on Y., and of sending him bills to put him in funds to meet them, and a separate account of these transactions was kept distinct from their general account:—Held, evidence of specific appropriation. Y. having effected with his creditors a composition of 3s. 4d. in the pound:—Held, that G. was entitled to have back remittances sent by him, and which had not matured when Y.'s failure took place, subject only to Y.'s right to be reimbursed the 3s. 4d. in the pound paid by him under the composition. *Ex parte Gomez; In re Yglesias*, Law Rep. 10 Chanc. 639.

24.—On the 14th of September P. & Co. purchased from H. a floating cargo of maize, and the same day resold it to the defendant. On the 4th of October P. & Co., according to the custom of the trade, paid H. (who retained the shipping documents) a deposit of 883*l.* on account of the cargo, and the same day drew a bill on the defendant for that amount, which the defendant accepted. P. & Co. thereupon discounted the bill with the plaintiffs. On the arrival of the cargo in November, P. & Co., acting on the defendant's instructions, sold the cargo for him to C., who paid H. the balance due from P. & Co. on the first sale, and received direct from H. the shipping documents. There was then remaining in C.'s hands a balance of 415*l.* due to the defendant. On the 2nd of December P. & Co. executed a deed of inspectorship; on the 17th the bill for 883*l.* was dishonoured at maturity; and on the 20th the defendant filed in Dublin a petition for arrangement with his creditors. Had P. & Co. not suspended payment, they would have been entitled, according to the regular course of business, to have appropriated the balance of 415*l.* to the taking up of the bill; and it would also have been their duty towards the defendant to have done so and to have retired the bill. C. having paid the 415*l.* into Court,—Held, that the money paid in ought to be applied towards taking up the bill, and ought not to be paid to the defendant or his trustees. *The Bank of Ireland v. Perry*, 41 Law J. Rep. (n.s.) Exch. 9; Law Rep. 7 Exch. 14.

25.—Two firms of G. & Co. and L. & Co. engaged in a joint transaction, which consisted in the purchase of cotton by L. & Co. in Bombay, which was consigned to G. & Co. in London for sale by them on the joint account. The cotton was paid for by means of the proceeds of bills of exchange which were drawn by L. & Co. upon G. & Co., and were sold to bankers in Bombay. The bills of lading of the cotton were sent to G. & Co., to put them in funds to meet their acceptances when due. Both firms went into liquidation. Some of the cotton which had been bought on the joint account came into the hands of the trustee of L. & Co.:—Held, that the holders of acceptances of G. & Co., the proceeds of which had been employed in paying for this cotton, were entitled to have the proceeds of the cotton specifically appropriated to meet the bills, subject, however, to the right of the creditors (if any) of the aggregate partnership composed of the two firms to have the proceeds of the cotton applied as part of the joint estate of that partnership.

*Ex parte Dewhurst; In re Leggett*, 42 Law J. Rep. (n.s.) Bankr. 87; Law Rep. 8 Chanc. 965.

26.—Bills were drawn against cotton consigned to England. The cotton was hypothecated, by means of a letter in favour of a bank which bought these bills; at the same time bills of lading and a policy were handed to the bank. The letter contained a power to keep insured, and a power to sell the cotton in case of non-payment, and to apply any balance, after satisfaction of the bills, towards other debts due from the consignor to the bank:—Held, that money received on the policy could not be applied in payment of anything beyond what was due on the bills. *Latham v. The Chartered Bank of India, China and Australia*, 43 Law J. Rep. (n.s.) Chanc. 612; Law Rep. 17 Eq. 205.

27.—The plaintiffs had had discount transactions with S., who applied to them for an advance of 5,000*l.*; the plaintiffs agreed to lend him that sum upon a guarantee, and in May, 1867, the defendant became surety for a portion of the amount required. The plaintiffs advanced 5,000*l.* to S., and subsequently discounted bills to a large extent for him. When the bills which he brought were discounted, the plaintiffs credited him with the amount thereof in their ledger, and then rediscounted the same. This method was adopted in order to keep the plaintiffs out of cash advances. Sometimes when the plaintiffs discounted bills for S. the transaction was not entered upon their ledger. If the discounted bills were not paid at maturity by the acceptors, or by S., and were paid by the plaintiffs, the amount was debited to S. According to the plaintiffs' ledger, between the 8th of May and the 12th of June, 1867, S. was credited "by bills discounted" with various sums, amounting in the whole to more than 5,000*l.* It appeared from the plaintiffs' books that from May, 1867, to December, 1868, the accounts were made up, and sometimes shewed only a small balance against S., e.g., at the end of 1867, a balance against him of 273*l.*, and at the end of June, 1868, of 1,060*l.*; but in December, 1868, the account shewed a balance against him of 27,704*l.* The foregoing balances in 1867 and June, 1868, were arrived at by taking into account the sums on the credit side, which represented the amount of the bills, less interest and commission, for discount, which were current at the date of the balance being struck, and of promissory notes of S., some of which bills and promissory notes were not paid at maturity, and were included in the ultimate balance of 27,704*l.* against S. The plaintiffs from time to time during 1867 and 1868 sent to S. accounts, which were copies of their ledger, and thus shewed the above balances. The bills discounted with the plaintiffs by S. at the time of the loan of 5,000*l.* were renewed and were never paid, and that sum was never liquidated. In December, 1868, S. became bankrupt:—Held, that the plaintiffs had not appropriated the bills discounted by S. after the loan of 5,000*l.* in payment thereof, and that as the loan to S. had never been paid by him, the defendant was liable to the plaintiffs upon his

guarantee after S. had become bankrupt. *The City Discount Co. v. McClean* (Exch. Ch.), 43 Law J. Rep. (N.S.) C.P. 344; Law Rep. 9 C.P. 692.

*Specific appropriation with country bankers of bills to answer acceptances: rights of acceptors against London banking agent.* [See *BANKER*, 13.]

*Securities held by banking company against their acceptances: proof in winding up.* [See *COMPANY H*, 2.]

(b) *Double insolvency; Ex parte Waring.*

28.—L., a merchant of Bremen, on various occasions consigned goods to S., of Havana, against which by the direction of S. he drew bills upon a common correspondent of theirs, R., of London, who accepted them. S. then remitted to R. sundry bills accompanied by directions to hold them against certain specified bills on account of which S. was liable to R., amongst them R.'s acceptances of L.'s bills on behalf of S. Previous to the maturing of the bills so remitted, S. and R. both suspended payment. Upon an application by L. against the trustee of R.'s estate to have the proceeds of the bills so remitted by S. to R. appropriated to R.'s acceptances of L.'s bills,—Held, that the rule in *Ex parte Waring* (19 Ves. 346) was applicable; that in the course of business between the parties, the remittances of S. were specifically appropriated to certain items of liability, and amongst them to R.'s acceptances, and that the appropriation was not affected by the abatement caused by the two bankruptcies. Held, also, that there was sufficient privity between the parties to admit of the application of *Ex parte Waring*. *Ex parte Smart; In re Richardson*, 42 Law J. Rep. (N.S.) Bankr. 22; Law Rep. 8 Chanc. 220.

29.—The principle of *Ex parte Waring* (19 Ves. 345) only applies where there is a double insolvency and a double right of proof. *Vaughan v. Halliday*, Law Rep. 8 Chanc. 561.

The plaintiff purchased bills drawn by R. upon A., and R. transmitted to A. other acceptances to cover the bills. Before these remittances reached A., R. went into liquidation. A. refused to accept the bills drawn on him by R., and also went into liquidation:—Held, that the plaintiff could not maintain a suit against the trustees under the two liquidations to have the remittances applied in payment of the bills. *Ibid*.

*Ex parte Smart* (No. 28, supra) distinguished. *Ibid*.

30.—The doctrine of *Ex parte Waring* does not apply where one of the parties, though practically insolvent, is subject to no jurisdiction, and cannot be compelled to submit his rights to the Court. *Ex parte General South American Company; In re Yglesias*, Law Rep. 10 Chanc. 735.

[And see *COMPANY*, H 5.]

(K) ACTIONS AND SUITS.

31.—Where the plaintiff sues on a bill of exchange payable after date, and the date of the bill produced corresponds with the date stated in the

declaration, the defendant may, under a plea traversing the acceptance, prove that when he accepted the bill it bore a different date, and that the alteration was made without his knowledge and after the bill had been put into circulation. *Hirschmann v. Budd*, 42 Law J. Rep. (N.S.) Exch. 113; Law Rep. 8 Exch. 171.

32.—The holder of a bill of exchange, having been paid part thereof by the drawer, can only sue the acceptor as regards that sum as trustee for the drawer. *Thornton v. Maynard*, 44 Law J. Rep. (N.S.) C.P. 382; Law Rep. 10 C.P. 695.

33.—Where a writ is issued under "The Summary Procedure on Bills of Exchange Act, 1855," a defence in abatement that the defendant was joint acceptor of the bill of exchange with another, is a legal defence entitling him to leave to appear under section 2. *Casella v. Darton*, 42 Law J. Rep. (N.S.) C.P. 58; Law Rep. 8 C.P. 100.

34.—Where a party brings an action on a lost bill of exchange against the acceptor without first offering to give him an indemnity against the claims of other persons on the bill, the Court or Judge, in the exercise of its discretion under section 87 of the Common Law Procedure Act, 1854, will make the order under that section, that the loss of the bill shall not be set up as a defence to the action, only on the terms that the plaintiff pay the defendant his costs of the action up to that time as well as give a proper indemnity against such claims. *King v. Zimmerman*, 40 Law J. Rep. (N.S.) C.P. 278; Law Rep. 6 C.P. 466.

*Promissory note: equitable defence by person joining as surety.* [See *PLEADING AT LAW*, 5.]

BILL OF LADING.

[See *SHIPPING LAW*.]

BILL OF SALE.

(A) REGISTRATION.

(a) *When necessary.*

- (1) *Equitable assignment in nature of bill of sale.*
- (2) *Chattels abroad.*
- (3) *Fixtures.*

(b) *Successive bills of which last alone registered.*

(B) DESCRIPTION OF ASSIGNOR AND OF ATTESTING WITNESS.

(C) CONDITION OR DEFEASANCE.

(D) APPARENT POSSESSION.

(E) CONSIDERATION.

(F) LICENSE TO SEIZE AFTER-ACQUIRED PROPERTY.

(G) PRIORITY.

## (A) REGISTRATION.

(a) *When necessary.*(1) *Equitable assignment in nature of bill of sale.*

1.—An agreement, in consideration of supplying goods on credit, to hold at the disposal of the vendors all the stock of raw materials, and to execute all further assurances, is an equitable assignment in the nature of a bill of sale, and requires registration. *Ex parte Conning*; *In re Steele*, 42 Law J. Rep. (n.s.) Bankr. 74; Law Rep. 16 Eq. 414.

2.—An agreement for a bill of sale cannot be relied on as an equitable assignment, unless registered. *Ex parte Mackay*. *Ex parte Brown*; *In re Jeavons*, 42 Law J. Rep. (n.s.) Bankr. 68; Law Rep. 8 Chanc. 643.

(2) *Chattels abroad.*

3.—A bill of sale of personal chattels situate in Scotland, though made in England and by a domiciled Englishman, need not be registered under the Bills of Sale Registration Act, 17 & 18 Vict. c. 36. *Coote v. Jecks*, 41 Law J. Rep. (n.s.) Chanc. 599; Law Rep. 13 Eq. 597.

(3) *Fixtures.*

4.—A mortgage by a leaseholder of his tenant's fixtures with his lease, in whatever form, requires registration under the Bills of Sale Act, 1854, as a bill of sale of fixtures. Such a mortgage is quite different from a mortgage by a freeholder of fixtures with the freehold. There the title to the land and fixtures is identical, for the fixtures belong to the landlord simply as part of the land, and it is for this reason that such a mortgage does not require registration. *Boyd v. Shorrocks* (37 Law J. Rep. (n.s.) Chanc. 144; Law Rep. 5 Eq. 72) dissented from. *Ex parte Daglish*; *In re Wilde*, 42 Law J. Rep. (n.s.) Bankr. 102; Law Rep. 8 Chanc. 1072; and see *Begbie v. Fenwick*, Law Rep. 8 Chanc. 1075, n.

A lease contained covenants by the lessee to erect certain machinery in the buildings demised, and to keep the buildings and machinery in repair during the term; and a covenant to deliver up the buildings at the end of the term, not mentioning the machinery:—Held, nevertheless, that the machinery was made landlord's fixtures, as, practically, the tenant could never remove it. *Ibid.*

5.—The lessee of a public-house who under a covenant in the lease was bound to deliver up to the lessor all the fixtures on the premises, tenant's fixtures put up for trade excepted, demised by way of mortgage the leasehold premises (including tenant's fixtures) to a mortgagee for the residue of the term less three days. The mortgage deed contained a power of sale by which it was provided that in case of default the mortgagee might sell the demised premises or any part thereof either for the term thereby granted, or for the whole term granted by the original lease, and either together or in parcels, with a proviso that after any sale the mortgagor should stand pos-

sessed of the last three days of the original term in trust for the purchaser:—Held, that the mortgage deed did not empower the mortgagee to take the fixtures and sell them separately from the public-house, and that consequently it was not requisite that the deed should be registered under the Bills of Sale Act. *Ex parte Barclay*; *In re Joyce*, 43 Law J. Rep. (n.s.) Bankr. 137; Law Rep. 9 Chanc. 576.

The test whether the Act applies in such a case is, whether the mortgage deed gives power to the mortgagee to sever the fixtures and sell them separately from the house. *Ex parte Daglish*; *In re Wilde* (No. 4 supra) considered and distinguished. *Ibid.*

*Trade fixtures passing by mortgage of freehold though mortgage not registered as bill of sale.* [See FIXTURES, 1.]

(b) *Successive bills of which last alone registered.*

6.—Where a bill of sale is given for good consideration, but not registered, and before the expiration of the time for registration it is annulled, and a similar bill of sale given which also is not registered, and after this process has been repeated several times, at last a bill of sale is duly registered, such last bill of sale is valid against execution creditors if made *bonâ fide* with the intention of passing the property comprised in it. *Smale v. Burr*, 42 Law J. Rep. (n.s.) C.P. 20; Law Rep. 8 C.P. 64.

7.—E. & W. were engaged in a speculation, and E. had agreed that the plaintiff should receive a share of the profits which should accrue to him. E. advanced a sum of money, and as W. was unable to repay it when it became due, it was agreed between E., W. and the plaintiff, that a bill of sale should be given to the plaintiff of certain furniture in a house occupied by W. It was at the same time agreed between the three parties that the bill of sale was to be kept renewed for twelve months, and that neither it nor the renewals were to be registered during that period unless W. should get into difficulties in the meantime. In pursuance of such agreement a bill of sale, dated the 8th of March, 1872, was executed by W. On the 27th of March, 1872, a fresh bill was executed in pursuance of the agreement, but the first bill of sale remained in the possession of the plaintiff. Another fresh bill was registered on the 15th of April, 1872, and the plaintiff having learnt that W. was in difficulties, took possession under it on the 20th of April:—Held (Cleasby, B., *dubitante*), affirming the judgment of the Court of Queen's Bench, that the plaintiff was entitled as against an execution creditor who seized on the 24th. *Ramsden v. Lupton* (Ex. Ch.), 43 Law J. Rep. (n.s.) Q.B. 17; Law Rep. 9 Q.B. 17.

8.—A bill of sale was executed in February for a good consideration. It was not registered, but was renewed, by a fresh bill of sale which was a copy of the last, from time to time, within the period allowed for registration. The last bill of

sale was executed on the 26th of May, and was duly registered:—Held, that the last bill of sale, being to secure an antecedent debt, was invalid against creditors. *Ramaden v. Lupton* (No. 7 supra) distinguished. *Ex parte Cohen*; *In re Sparke* (41 Law J. Rep. (n.s.) Bankr. 17) followed. *Ex parte Stevens*; *In re Stevens*, 44 Law J. Rep. (n.s.) Bankr. 136; Law Rep. 20 Eq. 786.

(B) DESCRIPTION OF ASSIGNOR AND OF ATTESTING WITNESS.

9.—In an affidavit filed with the copy of a bill of sale, it was sworn that the said bill of sale was made or given on the 5th day of December, 1870, being the day of the date thereof: "That I was present, and did see the said Isaac Anthony sign and execute the said bill of sale, and that the said Isaac Anthony resides at 'Dynevov Lodge,' and is an auctioneer." It was also sworn in the affidavit, that "the paper writing hereto annexed is a true copy of a bill of sale," made or given by Isaac Anthony, &c. The paper writing thus referred to and annexed commenced "This indenture, made the 5th day of December, 1870, between Isaac Anthony, of Dynevov Lodge, in the Parish of Llanarthney, in the county of Carmarthen, auctioneer, of the one part, and David Jones, of Wern, in the said parish of Llanarthney, in the county of Carmarthen, gentleman, of the other part:—Held, that although, if the affidavit was taken alone, the description of the residence of the grantor would be insufficient, the defect might be cured by reference to the bill of sale. *Jones v. Harris*, 41 Law J. Rep. (n.s.) Q. B. 6; Law Rep. 7 Q. B. 157.

10.—The grantor of a bill of sale was therein correctly described as of "No. 37, Malpas Road, Deptford, in the county of Kent," and the attesting witness to such bill of sale was therein also correctly stated to be of "2, South Terrace, Hatcham Park Road, New Cross." In the affidavit, however, which was filed with a copy of the bill of sale, the residence of the grantor was described as "No. 73, Malpas Road, Deptford, in the county, of Kent," and the residence of the attesting witness was described as "3, South Terrace, Hatcham Park Road, New Cross:—Held, that there was not a true description of residence of the grantor and attesting witness thereto filed as required by the Bills of Sale Act, 17 & 18 Vict. c. 36. *Murray v. Mackenzie*, 44 Law J. Rep. (n.s.) C. P. 313; Law Rep. 10 C. P. 625.

11.—The affidavit filed with a bill of sale under the Bills of Sale Act, 17 & 18 Vict. c. 36, must give, either directly or by reference to the bill of sale, a description of the residence and occupation of the attesting witness at the time of his attesting the bill of sale. Therefore, where the witness was described in the attestation to the bill of sale as "clerk to a solicitor," but in the affidavit he was described as being then a "gentleman," without any statement that the description of him in the attestation to the bill of sale was true, it was held that the statute 17 & 18 Vict. c. 36, had not been complied with. *Brodrick*

*v. Scale*, 40 Law J. Rep. (n.s.) C. P. 130; Law Rep. 6 C. P. 98.

12.—S., who was a clerk in the Admiralty, was described in a bill of sale given by himself and in the affidavit filed pursuant to 17 & 18 Vict. c. 36, s. 1, as a "government clerk," and the attesting witness, of whose occupation there was no direct evidence, was described as an "insurance clerk:—Held, that the descriptions were sufficient. *Grant v. Shaw*, 41 Law J. Rep. (n.s.) Q. B. 305; Law Rep. 7 Q. B. 700.

13.—The grantor of a bill of sale registered under 17 & 18 Vict. c. 36, was described as "accountant." He was clerk in the accountant's department of a railway company's office, and occasionally worked at book-keeping and matters of account for other people after office hours:—Held, affirming the decision of the Court below (42 Law J. Rep. (n.s.) Exch. 134; Law Rep. 8 Exch. 80), that the description of his occupation was insufficient to satisfy the statute. *Briggs v. Boss* (37 Law J. Rep. (n.s.) Q. B. 101; Law Rep. 3 Q. B. 268) commented on. *Larchin v. North Western Deposit Bank (Lim.)* (Exch. Ch.), 44 Law J. Rep. (n.s.) Exch. 71; Law Rep. 10 Exch. 64.

14.—An insufficient description of the attesting witness to a bill of sale contained in his affidavit registered therewith may be cured by reference to a sufficient description of him in the attestation clause of the bill of sale. *Ex parte Mackenzie*; *In re Bent*, 42 Law J. Rep. (n.s.) Bankr. 25.

(C) CONDITION OR DEFEASANCE.

15.—A parol arrangement to repay by instalments a loan secured by a bill of sale is a condition within the meaning of the 2nd section of the Bills of Sale Act, and as such must be reduced into writing and appear on the registered copy of the bill of sale, otherwise the latter will be void against a trustee in bankruptcy. *Ex parte Southam*; *In re Southam*, 43 Law J. Rep. (n.s.) Bankr. 39; Law Rep. 17 Eq. 578.

16.—A memorandum, signed by the giver of a bill of sale, stating that a sum of money to be paid by way of bonus was to be paid in full, notwithstanding that the principal money secured by the bill of sale might be repaid, or the rights of the assignee enforced before the expiration of the time for payment mentioned in the bill of sale,—Held, not to be such a defeasance, condition or declaration of trust as by the 2nd section of the Bills of Sale Act, 1854, is required to be written on the same paper or parchment as the bill of sale. *Ex parte Collins*; *In re Lees*, 44 Law J. Rep. (n.s.) Bankr. 78; Law Rep. 10 Chanc. 367.

(D) APPARENT POSSESSION.

17.—The occupation spoken of in the 7th section of the Bills of Sale Act, 1854, means a *de facto* occupation; and therefore, where goods comprised in an unregistered bill of sale had been deposited in rooms rented by the grantor, and the keys of the premises had been demanded and given up to the grantee in consequence of non-compliance by the grantor with the conditions of the bill of sale, and the grantor never returned to

the premises, but the grantee entered, marked the goods, and kept the keys, the jury found rightly, that the premises were not "occupied" by the grantor; and the goods were therefore not in his "apparent possession" within the meaning of the 1st and 7th sections of the Bills of Sale Act. *Robinson v. Briggs*, 40 Law J. Rep. (N.S.) Exch. 17; Law Rep. 6 Exch. 1.

18.—Goods formally seized by the sheriff under an execution remain in the apparent possession of the debtor within the meaning of the Bills of Sale Act. *Ex parte Mutton*; *In re Cole*, 41 Law J. Rep. (N.S.) Bankr. 57; Law Rep. 13 Eq. 178.

The goods of a debtor having been seized in execution, and a man left in possession, the holder of an unregistered bill of sale over them paid the debt and costs and took possession himself. On the same day, and before he did so, the debtor was adjudicated bankrupt:—Held, that the bill of sale was void against the trustee in bankruptcy. Also, that the holder of the bill of sale was entitled to be paid, out of the proceeds of the goods, the amount of the executions, which were good against the trustee. *Ibid*.

19.—A debtor gave promissory notes for the amount of his debt, which notes contained the words "security to be given by bill of sale when required." One year afterwards the creditor required security, and six weeks after the request the debtor gave him a bill of sale over a portion only of his property, which was registered: he having afterwards petitioned for liquidation the creditor took possession under his bill of sale:—Held, that the bill of sale was not bad as a fraud on the Bills of Sale Act, nor as a fraudulent preference under the Bankruptcy Act, 1869, s. 92:—Held, also, that the interval of six weeks between the request for security and the execution of the bill of sale was not in itself sufficient so to disconnect the two as to make the bill of sale voluntary. *Ex parte Mackenzie*; *In re Bent*, 42 Law J. Rep. (N.S.) Bankr. 25.

20.—To defeat the title of the holder of an unregistered bill of sale of chattels as against the trustee under the liquidation of the mortgagor, it is sufficient that the chattels are, at the commencement of the liquidation, in the visible possession of the mortgagor, even though the mortgagee has taken possession, so as to prevent the goods being removed by anyone else, and with the *bonâ fide* intention of himself removing them forthwith. *Ex parte Jay*; *In re Blenkhorn*, 43 Law J. Rep. (N.S.) Bankr. 122; Law Rep. 9 Chanc. 697.

In order to defeat the title of the trustee in bankruptcy of the mortgagor, the Bills of Sale Act requires that much more should be done by the mortgagee than would be necessary with reference to the doctrine of reputed ownership. *Ibid*.

Two ladies executed, on the 16th of June, 1873, a bill of sale of all their furniture and other effects, including some cows and a pony, to secure the repayment of a loan of 144*l*. The bill of sale was never registered. On the 10th of February, 1874, the mortgagee put two men into possession. These men slept in the house, but the mortgagors continued to use the furniture and other articles just

as before. They retained the keys of the premises and used the pony when they pleased, and the cows were milked by their servant. On the morning of the 14th of February the men in possession commenced removing the furniture and packing it into vans which had been brought there, the vans, while they were being loaded, standing on a drive inside the premises occupied by the mortgagors. In the afternoon the vans with the furniture and also the cows and the pony were taken away. But before this had been done, about noon the same day, the mortgagors filed a liquidation petition:—Held, that the mortgagee had done enough before the petition was filed to take the goods out of the possession or apparent possession of the mortgagors. That up to the morning of the 14th of February, the mortgagee's possession was only a formal one; and inasmuch as the mortgagors had, on the 11th of February, committed an act of bankruptcy, by executing a second mortgage of their furniture and other effects (which formed substantially their whole property) to secure an antecedent debt, that the trustee under the liquidation was entitled to the goods. *Ibid*.

21.—Where the holder of an unregistered bill of sale of furniture took possession by sending in a broker's man, and did not remove the furniture, but merely posted up placards announcing a sale of the furniture, such placards not shewing that the sale was to be made under a bill of sale, and the owner of the furniture was adjudged bankrupt before the sale:—Held, that the goods remained in the possession or apparent possession of the owner within the above Act, the possession of the broker's man being merely "formal," and that the trustee under the bankruptcy was entitled to them. *Ex parte Lewis*; *In re Henderson*, Law Rep. 6 Chanc. 626.

22.—An agreement to give a bill of sale need not be registered. Where a debtor executed a bill of sale, in pursuance of previous agreement, and afterwards on the same day filed a petition for liquidation:—Held, that the bill of sale, being registered within twenty-one days, was valid against the trustee. The order and disposition clauses of the Bankruptcy Act do not apply in such a case. *Ex parte Homan*; *In re Broadbent*, Law Rep. 12 Eq. 508.

[And see BANKRUPTCY B 16; G 19, 20.]

#### (E) CONSIDERATION.

23.—A sum of money advanced upon the faith of a promise that a bill of sale should be given, will be treated as an advance made on the execution of the bill of sale. But the promise must be a *bonâ fide* binding one, and the postponement of the execution of the bill of sale must also be *bonâ fide*, and not with any view to protect the credit of the borrower or other collateral object. *Ex parte Fisher*; *In re Ash*, 41 Law J. Rep. (N.S.) Bankr. 62; Law Rep. 7 Chanc. 636.

*New bill of sale to secure former debt and advances: notice of act of bankruptcy.*  
[See BANKRUPTCY B 37.]

## (F) LICENSE TO SEIZE AFTER-ACQUIRED PROPERTY.

**24.**—Where a bill of sale given to secure a debt contains, together with an assignment of existing property, words which amount to a license to seize after-acquired property, but which do not amount to an equitable assignment of the latter, such license is co-extensive with the debt, and cannot be exercised after the debt has been barred by the bankruptcy of the debtor. *Cole v. Kernot; Thompson v. Cohen*, 41 Law J. Rep. (N.S.) Q. B. 221; Law Rep. 7 Q. B. 527.

## (G) PRIORITY.

**25.**—A non-trader gave, on the 10th of February, 1870, a bill of sale of goods to A. as security for advances, and on the 28th of February, a second bill of the same goods to P. as security for advances, P. having no notice of A.'s bill. On the 2nd of March A. registered his bill; and on the 18th of March P. registered his. Neither having been repaid, on the 21st of March P. took possession under his bill, and in spite of a notice of A.'s claim sold the goods. Between the seizure and the sale, the debtor committed an act of bankruptcy, and was adjudicated bankrupt:—Held, that P. had not acquired any priority over A. since A.'s legal title to the goods was complete as against P. without taking possession. *Ex parte Allen and Ex parte Page; In re Middleton*, 40 Law J. Rep. (N.S.) Bankr. 17; Law Rep. 12 Eq. 209.

*Right of holder to remove goods from possession of receiver in bankruptcy: contempt of Court.* [See BANKRUPTCY P 4.]

## BOARD OF TRADE.

[Power given to Board of Trade to direct certain inquiries and to appoint the Railway Commissioners to be arbitrators or umpire. 37 & 38 Vict. c. 40.]

## BOND.

*Delivery up of bond.*

**1.**—No bill will lie in equity for the delivery up of a bond, after the bond debt is paid, though by the tenor of the bond the money secured would be payable at a future date, so that there was no present right of action. *Binns v. Fisher*, 43 Law J. Rep. (N.S.) Chanc. 188.

*By the defendant in action.*

**2.**—The plaintiff obtained a verdict in an action against E., who then, in consideration of a stay of proceedings until the following term, executed a bond, the condition of which was, that if the determination of the action should be in favour of the plaintiff, and E. should pay the amount for which the verdict was given, the bond should

be void. A rule to set aside the verdict upon a point reserved at the trial was afterwards discharged, and E. gave notice of appeal under section 37 of the Common Law Procedure Act, 1854, but, no bail having been put in under section 38, and more than two years having passed without any step being taken to prosecute the appeal, the plaintiff brought an action on the bond:—Held, that the time for putting in bail having elapsed, and no bail having been put in, the action against E. must be considered as determined in favour of the plaintiff, and that the bond might therefore be enforced. *Burnaby v. Earle*, 43 Law J. Rep. (N.S.) Q. B. 209; Law Rep. 9 Q. B. 490.

*Restraint of trade.*

**3.**—In the year 1864 R. G., a surgeon, apothecary and man-midwife, engaged T. B., a medical student, as his assistant, at a salary. In 1870 T. B., at R. G.'s request, executed a bond by which he bound himself to pay R. G. the penal sum of 1,000*l.* The bond then recited that R. G. some time since took T. B. into his employ and confidence as an assistant in his profession or business, which employment was to continue so long as the parties to the bond should agree, and that for the aforesaid consideration T. B. had agreed to enter into the same bond. The condition of the bond was that it should be void in case T. B. did not carry on the business of a surgeon, apothecary, or man-midwife within the parish of N. or within ten miles thereof (excepting at L.) during so long as R. G. or his successors in the business should carry on the same. Later in 1870 R. G. discharged T. B. from his employment, and in 1874, T. B. having qualified himself to practise as a surgeon, apothecary, and man-midwife, commenced business about four miles from F. On the motion for an injunction by R. G.:—Held, that there was sufficient consideration to support the bond, and the injunction was granted. *Gravelly v. Barnard*, 43 Law J. Rep. (N.S.) Chanc. 659; Law Rep. 18 Eq. 518.

## BOOTY OF WAR.

The High Court of Admiralty has no original jurisdiction in matters of booty of war. Its jurisdiction is derived solely from the statute 3 & 4 Vict. c. 65, and Orders in Council issued in pursuance of that statute. *The Banda and Kirwee Booty*, 44 Law J. Rep. (N.S.) Adm. 41; Law Rep. 4 Adm. & Ecc. 436.

The matter of the Banda and Kirwee booty had been by Order in Council referred to the Court to determine the persons entitled to share, and in what proportions, and as to costs. Certain moneys, the proceeds of the booty, had, as alleged, not been paid to the parties who had been declared by the Court entitled to the booty:—Held, that the Order in Council gave the Court no power to order that these moneys should be brought into Court for distribution, and that, therefore, the Court had no jurisdiction to make such an order. *Ibid.*



## BRAWLING.

[See CHURCH, 22.]

## BREACH OF PROMISE TO MARRY.

An action for breach of promise of marriage may be maintained against a man who has promised to marry a woman after the death of his father, and has afterwards absolutely declared his intention never to fulfil his promise, although his father be living at the time the action is brought. *Frost v. Knight*, 41 Law J. Rep. (N.S.) Exch. 78; Law Rep. 7 Exch. 111.

*Jurisdiction at law: defendant residing out of jurisdiction: cause of action.* [See JURISDICTION-AT-LAW, 5.]

*Production of documents in action of.* [See PRODUCTION, 5.]

## BREAD

*Adulteration.*

1.—A person cannot be convicted under s. 8 of 6 & 7 Will. 4. c. 37, for using prohibited mixtures or ingredients in the making of bread for sale, unless there be knowledge, either in himself or in the person employed by him, of the presence of the mixture or ingredient. *Core v. James*, 41 Law J. Rep. (N.S.) M. C. 19; Law Rep. 7 Q. B. 135.

*Sale by weight.*

2.—The appellant was convicted under 6 & 7 Will. 4. c. 37, s. 4 for selling bread without having a correct beam or scales, &c. The material of which the bread was made was in all respects the same as ordinary bread, except that carbonic acid gas was forced into it. It was crusty all round, and was known in the trade as French or fancy bread, but in no way, except the manner of baking in separate loaves, resembled what was called French or fancy bread at the time of the passing of the Act:—Held, that the conviction was right, as the exception in s. 4 as to selling French or fancy bread could not be construed to apply to bread of such a description. *The Queen v. Wood* (38 Law J. Rep. (N.S.) M. C. 144; Law Rep. 4 Q. B. 559) observed upon. *The Aërated Bread Company v. Grigg*, 42 Law J. Rep. (N.S.) M. C. 117; Law Rep. 8 Q. B. 355.

## BRIDGE.

*Toll: injury to bridge by statutory powers: compensation.* [See TOLL, 1.]

*Repair of bridge by railway company.* [See RAILWAY, 28; NEGLIGENCE, 11.]

*County bridge: damage to by locomotive.* [See LOCOMOTIVE.]

## BRISTOL IMPROVEMENT ACT.

A wall may be a party wall, within the meaning of the Bristol Improvement Acts, 1840 and 1847, for part of its length or height, and an external wall for the remainder of its length or height. *Weston v. Arnold*, 43 Law J. Rep. (N.S.) Chanc. 123; Law Rep. 8 Chanc. 1084.

A wall in Bristol separating buildings, but having in it, above the buildings, windows enjoying rights of light, was condemned as a party wall under the local Acts, on proceedings taken by the owner of the lights, and ordered to be rebuilt. The Acts contain provisions that there shall be no openings in party walls of new or re-erected buildings, except iron doors for communication between the separate buildings:—Held, that the Acts did not apply to these windows, and that the owner of the lights could maintain a suit to restrain the erection of a building that would interfere with them. *Ibid.*

## BROKER.

[See STOCK EXCHANGE; PRINCIPAL AND AGENT; FACTORS ACT.]

*Liability for want of skill.*

1.—The defendant, a broker, was employed by the plaintiff to sell, and as selling broker he sold for the plaintiff "to arrive" certain goods on the terms that they were "fair average quality in opinion of selling broker." The buyers having, on arrival of such goods, refused to take them, the defendant went and inspected them, and gave his opinion that they were not of fair average quality, according to the contract:—Held, affirming the decision of the Court of Common Pleas (41 Law J. Rep. (N.S.) C. P. 11; Law Rep. 7 C. P. 35), that the defendant was not liable to an action by the plaintiff for not using due skill in order to form a correct opinion of the quality of the goods, as there was no contract by him, express or implied, to exercise any skill whatever in forming such opinion. *Pappa v. Rose* (Exch. Ch.), 41 Law J. Rep. (N.S.) C. P. 187; Law Rep. 7 C. P. 595.

*Usage of market.*

2.—Although a person who, as principal, employs a broker to transact business for him in a particular market, is bound by the usage of that market, though unknown to him, provided the usage is one that merely regulates the mode of performing the contract, and does not change the intrinsic character of the contract, yet where the usage is one which gives the broker an interest at variance with his duty, as by converting him into a principal instead of a mere agent, to establish privity of contract between two principals, such a usage is not binding on a principal who, being ignorant of the usage, employs a broker to whom the usage is known, to perform the ordinary and accustomed duties belonging to the office or employment of a broker. The principal is not bound to enquire what the usage may be, or whether

there be any particular usage affecting the market in which he proposes to deal. *Robinson v. Mollett* (H. L.), 44 Law J. Rep. (n.s.) C. P. 362; Law Rep. 7 E. & L. App. 802.

*Liability of broker in trover.* [See PRINCIPAL AND AGENT, 24.]

*Criminal fraud.*

[See FRAUD, E.]

## BURIAL.

- (A) NEW BURIAL GROUND: DWELLING-HOUSE.
- (B) COMPENSATION FOR DISUSED BURIAL GROUND TAKEN UNDER STATUTORY POWERS.
- (C) BURIAL FEES.
- (D) SEXTON.

[Regulations as to the approval by the Secretary of State of the appointments of burial boards. 34 & 35 Vict. c. 33.]

### (A) NEW BURIAL GROUND: DWELLING HOUSE.

1.—The provisions of s. 9 of 18 & 19 Vict. c. 128, whereby it is enacted that no ground not already used as or appropriated for a cemetery shall be used for burials under 15 & 16 Vict. c. 85, or that Act, within the distance of 100 yards from any dwelling-house, without the consent in writing of the owner, lessee and occupier, are general provisions, and apply to all new burial grounds, whether parochial or non-parochial. *Greenwood v. Wadsworth*, 43 Law J. Rep. (n.s.) Chanc. 78; Law Rep. 16 Eq. 288.

### (B) COMPENSATION FOR DISUSED BURIAL GROUND TAKEN UNDER STATUTORY POWERS.

2.—A burial ground provided by Act of Parliament, but of which the rector was the freeholder, was closed by Order in Council. Subsequently a portion of the land was taken for public purposes, and a sum paid into Court under the Lands Clauses Act, 1845:—Held, that, inasmuch as the freehold was in the rector, and he received the burial fees, he was entitled to receive the dividends of the fund in Court. *Ex parte the Rector of Liverpool*, 40 Law J. Rep. (n.s.) Chanc. 65; Law Rep. 11 Eq. 15.

Semble—the parish clerk and sexton had no right to any interest in the fund, although they received certain fees for burials. *Ibid.*

In *re St. Pancras Burial Ground* (36 Law J. Rep. (n.s.) Chanc. 52; Law Rep. 3 Eq. 173) followed. *Ibid.*

3.—An Act of Parliament empowered certain persons to purchase land out of the rates of a parish, the land to be conveyed to the rector and churchwardens, in trust for the inhabitants of the parish. The Act was silent as to any right to receive burial fees. Land was purchased accordingly and duly consecrated, and the rector had always received the fees. A portion of the burial ground was taken by a railway company, and a sum of money was paid into Court under the

Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), as compensation money for the land taken. Subsequently the churchyard was closed by an Order in Council:—Held, that the rector was entitled to the dividends of the fund in Court. *Ex parte The Rector of St. Martin's, Birmingham*, 40 Law J. Rep. (n.s.) Chanc. 69; Law Rep. 11 Eq. 23.

The above case, *In re The Rector of Liverpool*, explained. *Ibid.*

### (C) BURIAL FEES.

4.—In 1851, the church of St. T. was built and consecrated. In 1852, an Order in Council under 59 Geo. 3. c. 134. s. 16, authorised services to be performed in the new church, assigned a district to it out of the ancient parish of W., in which it was situated, and granted the incumbent the fees. There was then no burial ground in the district, and the persons dying in it continued to be buried as before in the churchyard of the parish. The plaintiff was appointed incumbent of this church in 1854, and in 1856 a burial ground for the whole parish was consecrated, the district of the new church contributing to the rates for providing it. A new rector of the parish was appointed in 1864:—Held, by the Exchequer Chamber, affirming the judgment of the Queen's Bench, that the district of St. T. was a "new parish" within 20 & 21 Vict. c. 81, and that the plaintiff, on the first avoidance of the rectory, was entitled to the burial fees in respect of inhabitants of St. T. buried within the parish. *Cronshaw v. The Wigan Burial Board* (Exch. Ch.), 42 Law J. Rep. (n.s.) Q. B. 137; Law Rep. 8 Q. B. 217.

5.—A parson having the freehold of the body of the church may contract for a money consideration to permit the burial of a non-parishioner therein, and may sue upon such contract in a Court of law. *Neville v. Bridger*, 43 Law J. Rep. (n.s.) Exch. 147; Law Rep. 9 Exch. 214.

### (D) SEXTON.

6.—Where under 16 & 17 Vict. c. 134, and 15 & 16 Vict. c. 85, a new consecrated burial ground and chapel have been provided for a parish, the parish sexton has a right, at reasonable and proper times and places, and in a reasonable and proper way, to dig the graves of parishioners in the burial ground, and ring the chapel bell at their funerals, and he may appoint a deputy to do it, who is not liable to an action of trespass at the suit of the burial board for entering under such circumstances to do these acts, such board refusing permission on the ground that they are ready and willing to perform these duties by their own servants. *Burial Board of St. Margaret's, Rochester, v. Thompson*, 40 Law J. Rep. (n.s.) C. P. 213; Law Rep. 6 C. P. 445.

## CAMPBELL'S ACT.

[See ACTION, 1; CARRIER, 7; MASTER AND SERVANT, 13.]

1.—In actions under Lord Campbell's Act, 9 & 10 Vict. c. 93, to recover damages for the benefit

of a relative to whom the deceased had covenanted to pay an annuity during their joint lives, it is unobjectionable to direct the jury that they may estimate the damages to the annuitant by calculating what sum would buy him an equally good annuity. That sum must depend, in addition to other contingencies, on the probable duration of the lives, and to ascertain that it is material to know the average duration of the lives of persons of the same age as the lives in question. Such average and probable duration cannot be better shewn than by proving the practice of life assurance companies who learn it by experience; evidence may therefore be given of such practice, and tables—which purport to shew the average duration of the lives of persons of all ages, and the value of annuities on government or other very good security for such lives, and to which those companies refer for information—may be consulted to shew what is the average and probable duration of the lives in question, and what is the present value of the annuity, provided the attention of the jury be called to the difference in value between an annuity on government security, and one secured by a personal covenant.—So held, per Blackburn, J., Keating, J., Grove, J., Archibald, J. (*dissentiente* Brett, J.). *Rouley v. The London and North-Western Railway Company* (Exch. Ch.), 42 Law J. Rep. (N.S.) Exch. 153; Law Rep. 8 Exch. 221.

Per Brett, J.—In such cases the only legal direction to the jury is that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation. A direction, therefore, which leaves it open to the jury to give the present value of an annuity equal in annual amount to the income lost, for a period supposed to be equal to that which would have continued if there had been no accident, is a misdirection, and any evidence (such as that instanced above) given solely to enable a jury to calculate such present value is inadmissible, because necessarily misleading and legally irrelevant. *Ibid*.

A person who though not an actuary is acquainted with the business of life insurance is competent to give evidence as to the average and probable duration of lives and the present value of annuities as given by the tables and accepted by life insurance companies.—So held, per Blackburn, J., Keating, J., Grove, J., and Archibald, J. (*dubitante* Brett, J.). *Ibid*.

The jury may properly be directed to consider the lives in question as average lives, unless there is evidence to the contrary; and if there is such evidence, it is for the party excepting to the direction to place the evidence on the bill of exceptions.—So held, per Blackburn, J., Keating, J., Grove, J., Archibald, J. (*dissentiente* Honyman, J.). *Ibid*.

2.—In order to maintain an action under 9 & 10 Vict. c. 93, the persons upon whose behalf it is brought must prove that during the lifetime of the deceased a pecuniary advantage accrued to them

owing to their relationship with him: they are not entitled to compensation under that statute, if the only pecuniary benefit to them from his life was derived from a contract which they had entered into with him. *Sykes v. The North-Eastern Railway Company*, 44 Law J. Rep. (N.S.) C.P. 191.

The plaintiff, as administrator, sued the defendants to recover damages for the death of his son, who had been killed by their negligence. The deceased was a bricklayer, and received from the plaintiff the wages of a skilled workman; he was of great assistance to the plaintiff, who was also a bricklayer; owing to the loss of assistance from the deceased, the plaintiff could not take the contracts which he had taken during his son's lifetime:—Held, that the plaintiff had not suffered a pecuniary loss by his son's death entitling him to sue under 9 & 10 Vict. c. 93. *Ibid*.

### CANAL.

1.—An action was brought by the plaintiffs, as owners of mines lying beneath a canal of the defendants, for so negligently managing the canal as to allow water to escape from it, and flood the mines. The canal was constructed by the defendants, a company, under the provisions of a local Act, by which it was enacted that if any proprietor of mines under the canal, or within twelve yards of either side of it, should be desirous of working them, he should give three months' notice to the company, who, if they failed to inspect the mines within thirty days, should be considered as permitting them to be worked, and if on inspection they refused permission, they should be compelled to purchase the same. There was a proviso that in working the mines "no injury be done to the navigation, anything therein contained to the contrary notwithstanding." By the compensation clauses of the Act, the company, in making the canal, are to do as little damage as possible, and to make satisfaction for damage sustained by the owners of lands, tenements or hereditaments taken, used or prejudiced by the execution of the powers of the Act, and compensation is made payable for damage which should be at any time or times whatsoever sustained by the owners of lands, &c., by reason of making, repairing or maintaining the canal, or by the flowing, leaking or oozing of the water over or through the banks of the canal (if complaint be made within six months of the injury).

The plaintiffs gave notice of their intention to work the mines within the prescribed distance of the canal. The defendants did not inspect the mines, and refused to purchase them. The plaintiffs proceeded to work the mines, the canal being then in good order and watertight. They worked the mines in the usual manner, without which they could not have had the full benefit of the coal, and the effect of such working was to let down and crack the bed of the canal and to allow the water to flow into and cause damage to the mines. The defendants, during the working of

the mines, took all proper precautions to keep the canal watertight.

The Court of Queen's Bench, 41 Law J. Rep. (N.S.) Q. B. 121; Law Rep. 7 Q. B. 244 (Hannen, J., dissenting), having held that the defendants were not responsible for the damage to the mines, as there was no proof of any negligence on their part, or of anything done in excess of their statutory powers,—Held, by the Exchequer Chamber, affirming that decision, that the action, for the above reasons, was not maintainable. *Dunn v. The Birmingham Canal Company*, 42 Law J. Rep. (N.S.) Q. B. 137; Law Rep. 8 Q. B. 217.

Semble, per Kelly, C.B., and Pigott, B., that the plaintiffs were entitled to relief under the compensation clauses of the Canal Acts. *Ibid.*

2.—An injunction will be granted at the suit of a canal company entitled to take water from a stream to prevent abstraction of the water though damage is only shewn to have taken place in an exceptionally dry season. *The Wilts and Berks Canal Navigation Company v. The Swindon Waterworks Company*, 43 Law J. Rep. (N.S.) Chanc. 393; Law Rep. 9 Chanc. 451: affirmed with a variation on appeal to the House of Lords, Law Rep. 7 E. & I. App. 697.

Semble,—that at law, an action could be brought and nominal damages recovered for the abstraction of the water, though no real damage was shewn to prevent an adverse title being acquired by prescription. *Ibid.*

Where a canal company lawfully buy land to enable them to take a stream and construct a culvert for that purpose, they acquire in respect of that land, and of the culvert constructed, the rights of ordinary riparian proprietors, and though a canal company may be entitled to sell any surplus water from their canal, they are only entitled to an injunction to prevent interference with a feeding stream so as to cause damage to their navigation or their ordinary use of the water as riparian proprietors. *Ibid.*

*Rating of land lying near canal.* [See RATE, 25.]

## CARRIER.

### (A) CONVEYANCE OF PASSENGERS.

- (a) *Negligence in conveyance of passenger.*
- (b) *Invitation to passengers to alight.*
- (c) *Insufficient accommodation for passenger to alight.*
- (d) *Contributory negligence by passenger.*
- (e) *Passenger travelling at his own risk.*
- (f) *Conveyance by railway company over other company's line.*

### (B) CONVEYANCE OF PASSENGER'S LUGGAGE.

### (C) CONVEYANCE OF GOODS.

- (a) *Liability as common carrier.*
- (b) *Special agreement.*
- (c) *Owner's risk.*
- (d) *"Parcel or package."*
- (e) *Loss by felony of servants.*

### (D) DELIVERY.

- (a) *Liability for misdelivery or late delivery.*
- (b) *Goods left in hands of carriers.*

### (E) CONVEYANCE OF LIVE STOCK.

### (A) CONVEYANCE OF PASSENGERS.

#### (a) *Negligence in conveyance of passenger.*

1.—Where the execution of a work, which, if carefully and properly done, need not result in accident to passers by, is entrusted to skilled and proper workmen, there is no obligation on a railway company whose line adjoins the work to take special precautions to avert from their passengers a danger which can only be apprehended on the supposition that the workmen engaged will do their work negligently; at all events, if the company have no control over the workmen, and are otherwise not responsible for their acts—and by Lord Westbury, not even if those proper and skilled workmen were employed directly by the company. *Daniel v. The Metropolitan Railway Company (H.L.)*, 40 Law J. Rep. (N.S.) C.P. 121; Law Rep. 5 E. & I. App. 45.

The plaintiff, while travelling by the defendants' railway, was injured by the fall of an iron girder, which was being placed over part of the railway, with the knowledge of the defendants, and in the construction of the works which were to be executed, partly to their satisfaction but were not under the control of the defendant company. It was proved that the work was extremely dangerous, though no girder had ever fallen before. It was also proved that generally when work of such a nature was being carried on over a railway, the company had posted a signalman, either to warn the workpeople of the approach of the train, and to stop them if they were under the control of the railway company, or to warn the driver of the train, so as to stop the train before incurring any danger, and this precaution was not adopted. By consent, a verdict had been entered for the plaintiff, with leave reserved to the defendants to set it aside, &c., on the ground that there was not sufficient evidence of the defendants' negligence—the Court to be at liberty to draw inferences of fact, and to adjudge upon the evidence:—Held, that the Court were to find such a verdict as, in their judgment, a jury ought upon the evidence to have found, and that, though there was evidence on which a jury might find negligence, the Court, sitting as a jury, were at liberty to and did find that the defendants had not been guilty of negligence.

2.—By the rules and bye-laws of a railway company, the porters were directed to prevent passengers from leaving trains whilst in motion, and to do all in their power to promote the comfort of the passengers and interests of the company, and specially given powers of removal under certain specified circumstances not applicable to the particular case. And it was found by a case stated in an action for injury to a passenger in his removal from a carriage by a porter under

the mistaken idea that he was in the wrong train, that he was violently removed just as the train was moving; that it was the duty of the porters to prevent passengers going by wrong trains as far as possible; but if they were, to request them to alight, and on refusal, report them with a view to charging an excess of fare, but not remove them:—Held, by the Court of Exchequer Chamber, affirming the decision of the Court of Common Pleas (41 Law J. Rep. (n.s.) C. P. 278; Law Rep. 7 C. P. 415), that there was evidence of the porter having acted within the scope of his authority and abused it, and that the company were responsible. *Bayley v. The Manchester, Sheffield and Lincolnshire Railway Company*, 42 Law J. Rep. (n.s.) C. P. 78; Law Rep. 8 C. P. 148.

3.—In an action for injury to a passenger in an omnibus from the kick of one of the horses who kicked through the front panel of the vehicle, it was proved that the panel bore marks of other kicks, and that no kicking-strap was used as a precaution against the horse's kicking, but there was no evidence that the horse was a kicker:—Held, that there was evidence of negligence to go to a jury. *Simpson v. The London General Omnibus Company*, 42 Law J. Rep. (n.s.) C. P. 112; Law Rep. 8 C. P. 390.

4.—The plaintiff was a passenger in a railway carriage, when three persons got in beyond the number it was constructed to carry, and remained standing in it until the train arrived at the next station, where, the platform being crowded, a rush was made for places, and notwithstanding there were these three extra persons in the carriage, the door of it was opened and other persons tried to get in, but the plaintiff prevented them from doing so. The door, however, remained open after the train had begun to move, when, just as it was entering a tunnel at the end of the station, a porter shut the door with a slam, and in doing so caught and crushed the plaintiff's thumb whilst the plaintiff, who had been holding out his hand to prevent more persons from getting into the carriage, had had it pushed against the framework of the door by the extra persons who were standing. There was only one porter at the station, and it was not unusual for the trains to be full and the platform to be crowded at the time when the accident occurred:—Held, in an action against the railway company, that their not removing the three extra persons from the carriage after its arrival at the station, when there was an opportunity to do so, and their not having a sufficient number of porters to control the crowd at the platform, were, when taken together, evidence on which a jury might find negligence of the company, which contributed to the accident. *Jackson v. The Metropolitan Railway Company*, 44 Law J. Rep. (n.s.) C. P. 83; Law Rep. 10 C. P. 49.

*Omission of statutory precaution: communication between passengers and railway guard.* [See RAILWAY COMPANY, 30.]

*Carrying passengers to wrong station: remoteness of damage.* [See DAMAGES, 19.]

(b) *Invitation to passengers to alight.*

5.—An invitation to railway passengers to alight on the stopping of a train without any warning of danger to a passenger, who is so circumstanced as not to be able to alight without danger, such danger not being visible or apparent, amounts to negligence on the part of the railway company; and the bringing up a train to a final stand-still for the purpose of the passengers alighting amounts to an invitation to alight, at all events after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out if he proposes to alight at the particular station. *Cockle v. The South-Eastern Railway Company* (Exch. Ch.), 41 Law J. Rep. (n.s.) C. P. 140; Law Rep. 7 C. P. 321.

6.—The mere stopping of a train, and calling out the name of a station, is no evidence of an invitation to alight. *Lewis v. The London, Chatham and Dover Railway Company*, 43 Law J. Rep. (n.s.) Q. B. 8; Law Rep. 9 Q. B. 66.

The plaintiff was a passenger by the defendants railway to Bromley station. As the train arrived there, she heard "Bromley, Bromley," called out several times. The train was brought to a stand-still, but not before it had partly overshot the platform. The engine was then on the other side of a bridge adjoining the platform. As the plaintiff was in the act of getting out, and when her foot was on the step of the carriage, the train was put back, with a jerk, and she fell on the platform. The period occupied by the stoppage was little more than momentary, and the plaintiff knew the station well:—Held, that there was no evidence of negligence on the part of the defendants to go to the jury. *Ibid.*

7.—The plaintiff was a passenger by the defendants' railway, and as the train reached the station to which he was to be carried, he heard the name of such station called out; the train afterwards stopped, and he heard the opening and shutting of doors usual upon passengers alighting. He then opened the door of the carriage in which he travelled, and which was the second from the engine, and put one foot on the step and the other on what he expected to be the platform, but the part of the train in which he was carried having overshot the platform he fell on to the embankment. It was a dark night at the time, and there was no light within forty feet of the spot, and the plaintiff was therefore unable to see whether the platform was or was not by the side of the carriage. A passenger in the third carriage from the engine proved that he got out and alighted on the platform, and that he afterwards saw the plaintiff fall. No warning was given by the defendants' servants to any of the passengers not to leave their seats, and the train was never backed, but after the accident proceeded on its journey. In an action for the injury the plaintiff had sustained by such fall through the defendants' negligence,—Held, that there was evidence on which a jury might reasonably find negligence on the part of the defendants, without contributory negligence of the plaintiff. *Weller v. The London,*

*Brighton and South Coast Railway Company*, 43 Law J. Rep. (N.S.) C.P. 137; Law Rep. 9 C.P. 126.

8.—In an action, brought under Lord Campbell's Act, 9 & 10 Vict. c. 93, against a railway company, for negligently causing the death of one of their passengers, it appeared that the deceased, who was short-sighted, was in the habit of travelling daily from Highbury station to Broad Street station, and back. One evening after dark the deceased arrived at Highbury station in one of the company's trains. The train was stopped when part of it was brought up to the platform and part of it was in a tunnel, through which the station is approached from Broad Street station. Part of the platform runs a short distance into the tunnel, and from the end of the platform a slope leads down to the level of the line. On the night in question there was a quantity of hard rubbish, from one to two feet high, lying along beyond the slope. The carriage in which the deceased was riding was pulled up opposite this rubbish, at the distance of twenty-seven feet from the mouth of the tunnel. After the train had stopped, a passenger in the next carriage gave evidence that he heard the company's servant call out "Highbury;" that he got out; that he then heard called out "Keep your seats;" that he then heard a groan, and going to the sound found the deceased, lying partly on the rubbish, and partly with his legs on the rails between the wheels, and having sustained such internal injuries in attempting to alight from the carriage that he died soon afterwards. The wheels of the carriage had not gone over the deceased, the train must therefore have been at a stand-still long enough for the passenger who gave evidence to alight, and then to proceed in the darkness, and to find the deceased in the situation described. The tunnel was dark, being filled with steam, but there was a lamp at the end of the tunnel. The Judge at Nisi Prius having on this evidence directed a nonsuit,—Held (reversing the judgment of the Exchequer Chamber, 40 Law J. Rep. (N.S.) Q.B. 188; Law Rep. 6 Q.B. 377), that without laying down any rule as to the effect in all cases of the company's servant calling out the name of the station, the evidence of the calling out the name in this case, coupled with the stopping of the train, and the interval of time which elapsed before it was again moved on, was evidence which ought to have gone to the jury, as it was, in the absence of rebutting evidence on the part of the company, sufficient to authorise their finding a verdict for the plaintiff. *Bridges v. The North London Railway Company*, 43 Law J. Rep. (N.S.) Q.B. 151; Law Rep. 7 E. & I. App. 213.

(c) *Insufficient accommodation for passenger to alight.*

9.—The plaintiff was a passenger on the defendants' railway, and on arriving at the station at which she intended to alight, the carriage in which she was travelling was carried past the platform, and came to a final stand-still. The

circumstances were such as to induce the plaintiff to believe she was to alight at that spot. There were no railway servants to assist her, and fearing she would be carried on, she attempted after a time to alight by stepping from the iron step on to the foot-board, and so to the ground. In doing so she slipped her foot, fell and sustained injuries:—Held, that the duty of the defendants not to expose a passenger to undue danger required them to provide for a person in the plaintiff's situation some reasonably fit and safe substitute for the ordinary means of descent, and that a jury might reasonably find the defendants had not performed this duty to the plaintiff, and had been guilty of negligence. *Robson v. The North-Eastern Railway Company*, 44 Law J. Rep. (N.S.) Q.B. 112; Law Rep. 10 Q.B. 271.

(d) *Contributory negligence by passenger.*

10.—The plaintiff, in company with his brother, was travelling by an underground railway. While the train was in motion he got up for the purpose of looking out of the window, in order to point out some object to his brother, and placed his hand against a bar which went across the carriage window, when the door flew open, and he fell out and was injured:—Held, by the Exchequer Chamber, upon the argument of a rule, to enter the verdict for the defendants, on the ground that there was no evidence of negligence to go to the jury, that the rule must be discharged, as the question whether the omission to fasten the door was the cause of the accident was rightly left to the jury. Per Kelly, C.B.—That assuming that the question of contributory negligence could be taken into account in considering whether the plaintiff had established a *prima facie* case, there was no evidence of contributory negligence on the part of the plaintiff. *Gee v. The Metropolitan Railway Company*, 42 Law J. Rep. (N.S.) Q.B. 105; Law Rep. 8 Q.B. 161.

11.—The L. & N. W. Railway Company have running powers over the defendants' railway. The plaintiff, employed by the L. & N. W. Railway Company as travelling inspector of carriages, was upon a journey with a free pass, in a carriage of a train of that company over the defendants' line, when the train ran past an adverse danger signal, and into some trucks which were then being shunted on the line by the defendants' servants. The collision hurt the plaintiff. In an action by him against the defendants, the jury found that the driver of the L. & N. W. Railway train was negligent in passing the signal, and that the servants of the defendants were also negligent in shunting the trucks:—Held (substantiating *Thorogood v. Bryan*, 18 Law J. Rep. (N.S.) C.P. 336), that the contributory negligence of the driver of the train disentitled the plaintiff to recover damages for the defendants' negligence. *Armstrong v. The Lancashire and Yorkshire Railway Company*, 44 Law J. Rep. (N.S.) Exch. 89 Law Rep. 10 Exch. 47.

*(e) Passenger travelling at his own risk.*

**12.**—Declaration, that the plaintiff was received by the defendants, a railway company, as a passenger to be safely carried on their railway on a journey from Piel Pier to Carlisle, and that the defendants so negligently managed the railway and the traffic upon it that a collision took place, by which the plaintiff was injured. Plea, that the plaintiff was received as a passenger under an agreement that he should travel at his own risk. Replication, that it was by reason of gross and wilful negligence and mismanagement of the defendants that the collision took place:—Held, that the replication was bad, for the agreement stated in the plea must be taken to include the negligence mentioned in the replication. *Macaulay v. The Furness Railway Company*, 42 Law J. Rep. (n.s.) Q. B. 4; Law Rep. 8 Q. B. 57, *nom. McCawley v. Furness Railway Company*.

**13.**—Where a passenger travels on a railway at his own risk, the exemption from liability on the part of the railway company extends, not only to the actual transit, but to risks incurred on the premises of the company in coming to and going from the points to which the contract to carry applies; so that a cattle drover so travelling who had to alight at a siding, and in necessarily going to the station passed a dangerous place at which he met with an accident, was held not entitled to recover, although the jury found there had been negligence on the defendants' part. *Gallin v. The London and North-Western Railway Company*, 44 Law J. Rep. (n.s.) Q. B. 89; Law Rep. 10 Q. B. 212.

**14.**—A cattle drover booked stock at a station on the North British line to a station on the North-Eastern line, taking from the North British Company a free pass to travel by the same train with the stock at his own risk, and exonerating the company from all responsibility for injury or loss to himself, however occasioned, on the journey for which it was issued or used. By the negligence of the North-Eastern Company a train of that company ran into the train in which the plaintiff was on the North-Eastern line, and injured him:—Held, that the North-Eastern Company were free from liability to the plaintiff by reason of the above contract, and that the plaintiff could not recover against them. *Hall v. The North-Eastern Railway Company*, 44 Law J. Rep. (n.s.) Q. B. 164; Law Rep. 10 Q. B. 437.

*(f) Conveyance by railway company over other company's line.*

**15.**—Under an agreement embodied in an Act of Parliament, the M. Railway Company granted running powers, on the payment of a mileage charge, over a portion of their own line to the L. Railway Company, and regulated by their own servants the passage of all the trains of both companies over such portion. Through the negligence of the servants of the L. Company in the exercise of the running powers, a train of that company ran into a train of the M. Company, by which the M. Company were carrying a passenger in fulfilment of a contract over such portion of

their line. The servants of the M. Company were not guilty of any negligence:—Held, that the M. Company were not liable to the passenger for the injuries caused by the collision, since the servants of the L. Company, whose negligence caused the collision, were not concerned in the carriage of the passenger, and were not employed by, or under the control of, the M. Company. *Wright v. The Midland Railway Company*, 41 Law J. Rep. (n.s.) Exch. 89; Law Rep. 8 Exch. 137.

**16.**—The plaintiff purchased a ticket from the defendants, a railway company, entitling him to travel from C. to C. An intermediate portion of the journey was along the railway of the T. V. Company, over which, by Act of Parliament, the defendants had running powers upon payment of certain tolls; the whole of the traffic arrangements being left by the Act under the control of the T. V. Company. On that portion of the line, the train of the defendants in which the plaintiff was travelling ran into a train of the T. V. Company, and the plaintiff was injured by the collision, which was owing solely to the negligence of the servants of the T. V. Company in sending on their own train without proper tail lights, and in allowing the defendants' train to proceed upon the same line of rails too soon after their own train, without giving any warning to the driver of the defendants' train:—Held, affirming the judgment of the Court of Queen's Bench (see 39 Law J. Rep. (n.s.) Q. B. 141), that the defendants were liable for the negligence of the T. V. Company. *Thomas v. The Rhymney Railway Company*, 40 Law J. Rep. (n.s.) Q. B. 89; Law Rep. 6 Q. B. 266.

*Statutory precaution: communication with guard.* [See RAILWAY, 30.]

*(B) CONVEYANCE OF PASSENGER'S LUGGAGE.*

**17.**—The liability of common carriers to insure the safe delivery of goods does not attach to a railway company in respect of passengers' luggage which is not put in the usual luggage van, under the entire control of the company, but is placed in the carriage with the passenger and under his control. With respect to luggage so placed, the obligation of the railway company is only to take reasonable care of it, and consequently the company will not be responsible for its loss unless occasioned by their negligence. *The Great Western Railway Company v. Talley*, 40 Law J. Rep. (n.s.) C. P. 9; Law Rep. 6 C. P. 44, *nom. Talley v. Great Western Railway Company*.

In an action by a passenger against a railway company for not safely carrying his portmanteau which formed his luggage, the evidence was that the plaintiff had the portmanteau put into the same carriage with him, and that in the course of the journey he got out for refreshment at a station where the train stopped for a short time, and upon returning failed to find his carriage, and completed his journey in another carriage in the same train. He afterwards obtained his portmanteau, but cut open and minus a portion of its contents, which had been stolen by some one

in the carriage after the plaintiff had left it. The jury negatived negligence on the part of the defendants' servants, and found that the plaintiff had by his negligence contributed to the loss:—Held, that the general liability of the defendants was, under the circumstances, modified by the implied condition that the plaintiff should use reasonable care, and that as the loss was occasioned by his neglect to do so, and would not have happened without such neglect, the defendants were entitled to have the verdict entered for them. *Ibid*.

18.—A clause of exemption from liability on the back of a passenger's ticket, of which the passenger had no knowledge, the ticket being complete on the face of it:—Held, not to exempt a steam packet company from responsibility for loss of luggage. *Henderson v. Stevenson*, Law Rep. 2 Sc. App. 470.

19.—The plaintiff, while travelling as a passenger by the defendants' railway, lost a box which had been received by the defendants as part of his personal luggage, and placed in the van. He had recently returned from Canada, with the intention of settling in England, and the box contained six pairs of sheets and a like number of blankets and quilts, which had formed part of his household goods in Canada, and which he intended to be again part of his household goods when he should have provided himself with a home:—Held, that although a pair of sheets or the like taken by a passenger for his own use on a journey might fairly be considered as personal luggage, yet that a quantity of articles of this description, intended not for the use of the traveller on the journey but for the use of his household when permanently settled, could not be so regarded, and that the defendants were not responsible for them. *Macrow v. The Great Western Railway*, 40 Law J. Rep. (N.S.) Q.B. 300; Law Rep. 6 Q.B. 612.

20.—The plaintiff went to the defendants' station at Bath, and there took a through ticket to Chester, having on it, "This ticket is issued subject to the regulations and conditions stated in the company's time tables and bills;" and there were notices on the company's time tables, "The company does not hold itself responsible for any delay, detention, or other loss or injury whatsoever arising off its lines, or from the acts or default of other parties." The train arrived at Birmingham, from which point to Chester the journey is on the London and North-Western Company's line, the London and North-Western train departing from a different platform to that at which the Midland Company's train arrives. The station at Birmingham belongs to the London and North-Western Company, and the porters there are employed and paid by that company, the Midland Company having, by agreement between them and the London and North-Western Company, the right of using the station, with its appliances (including the services of the porters), for their trains. On the arrival of the train at Birmingham, a porter came to the plaintiff and took charge of his luggage out of the train, and said

that he would meet him with the luggage at the train for Chester. When the plaintiff came to the train for Chester the porter was on the platform with the luggage; the plaintiff never saw it again:—Held (without deciding whether the plaintiff was bound by the condition, though he had not read the reference to it on the ticket, and whether the condition itself was so reasonable as to be binding upon him), that he was entitled to recover as there was no evidence that the London and North-Western Company ever took the luggage into their custody. *Kent v. The Midland Railway Company*, 44 Law J. Rep. (N.S.) Q.B. 18; Law Rep. 10 Q.B. 1.

### (C) CONVEYANCE OF GOODS.

#### (a) Liability as common carrier.

21.—The owner of a lighter, hoy or flat which he uses regularly for carrying therein for hire from place to place on the banks of the Mersey the goods of such persons as choose to employ him, though not plying regularly between fixed termini, is a common carrier, and may therefore, without negligence on his part, be liable for the loss of goods delivered to him for carriage and lost whilst under his charge, notwithstanding that all the goods carried on the journey when the loss occurs belong to one and the same person. *The Liver Alkali Company v. Johnson*, 41 Law J. Rep. (N.S.) Exch. 110; Law Rep. 7 Exch. 267: affirmed on appeal, see next case.

22.—A person who exercises the ordinary employment of a lighterman by carrying goods in his flats for reward, although he may not be bound as a common carrier to receive the goods of all comers indifferently, nevertheless incurs the liability of a common carrier for the safety of goods carried by him. So held by the majority of the Court. *The Liver Alkali Company (Lim.) v. Johnson*, 43 Law J. Rep. (N.S.) Exch. 216; Law Rep. 9 Exch. 338.

Per Brett, J., such person is not a common carrier, but, in the absence of any special agreement, is, by a custom adopted and recognised by the Courts, liable as a shipowner upon an implied undertaking to carry at his own absolute risk, the act of God and the Queen's enemies alone excepted. *Ibid*.

#### (b) Special agreement.

23.—The plaintiff wishing his household furniture removed, asked the defendant, whose business it was to remove furniture in vans, to undertake the removal. The defendant having sent his foreman, who inspected the goods, wrote to the plaintiff: "I beg to inform you the terms for removal of your furniture and effects from Paignton to Plymouth will be 22l. 10s., with risk of breakage in transit, including the use of all necessary mats, cases and packing materials, and every expense. In the event of your accepting the estimate, be kind enough to sign and return to me the annexed memorandum, by which I am liable to the amount therein specified. Payment of the account is required on delivery of the goods." The memoran-



dum, which the plaintiff signed, was: "I hereby agree to pay you the sum of 22l. 10s. for the removal of my furniture and effects from Paignton to Plymouth, you undertaking risk of breakages (if any) not exceeding 5l. on any one article." The goods were removed by the defendant, but, while in transit, were destroyed by accidental fire without any negligence on his part. In an action against him as a common carrier, to recover for the loss of the goods, he described his occupation by saying, "I carry goods for all that ask me to all parts of the kingdom, they paying the price. I receive furniture of customers by contract."—Held, that as he had made a special contract rendering himself liable for breakages only, any other liability was excluded from it, and he was not responsible for the damage which the plaintiff had sustained. *Scalfe v. Tarrant*, 44 Law J. Rep. (N.S.) Exch. 234; Law Rep. 10 Exch. 559.

(c) *Owner's risk.*

24.—Where goods were conveyed by a railway company at a lower rate than ordinary, "at owner's risk":—Held, that the company were liable for damage occasioned by an unreasonable delay. *Robinson v. The Great Western Railway Company* (35 Law J. Rep. (N.S.) C.P. 123) followed. *D'Arc v. The London & North-Western Railway Company*, Law Rep. 9 C.P. 325.

(d) *"Parcel or package."*

25.—Pictures were laid upon one another without any covering or tie in the owner's wagon, which had sides but no top; and the wagon was delivered to a railway company, and placed by their servants on one of their trucks for carriage by the railway:—Held, that the pictures were "contained in a parcel or package" within the meaning of section 1 of 1 Will. 4. c. 68, so as to give the company the protection of that statute. *Whaite v. The Lancashire and Yorkshire Railway Company*, 43 Law J. Rep. (N.S.) Exch. 47; Law Rep. 9 Exch. 67.

(e) *Loss by felony of servants.*

26.—In an action against a railway company for the loss of a parcel of money above the value of 10l., the issue being whether the loss was occasioned by the felonious act of one of the company's servants, who had absconded at the time of the parcel being missed, it is allowable to call a police officer to prove instructions which he received from the station master tending to shew that he, the station master, had suspicions that the servant had stolen the parcel. *The Kirkstall Brewery Company (Lim.) v. The Furness Railway Company*, 43 Law J. Rep. (N.S.) Q.B. 142; Law Rep. 9 Q.B. 468.

27.—In an action against common carriers for the loss of goods within section 1 of the Carriers Act, and which are alleged to have been lost by the felonious acts of the carriers' servants, the plaintiff must establish a *prima facie* case that the loss has arisen from such felonious acts, and it is not sufficient to shew that it is more probable that

the loss has arisen from such felonious acts than by the act of some person not in the employment of the carriers. The judgment of Pigott, B., in *Vaughton v. The London and North-Western Railway Company* (43 Law J. Rep. (N.S.) Exch. 75; Law Rep. 9 Exch. 93) commented on. *M'Queen v. The Great Western Railway Company*, 44 Law J. Rep. (N.S.) Q.B. 130; Law Rep. 10 Q.B. 569.

28.—In order to support a replication under the Carriers Act (1 Will. 4. c. 68. s. 1) of loss by the felonious acts of the defendants' servants, it is not necessary to give such an amount of evidence as would be required to justify a Judge in leaving it to the jury upon an indictment for felony, because in the civil action the servants have an opportunity of being witnesses for the defence, and of clearing themselves from imputation; nor is it necessary for the plaintiffs to charge any one individual servant with the theft. *Vaughton v. The London and North-Western Railway Company*, 43 Law J. Rep. (N.S.) Exch. 75; Law Rep. 9 Exch. 93.

On the 29th of January the plaintiffs delivered a box of jewellery, worth more than 10l., although the nature and value was undeclared, to the defendants, as common carriers, for carriage to the L. Hotel, Liverpool. The box was transmitted by the defendants' railway, reached the Liverpool, Lime Street, station, on their line, next morning, and was entered with other parcels directed to the same hotel, in the delivery book of H., a carman employed by the defendants' agent to deliver goods. H. then went with his cart to the hotel, and there, while allowing the housekeeper to sign a receipt for three parcels, only delivered two; the hotel manager, however, noticed the deficiency, and asked him where the other was. H. said, "Isn't it there?" and on being answered in the negative, went out to search his van, but came back, saying that he could not find the parcel. This was the plaintiff's box. On Monday, the 10th of February, some of the jewellery was handed to a detective by a pawnbroker, with whom it had been pledged. Two men were apprehended in consequence. One of them took the detective to a siding of the station, and there, at a place a hundred yards away from the spot near the defendants' parcels delivery office, where the cart was loaded, a small piece of the jewellery and a bit of a broken box were picked up. The men were released, and afterwards the articles found were shewn to the clerks in the office, one of whom, W., said that on the Thursday before, he had found a pin near the same spot, and another man had found two. When told that he ought to have spoken about it, W. answered that he did not think it worth anything. In an action against the defendants for the loss of the jewellery, they pleaded the Carriers Act, 1 Will. 4. c. 68. s. 1, to which the plaintiffs replied that the loss arose from the felonious acts of servants in the employ of the defendants and not otherwise. At the trial the facts above stated were proved, the defendants called no witnesses, and the jury found a verdict for the plaintiffs:—Held that, having regard to the fact of the defendants' servants not

having been called to rebut by their explanations the *prima facie* case made out against them, there was evidence to go to the jury in support of the replication. *Ibid.*

### (D) DELIVERY.

#### (a) Liability for misdelivery or late delivery.

**29.**—A common carrier is liable for the late delivery of goods received by him in the amount of damages which may reasonably be expected to arise out of the breach of an ordinary contract; but he is not liable to an unusual amount of damages, arising out of exceptional circumstances, unless distinct notice is given to the carrier by the consignor before the delivery, of the exceptional circumstances touching the delivery of the goods. *Horn v. The Midland Railway Company*, 41 Law J. Rep. (n.s.) C. P. 264; Law Rep. 7 C. P. 583: affirmed on appeal, 42 Law J. Rep. (n.s.) C. P. 59; Law Rep. 8 C. P. 131.

A consignor, having a contract with his consignees for the delivery to the consignees of goods by a particular day at an exceptional price, with power in the consignees to reject the goods and rescind the contract if not performed to the day, delivered to a railway company goods within the contract, in time for delivery to the consignees within the time mentioned by the contract, and at the time of delivery the company had notice that the consignor was under a contract to deliver by the time mentioned in the contract, and was liable, in case of late delivery, to have the goods thrown on his hands. The company did not deliver the goods till after the time stipulated in the contract, and the consignees refused to receive them:—Held, that the measure of damages to which the company were liable was the difference between the market price of the goods on the day when they ought to have been delivered and on the day on which they were delivered, and any incidental expenses to which the consignor may have been put in finding a customer and re-selling the goods; but that the company, under the notice which they had received, were not liable to repay to the consignor the difference between the exceptional price mentioned in the contract and the price of resale. *Ibid.*

**30.**—Where goods are consigned to a carrier to be delivered to a purchaser, whose name is made known to the carrier, the inference is that the contract is between the carrier and the consignee, and therefore if the goods are consigned to be delivered at a certain place, the carrier is justified in delivering them to the consignee on demand elsewhere, and cannot be made liable for loss thereby occasioned to the consignor, *e.g.* by his being forced to pay custom duties. Special circumstances must be shewn to establish a contract between the carrier and consignor. *Cork Distillery Company v. The Great Southern and Western Railway Company*, Law Rep. 7 E. & I. App. 269.

**31.**—H., agent for obtaining orders for the plaintiffs' goods in Glasgow, directed them to send parcels of goods to C. & Co. and T. & Co. respec-

tively, giving the addresses of those firms in Glasgow. The defendants, in accordance with the plaintiffs' instructions, carried the goods to Glasgow, and there delivered them (having observed all the rules of their ordinary course of business) at the addresses written on the parcels. H., who had endorsed delivery orders in the names of the firms, received the parcels at both addresses and made away with them. The name of C. & Co. was found put up at the one address, but there was no such name or firm as T. & Co. at the other:—Held, that the defendants having, in following the plaintiffs' directions, pursued *bona fide* their usual course of business were not liable for misdelivery in the case of either parcel. *M'Kean v. M'Ivor*, 40 Law J. Rep. (n.s.) Exch. 30; Law Rep. 6 Exch. 36, *nom.* *M'Keane v. M'Ivor*.

#### (b) Goods left in hands of carriers.

**32.**—When carriers by land have carried goods to their destination, in pursuance of a contract with one who is both consignor and consignee, and through his default the goods are left in the carriers' hands, they are bound to take reasonable measures for the preservation of the goods, and can recover from him payments they have made on account of expenses so incurred. *The Great Northern Railway Company v. Swaffield*, 43 Law J. Rep. (n.s.) Exch. 89; Law Rep. 9 Exch. 132.

The defendant sent a horse by railway consigned to himself to a station on the line, and paid the fare. When the horse arrived at the station there was no one on the defendant's behalf to receive it, and the railway company therefore placed it with a livery stable keeper:—Held, that they could recover from the defendant the reasonable charges which they had paid to the stable keeper. *Ibid.*

**33.**—A railway company, as carriers, brought some goods by their railway to one of their stations, and immediately gave the consignee notice of the arrival, and that they held the goods "not as common carriers, but as warehousemen, at owners' sole risk, and subject to the usual warehouse charges." The consignee acquiesced in this, and the goods remained in the charge of the company, and, by their negligence, were damaged. In an action by the consignee against the company, —Held, that on the true construction of the notice, the defendants were not exempted from all liability, but were bound as bailees to take reasonable care of the goods. *Mitchell v. The Lancashire and Yorkshire Railway Company*, 44 Law J. Rep. (n.s.) Q. B. 107; Law Rep. 10 Q. B. 256.

### (E) CONVEYANCE OF LIVE STOCK.

**34.**—R. delivered a dog to a railway company for carriage on their railway. The company received it, not as common carriers, but as ordinary bailees. The dog was delivered with a collar on it and a strap attached thereto. During the journey there was a change of trains; for security during the interval of change a servant of the company fastened the dog up by means of the strap, and the dog slipped through the collar, got

on to the railway, and was killed:—Held, that the company were not liable. *The North-Eastern Railway Company v. Richardson*, 41 Law J. Rep. (N.S.) C. P. 60; Law Rep. 7 C. P. 75, *nom. Richardson v. The North-Eastern Railway Company*.

**35.**—A saddled horse, delivered to a railway company to be carried on a journey, was placed by their servants in a proper horse box in the usual manner. The saddle was left on the horse according to the usual custom in such cases with the stirrups hanging down. At the journey's end the horse was found to be injured in the forearm and fetlock. The horse was proved to be free from vice, and it was shewn by the defendants that nothing unusual occurred to the train during the journey:—Held, by Martin, B., and Bramwell, B., that, in the absence of further proof of the cause of the mischief, the company were not liable. *Contra*, by Pigott, B., on the ground that, in order to relieve themselves from their common law liability, the company must shew affirmatively the mischief arose from the act of the animal itself. *Kendall v. The London and South-Western Railway Company*, 41 Law J. Rep. (N.S.) Exch. 184; Law Rep. 7 Exch. 373.

**36.**—The G. N. R. Co. and the defendants agreed that a complete and full system of interchange of traffic should be established from all parts of one company and beyond its limits, to all parts of the other company and beyond its limits, with through tickets, through rates and invoices, and interchange of stock at junctions, the stock of the two companies being treated as one stock. The agreement provided for the division of the traffic. The plaintiff, wishing to send a cow from D. to S., went to the station of the G. N. R. Co. at D. and booked her for S. by the defendants' line. He signed a contract, by which it was agreed that the cow was to be conveyed upon certain conditions, one of which was as follows: "The G. N. R. Co. give notice that they convey horses, cattle, sheep, pigs and other live stock in waggons, subject to the following condition: That they will not be responsible for any loss or injury to any horse, cattle, sheep, or other animal, in the receiving, forwarding or delivering, if such damage be occasioned by the kicking, plunging, or restiveness of the animal." The cow was put into a truck belonging to the defendants, and was conveyed to S., where a servant of the defendants, who was in charge of the yard or loading place, let her out of the truck, although he was cautioned by the plaintiff not to do so at that time. The cow rushed out of the truck, and after running about the yard, got upon the line and was killed:—Held, per totam Curiam, having power to draw inferences of fact, that the G. N. R. Co. were the agents of the defendants to make the contract for the carriage of the cow, and that if the defendants were not protected by the condition above set out, an action was maintainable against them. Held, also, per Blackburn, J., and Lush, J. (dissentiente), that the accident to the cow was attributable to the fact that the porter let her out of the truck without waiting a reasonable time, as he might have done, and that the de-

fendants were therefore liable to the plaintiffs for the value of the cow. *Gill v. The Manchester, &c., Railway Company*, 42 Law J. Rep. (N.S.) Q. B. 89; Law Rep. 8 Q. B. 186.

**37.**—The liability of a railway company as common carriers of live animals as well as of goods is, in the absence of any negligence, subject not only to the exemption of the act of God or the Queen's enemies, but to the further exemption of any act wholly attributable to the development of a latent inherent vice in the animal itself. *The Great Western Railway Company v. Blower*, 41 Law J. Rep. (N.S.) C. P. 268; Law Rep. 7 C. P. 655.

A bullock, one of a number of cattle delivered to a railway company, was properly loaded into a proper truck by the railway company. The truck was properly fastened and secured, but in the course of its journey the bullock escaped from the truck and was found lying dead on the railway. There was no negligence on the part of the railway company, and the fact was that the escape of the bullock was wholly attributable to the efforts and exertions of the animal itself:—Held, that the company were not liable for the loss of the animal. *Ibid*.

*Neglect to supply animals with water.* [See ANIMALS, 3.]

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## CATHEDRAL CLERGY.

[See CHURCH.]

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## CATTLE.

[See CONTAGIOUS DISEASES ACT.]

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## CEMETERY.

*Rating of.* [See RATE, 11.]

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## CERTIORARI.

On an appeal against a conviction under 12 & 13 Vict. c. 92, s. 2, passed for the more effectual prevention of cruelty to animals, the sessions, with the consent of counsel on both sides, confirmed the conviction, subject to a case to be stated for the Court of Queen's Bench. A writ of certiorari, for the purpose of bringing up the conviction and the case, had been obtained. By 12 & 13 Vict. c. 92, s. 26, no conviction, judgment or proceeding relative thereto, shall be removed by certiorari, or otherwise, into any superior Court:—Held, that the writ of certiorari, having been taken away generally, without any exception in favour of a special case, the consent of the parties could not give the Court jurisdiction, and therefore that the writ had issued improvidently,

and must be quashed. *The Queen v. Chantrell*, 44 Law J. Rep. (N.S.) M. C. 94; Law Rep. 10 Q. B. 587.

*Time for application for: order of quarter sessions.* [See JUSTICE OF THE PEACE, 12.]

*Costs of prosecution.* [See COSTS AT LAW, 12.]

*Amendment of order of justices.* [See JUSTICE OF THE PEACE, 13.]

*Practice on, in equity.* [See PRACTICE IN EQUITY, 42.]

### CHAMPERTY.

Declaration that H., a brother of the defendant and a cousin of the plaintiff, had died leaving landed estates and personal property, and the defendant was heir-at-law of the deceased and one of his next-of-kin, and the deceased died leaving a will whereby his property, real and personal, was left to persons other than the plaintiff and the defendant, and the plaintiff believed that such will revoked a former will by which the testator had bequeathed certain property to the plaintiff, and in consideration that the plaintiff would take the necessary steps to contest the validity of the said will and would advance certain moneys and obtain evidence for such purpose, and instruct an attorney in that behalf, the defendant promised that he would pay to the plaintiff one half of any personal property and convey to him a moiety of any landed estates he might recover or which might come to him, the defendant, by reason of the taking of such proceedings for the setting aside of such will; and the plaintiff took such steps as aforesaid and advanced certain moneys and instructed an attorney, and a large sum of money was thereby recovered by the defendant, and the said will was declared invalid, and the defendant became entitled to and obtained possession of large landed estates of the deceased. Breach, that the defendant had not paid to the plaintiff half the personal property, or conveyed to him one-half of the real estates:—Held, on demurrer, that the declaration was bad, for the agreement being to advance money and procure evidence for the purpose of a suit in consideration of a share in what was recovered by it, was *prima facie* invalid on the ground of champerty, and that the relationship of the parties, and the other circumstances stated in the declaration, did not give the plaintiff such an interest in the suit as to alter the nature of the transaction. *Hutley v. Hutley*, 42 Law J. Rep. (N.S.) Q. B. 62; Law Rep. 8 Q. B. 112.

### CHANCERY FUNDS ACT, 1872.

[Rules under the 21st of December, 1872, and the 23rd of December, 1872. See 42 Law J. Rep. (N.S.) Chanc. Introd.]

### CHARGING ORDER.

[See JUDGMENT.]

### CHARITY.

(A) CHARITABLE TRUSTS ACTS.

(B) GIFT INTER VIVOS.

(C) DEVISES AND BEQUESTS.

(a) *Validity of.*

(1) *Gift for building.*

(2) *Covenant to pay money.*

(3) *Power of particular charities to receive bequests.*

(b) *Construction of.*

(1) *What bequests are charitable.*

(2) *Lapse or failure of bequest.*

(3) *Uncertainty.*

(4) *Cy-près.*

(5) *Trust or condition.*

(c) *Marshalling assets.*

(D) ADMINISTRATION.

(a) *Scheme.*

(b) *Election.*

(c) *Trustees and investment.*

### (A) CHARITABLE TRUSTS ACTS.

1.—The Charity Commissioners have jurisdiction to appoint new trustees in contentious cases. *In re the Burnham National Schools*, 43 Law J. Rep. (N.S.) Chanc. 340; Law Rep. 17 Eq. 241.

The dictum of Lord Romilly in *Hackney Charities; In re Nicholls* (34 Law J. Rep. (N.S.) Chanc. 169), that section 5 of the Charitable Trusts Act of 1860 excludes their jurisdiction in contentious cases, disapproved of. *Ibid.*

Where the Charity Commissioners have jurisdiction the Court of Chancery will only interfere in a case of great miscarriage. *Ibid.*

Under 6 & 7 Will. 4. c. 70, two joint rectors of a parish were *ex officio* trustees of a Church school, and through their disagreement a vacant mastership was not filled up, and the school was consequently closed for more than two years. The Charity Commissioners appointed three additional trustees (all members of the Church of England), who immediately after their appointment, with the concurrence of one of the old trustees, transferred the school to the School Board. The Court refused to interfere with the appointment of the additional trustees. *Ibid.*

Semble—It is very doubtful whether the Charity Commissioners could have removed the *ex officio* trustees. *Ibid.*

If either of the new trustees had not been a member of the Church of England the appointment would have been improper. *Ibid.*

2.—Property originally given for superstitious uses in a parish became, by the statutes for avoiding superstitious uses, vested in the Crown. It was granted by the Crown to Lord Wentworth, and by money raised out of the property the trustees of the parish obtained a re-grant to two

persons absolutely without any trust expressed, and ever since the property had been applied for valid charitable purposes in the parish:—Held, that such property was not the private property of the parish, but was subject to the powers of the Charity Commissioners; also, that as the trustees, acting against advice, had compelled the Attorney-General to file an information, they must bear their own costs. *The Attorney-General v. Webster*, 44 Law J. Rep. (n.s.) Chanc. 766; Law Rep. 20 Eq. 483.

Although parishioners may hold an advowson for their general benefit, and nominate their vicar, this is an exception to the general law, and other property held upon trust for a parish or parishioner is charity property. *Ibid.*

#### (B) GIFT INTER VIVOS.

3.—On the 24th of March, 1866, D. gave a cheque for 5,000*l.* to trustees for the purpose of building a hospital. The money was received and immediately invested in stock in the names of the trustees, who on the 3rd of April, 1866, executed a declaration of trust to that effect, which was not communicated to the donor. D. died on the 7th of April, 1866:—Held, that the gift was void under the Mortmain Act, and that the next-of-kin were entitled to the 5,000*l.* *Hawkins v. Allen*, 40 Law J. Rep. (n.s.) Chanc. 23; Law Rep. 10 Eq. 246.

#### (C) DEVISES AND BEQUESTS.

##### (a) Validity of.

##### (1) Gift for building.

[Gifts and bequests of land for providing or erecting public parks, elementary schools, and museums excepted from the operation of the Mortmain Acts. 34 & 35 Vict. c. 13.]

4.—A charitable bequest for building is invalid unless it either refers to an existing site on which the building is to be erected or contains words expressly excluding the application of the money in the purchase of land. *Pratt v. Harvey*, Law Rep. 12 Eq. 544.

5.—A testatrix bequeathed her residuary personal estate to trustees upon trust to be by them applied in aid of erecting or of endowing an additional church at A. There was no additional church in course of erection or intended to be erected at the date of the will or at the testatrix's death:—Held, reversing the decision of one of the Vice-Chancellors (40 Law J. Rep. (n.s.) Chanc. 509; Law Rep. 12 Eq. 201), that the intentions of the testatrix were not confined to a church in course of erection or contemplated at the date of the will, or at the death of the testatrix, and an enquiry was directed whether the bequest, or any and what part thereof, could be laid out and employed as directed by the will. *Sinnett v. Herbert*, 41 Law J. Rep. (n.s.) Chanc. 388; Law Rep. 7 Chanc. 232.

A bequest for building or endowing a church is not void under the statutes of Mortmain, because the trustee having an option may apply the whole

fund for endowment. *Girdlestone v. Creed* (10 Hare, 480) distinguished. *Ibid.*

Gift supported under the 43 Geo. 3. c. 108, to the extent of 500*l.* out of the mixed personality. *Ibid.*

##### (2) Covenant to pay money.

6.—A voluntary covenant to leave by will money to a charity stands on the same footing as a legacy to a charity, and must abate in the same proportion as the impure bears to the pure personality of the covenantor's estate. *Fox v. Lownds*, 44 Law J. Rep. (n.s.) Chanc. 474; Law Rep. 19 Eq. 453.

##### (3) Power of particular charities to receive bequests.

7.—A charity by its statute of incorporation authorised to receive money, "paid, given, devised or bequeathed" to it, and with license in mortmain "to take, receive, hold and enjoy" any lands or interest in lands, for the purposes of the charity, cannot take by bequest money secured on lands. *Neithersole v. The Indigent Blind School*, 40 Law J. Rep. (n.s.) Chanc. 26; Law Rep. 11 Eq. 1.

8.—Where a charitable institution was empowered by private Act of Parliament to take all sums of money "paid, given, devised, and bequeathed" to it, and to purchase, take, or receive lands not exceeding two acres, without incurring any of the penalties of the Statutes of Mortmain:—Held, that the institution could not take a bequest of impure personality. *Chester v. Chester*, Law Rep. 12 Eq. 444.

9.—A statute which in terms conferred upon a charity the power to acquire real estate by will, was held by implication to empower testators to devise real estate to the charity, and the charity was held entitled to have a legacy payable out of mixed realty and personality paid in full, although the pure personality was insufficient. *Perring v. Trail*, 43 Law J. Rep. (n.s.) Chanc. 775; Law Rep. 18 Eq. 88.

10.—A testator bequeathed pure personality to an existing charity whose funds might be applied at the discretion of the trustees in any of various objects, some of which were within the Act of 9 Geo. 2. c. 36, and some not:—Held, that the legacy was valid. *Wilkinson v. Barber*, 41 Law J. Rep. (n.s.) Chanc. 721; Law Rep. 14 Eq. 96.

The testator directed that the duty on the charitable legacies should be paid out of impure personality:—Held, that this direction was invalid. *Ibid.*

The next-of-kin who unsuccessfully opposed the charitable legacies applied for their costs as between solicitor and client on the authority of *Carter v. Green* (3 Kay & J. 591):—Held, that they were only entitled to costs as between party and party. *Ibid.*

11.—An English convent may be a devisee or legatee of real or personal estate. *Cocks v. Manners*, 40 Law J. Rep. (n.s.) Chanc. 640; Law Rep. 12 Eq. 574.

Testatrix by her will appointed the residue of her disposable property equally between the following religious institutions, viz.:—The Newport

Catholic Chapel, for the general purposes thereof (and payable to the officiating priest for the time being); the Brighton Catholic Chapel, in Upper St. James's Street (payable for the like purposes, to the officiating priest); the Dominican Convent at Carisbrook (payable to the superior for the time being); and the Sisters of the Charity of St. Paul, at Selley Oak, near Birmingham (payable to the superior thereof for the time being). The receipts of the priests and superiors were respectively made discharges for the same. The testatrix died, seised and possessed of (*inter alia*) considerable realty, and pure and impure personalty, all subject to her appointment. The priests each claimed only one-fourth of the residue of the pure personalty, which was not disputed:—Held, that the appointment in favour of the Dominican Convent was valid, *in toto*, but that in favour of the Sisters at Selley Oak was good as a charitable bequest only. *Ibid*.

(b) *Construction of.*

(1) *What bequests are charitable.*

12.—A bequest of 200*l.* "to each of ten poor clergymen of the Church of England, to be selected by A." is not a charitable bequest. *Thomas v. Howell*, 43 Law J. Rep. (N.S.) Chanc. 799.

13.—Under a will directing payment of charitable legacies out of pure personalty:—Held, 1. That a sum standing to testator's credit at his banker's, to whom he owed a larger sum payable at a day certain which had not arrived at the time of his death; 2. That a sum for rents collected in the hands of testator's agent, to whom a larger sum was due for commission, were respectively to be set off against the larger sums, and not treated as assets. Arrears of rent due in respect of which ground rents and other outgoings were payable, and a sum due for the apportionment of a quarter's rent of leaseholds:—Held, to be pure personalty. Bequest of a sum to each of ten poor clergymen to be selected by testator's friend J. O.:—Held, not charitable. *Thomas v. Howell*, 43 Law J. Rep. (N.S.) Chanc. 511; Law Rep. 18 Eq. 198.

14.—Testatrix by will gave a legacy of 100*l.* to each of several persons, "to be applied by each of them to such charitable purposes as each may think most advisable." Some of these persons died in the testatrix's lifetime:—Held, that the legacies given to those persons lapsed. *Chamberlayn v. Brockett*, 41 Law J. Rep. (N.S.) Chanc. 789.

15.—Testatrix by will, "feeling that she was doing right in returning her money in charity to God who gave it," bequeathed all her residuary personal estate to be applied in building almshouses "when land should be given for the purpose":—Held, reversing the decision of the Master of the Rolls, to be a good charitable gift. *Chamberlayn v. Brockett*, 42 Law J. Rep. (N.S.) Chanc. 368; Law Rep. 8 Chanc. 206.

16.—Testator devised and bequeathed the residue of his real and personal estates to trustees, in order that it might be invested in Government security, in their joint names, and the interest from time to time given to such of the lineal de-

scendants of R. W., his "dearest mother's brother," as they might severally need; and that the trustees of the fund should make such provisions as would ensure a continuance of the said trust at their decease:—Held, that the bequest was charitable, and resulted as to the realty to testator's heir-at-law; and as to the impure personalty to his next-of-kin. As to the pure personalty, a scheme was decreed. *Gillam v. Taylor*, 42 Law J. Rep. (N.S.) Chanc. 674; Law Rep. 16 Eq. 581.

(2) *Lapse or failure of bequest.*

[And see *supra* Nos. 14, 16, *infra* No. 22.]

17.—S. bequeathed 600*l.* arising from such part of his estate as should not be secured upon mortgages or chattels real, to apply the income to keep in good repair the tombstones of himself and several of his relatives, and directed the surplus income to be given away on his birthday in charity:—Held, that the prior gift to keep the tombstones in repair being void, the whole fund went to the charity. *Dawson v. Small*, 43 Law J. Rep. (N.S.) Chanc. 406; Law Rep. 18 Eq. 114.

(3) *Uncertainty.*

18.—Bequest to the Kent County Hospital. There being no hospital so named,—Held, that a general county hospital must be presumed to be intended, and that the Kent County Ophthalmic Hospital could not take, but that the legacy must be equally divided between the Kent and Canterbury Hospital and the West Kent General Hospital, which together formed a general county Hospital. *In re Alochin's Trusts; Ex parte Furley; Ex parte Earl Romney*, Law Rep. 14 Eq. 230.

(4) *Cy-près.*

19.—*Quære*—whether the doctrine of *cy-près* is applicable in the case of a gift for a particular purpose which there is no reasonable prospect of carrying into effect. *Sinnott v. Herbert*, 41 Law J. Rep. (N.S.) Chanc. 388; Law Rep. 7 Chanc. 232.

20.—A testatrix gave a legacy to the "treasurer for the time being of the fund for the relief of the widows and orphans of the clergy in the diocese of Worcester." There was no society which exactly answered to this description, nor was there any single society whose funds were devoted to the relief of the widows and orphans of clergy in the whole diocese, which consisted of the archdeaconries of Worcester and Coventry. But there were in existence two societies—one for the relief of widows and orphans of clergy in the archdeaconry of Worcester, another for the relief of widows and orphans in the archdeaconry of Coventry:—Held, that there being no society exactly answering to the description in the will, the Court must consider the charitable object expressed by the testatrix, that this extended to the whole diocese, and would be fulfilled by dividing the legacy between the two societies in proportion to the number of beneficed clergymen in each. *In re Kilvert's Trusts*, 40 Law J. Rep. (N.S.) Chanc. 703; Law Rep. 12 Eq. 183.

Evidence of surrounding circumstances, including the fact of subscription by testatrix and her family to one society, was admitted in order to shew that she intended to benefit a particular society to which the description in part applied. *Ibid.*

**21.**—Numerous charities were established for the relief, some of "Poor Prisoners," some of "Prisoners for Debt":—Held, that the terms were synonymous. *In re The Prison Charities*, 42 Law J. Rep. (N.S.) Chanc. 748; Law Rep. 16 Eq. 129. And see *The Attorney-General v. Hankey*, Law Rep. 16 Eq. 140n.

Such charities having failed,—Held, that a scheme for the establishment of an industrial school for the children of criminals was not *cy-près* the original purposes. *Ibid.*

**22.**—That testator devised a freehold house as a Sailors' Home, and gave 10,000*l.* upon trust, to apply the income to the repair of the Sailors' Home, and for insurance, and to apply the residue "in or towards payment of the salaries of the several officers of the establishment, and all other expenses necessary for keeping up the said establishment as a Sailors' Home;" and provided that in case the number of ships belonging to his docks fell below ten, the trustees should convey the home and assign the funds to be purchased with the 10,000*l.* to the trustees of the Sailors' Home, Wells Street, so that the said buildings should be continued as a Sailors' Home for ever, and the income of the funds applied as an endowment for the same:—Held, that the 10,000*l.* could not be applied *cy-près*, but failed with the devise. *Green v. Britten*, 42 Law J. Rep. (N.S.) Chanc. 187.

#### (5) Trust or condition.

**23.**—A testator, in 1570, devised house property to the Merchant Taylors' Company and their successors for ever, to this intent, and upon this condition, that they should yearly, for ever, of and with the rents and profits, provide and give to a specified number of poor persons, certain articles of clothing of a specified value, and he prayed the chamberlain and town clerk of the city of London for the time being to call upon and put in mind the master and wardens of the said company, and look that the said articles should be justly and truly given, and he gave to the same chamberlain and town clerk for their labour and pains in that behalf, 10*s.* a piece yearly, to be received at the hands of the company, out of the rents and profits, and so that the whole residue of the said rents and profits they should maintain, and gather yearly into an whole stock, and therewith do and keep the reparations of the said tenements to them devised, and if need be, new build the same as to their discretions need should appear, as the same stock would fall out. And in case the company should be remiss in the performance of the trust, he devised the same premises to the parson, churchwardens, and parishioners of St. M., to the same intent and upon the same condition. The rents and profits, having since the death of the testator increased to an amount considerably larger than was necessary to

answer the purposes mentioned in his will:—Held, affirming the decision of the Master of the Rolls (Law Rep. 11 Eq. 35), that the Merchant Taylors' Company were not entitled to appropriate the surplus to their own purposes, but the same must be applied *cy-près* for charitable purposes. *The Merchant Taylors' Company v. The Attorney-General*, 40 Law J. Rep. (N.S.) Chanc. 545; Law Rep. 6 Chanc. 512.

*The Attorney-General v. The Wax Chandlers' Company* (39 Law J. Rep. (N.S.) Chanc. 782; Law Rep. 5 Chanc. 503) distinguished. *Ibid.*

**24.**—Houses were devised to a city company for the intent and purpose and upon the condition, "that the company yearly distribute four pounds among the poor of parish A., two pounds among the poor of parish B., thirty-five shillings among the poorest members of the company, and five shillings between the Master and Wardens of the same company." The rest of the profits of the said houses the testator willed should "be bestowed upon the reparations of the said houses and tenements." If the company should neglect to do the things directed by his will, the testator willed that his next-of-kin should enter on and hold the houses for ever, upon condition that he and his heirs should do the said things. It was proved that eight years before the date of the will, the rents out of which these payments were directed exceeded the amount of the payments by only thirteen shillings; sixteen years after that date it was found by inquisition that the annual value of the property was sixteen pounds, or more than double the amount of the payments. The rents having increased to an amount considerably larger than was necessary to meet the payments mentioned in the will,—Held, that this was not a gift upon condition, but upon trust, and as part of the rents was given for charitable purposes, the residue being directed to be applied in maintaining the property, the whole of the rent must be taken to be specifically dedicated to charitable purposes, and not to the purposes of the company, and therefore the whole increased rents must be devoted to charitable purposes. An account was directed from the date of the filing of the information. *The Attorney-General v. The Wax Chandlers' Company*, 42 Law J. Rep. (N.S.) Chanc. 425; Law Rep. 6 E. & I. App. 1.

A piece of land intermingled with the devised property, and which the corporation bought and built over so that the two sites could not be distinguished by external marks, and the whole had been for many years treated as one property, was held to be exempt from the charitable trust, it not being proved that it was purchased out of proceeds of the devised property. *Ibid.*

#### (a) Marshalling assets.

**25.**—The testator directed his personal estate, including leaseholds, to be converted into money, and the residue of the proceeds, after payment of his funeral and testamentary expenses, debts and legacies, to be invested, and, subject to a life interest therein given to his wife, and to certain annuities and legacies including a charitable

legacy of 100l., bequeathed all the residue of his personal estate in equal thirds to three charitable institutions, and directed that the three last-mentioned legacies should be paid out of such part of his personal estate as could lawfully be applied to the payment thereof, and which should be reserved by his trustees for that purpose:—Held, reversing the decision of one of the Vice-Chancellors, that the assets must be marshalled in favour of the three charities, so as to throw the debts, funeral and testamentary expenses, including costs of administration, suit and legacies, except the 100l. charitable legacy, upon the impure personalty, but that there could be no marshalling as against the 100l. charitable legacy which must be paid in the proportion which the pure personalty bore to the impure, and fail as to the residue. *Miles v. Harrison*, 43 Law J. Rep. (n.s.) Chanc. 85; Law Rep. 9 Chanc. 316.

**26.**—Bequest of all the residue of the testator's personal estate which might be legally applied for such purposes to six hospitals (two of which had power by law to hold land, notwithstanding 9 Geo. 2. c. 36, while the other two had not) with a direction that his estate should be so marshalled and administered as to give the fullest possible effect to the charitable bequests, and gift of residuary real estate and residue of personal estate not applicable to the charitable purposes to the M. Hospital, which had power by law to receive the same:—Held, that the bequest to the six hospitals included impure personalty, and that such impure personalty must be applied as far as possible in payment of the shares of those of the six hospitals which had power to hold land. *Wigg v. Nicholl*, Law Rep. 14 Eq. 92.

*Who take under charitable bequests.* [See WILL, CONSTRUCTION, H 1-3.]

## (D) ADMINISTRATION.

### (a) Scheme.

**27.**—Where, in consequence of the object of a charity being incapable of being carried out, a scheme has been sanctioned by the Court for the application of the fund *cy-près* to a different but most useful charitable object, the Court will not alter the scheme for the purpose of restoring the fund to its original application, except upon very strong grounds. Quære, whether a scheme can be reviewed except upon the application or at all events with the consent of the Attorney-General. *The Attorney-General v. Stewart*, Law Rep. 14 Eq. 17.

### (b) Election.

**28.**—By the scheme of a charity, it was provided that the income should be applied towards the maintenance of a scholar at Oxford or Cambridge, who was child of a resident of Guildford, "preference being given *ceteris paribus* to the son of a freeman:" it was also provided that the scholar should be examined and approved by examiners; that the examination and approbation should be declared in writing delivered to the trustees before election. On a vacancy occurring

there were two candidates; one the son of a freeman resident, the other the son of a resident who was not a freeman. The examiners recommended for election the one who was not the son of a freeman, reporting that he was the superior in every respect, but that they thought the other, if admitted to the university, would pass the examinations. The trustees elected the son of the freeman:—Held, on petition to set aside the election, that the preference to be given to the son of a freeman was only to be given in case of substantial equality; that the trustees should have followed the recommendation of the examiners, and elected the best scholar; that the election must be set aside, and the son of the non-freeman, who passed the best examination, elected. *In re Nettles Charity*, 41 Law J. Rep. (n.s.) Chanc. 694; Law Rep. 14 Eq. 434.

**29.**—A scheme provided (*inter alia*) that no child should be considered eligible for election to the benefits of a charity unless he or she should have been born in, or unless his or her parents or one of them should be, or should have been "parishioners" or a "parishioner" of the parish. The father of a boy who was a candidate for election to the charity, in order to qualify his son took a house in the parish for three months, with an option of continuing it at a rent of thirty shillings per month; but with the exception of sleeping in it once or twice, and paying rates for it, the day before the election, he did not reside in the parish. His son was elected:—Held, in a suit instituted for the purpose of declaring the election invalid, that the father's attempt to qualify himself was not a compliance with the scheme; and the election was set aside accordingly. *Etherington v. Wilson*, 44 Law J. Rep. (n.s.) Chanc. 637; Law Rep. 20 Eq. 606; reversed, on appeal, 45 Law J. Rep. (n.s.) Chanc. 153; Law Rep. 1 Chanc. Div. 160.

### (c) Trustees and investments.

[29 & 30 Vict. c. 57 amended and provision made for the incorporation of charitable trustees. 35 & 36 Vict. c. 24.]

[Corporations or trustees for a public or charitable purpose empowered to invest in real securities. 33 & 34 Vict. c. 34.]

**30.**—Under 23 & 24 Vict. c. 38, s. 11, stock in the funds belonging to an incorporated charity may be sold for reinvestment in any of the stocks in which cash under the control of the Court may be invested, including Metropolitan Consolidated Stock. *In re the Clergy Orphan Corporation*, Law Rep. 18 Eq. 280.

*Exchange of votes for charitable institution: consideration for contract.* [See CONTRACT, 5.]

## CHARTER.

In order to prevent the sealing of a supplemental charter to an existing corporation, it must be shewn (1) that the proposed charter is



contrary to law, or (2) that no proper authority to apply for it has been given, or (3) that some personal right of a member is wrongly interfered with. *Ex parte the Society of Attorneys, &c.*, Law Rep. 8 Chanc. 163.

## CHARTER-PARTY.

[See SHIPPING LAW.]

## CHEQUE.

[See BILL OF EXCHANGE.]

## CHILD.

[See PARENT AND CHILD.]

## CHIMNEY SWEEPERS.

[3 & 4 Vict. c. 85 and 27 & 28 Vict. c. 37 amended. Provisions as to certificates of chimney sweepers, offences, &c. 38 & 39 Vict. c. 70.]

## CHOSE IN ACTION.

[Assignments of debts and choses in action to pass the legal right to sue after November 2, 1874. Saving of rights of persons liable, to call upon adverse claimants to interplead. 36 & 37 Vict. c. 66, s. 25.]

The assignee of a life policy, who had no knowledge of the assignor's bankruptcy, and who, after the assignor's death, gave notice to the insurance office before notice was given them by the assignees in bankruptcy,—Held, entitled to priority. *In re Russell's Policy Trusts*, Law Rep. 15 Eq. 26.

*Notice as between equitable assignees of proceeds of sale of commission of officer in the army.* [See MORTGAGE, 17, 18.]  
*Things in action within Bankruptcy Act, 1869.* [See BANKRUPTCY, C 13–17.]  
*Reduction into possession by husband.* [See BARON AND FEME, 6–8.]

## CHURCH AND CLERGY.

[See BURIAL.]

- (A) BISHOP: JURISDICTION AND FUNCTIONS OF.
- (B) CATHEDRAL CLERGY.
- (C) ARCHDEACONS.
- (D) COLONIAL CLERGY.
- (E) RELINQUISHMENT OF ORDERS.
- (F) BENEFICES.

## (G) ADVOWSON.

- (a) *Presentation.*
- (b) *Simony.*
- (c) *Devise of.*

## (H) DILAPIDATIONS.

## (I) SEXTON.

## (K) CHURCHWARDENS.

## (L) CHURCHYARD.

## (M) FACULTY.

## (N) FEES.

## (O) PRIVATE AND PROPRIETARY CHAPELS.

## (P) CHURCH BUILDING ACTS.

## (Q) CHURCH SEATS.

## (R) OFFENCES.

- (a) *Rites, ceremonies, and ornaments.*
- (b) *Doctrine.*
- (c) *Disturbance in church.*

## (S) ECCLESIASTICAL COURTS: PLEADING AND PRACTICE.

- (a) *Statement of offence.*
- (b) *Act on petition.*
- (c) *Monition.*
- (d) *Commission under Church Discipline Act.*
- (e) *Appeal.*
- (f) *Duplex querela and quare impedit.*
- (g) *Sequestration.*
- (h) *Suspension.*
- (i) *Proctor.*

[The law relating to the Tables of Lessons and Psalter contained in the Book of Common Prayer amended. 34 & 35 Vict. c. 37.]

[The Ecclesiastical Titles Act repealed. 34 & 35 Vict. c. 53.]

[Provision made for the use of shortened forms of Morning and Evening Prayer, and of special forms of prayer on special occasions, and for the separation of services, and the preaching of sermons without previous service. 35 & 36 Vict. c. 35.]

[Further facilities afforded for the conveyance of land for sites for places of religious worship and burial places. 36 & 37 Vict. c. 50.]

## (A) BISHOP: JURISDICTION AND FUNCTIONS OF.

[Provisions empowering bishops to appoint curates, &c., in cases of sequestration of benefices. 34 & 35 Vict. c. 45.]

[32 & 33 Vict. c. 111, s. 16, repealed, and the Act made perpetual. 38 & 39 Vict. c. 19.]

1.—The bishop of a diocese as ordinary has a visitatorial jurisdiction in respect of the fabric of the cathedral church of his diocese, but he has no discretion to order any alteration in the fabric except on some definite legal ground. *Phillpotts v. Boyd*, 44 Law J. Rep. (N.S.) Ecc. 44; Law Rep. 6 P. C. 435.

The injunctions of Ed. 6 and of Eliz., directing the removal and destruction of images, relate to images which have been abused by superstitious observances. *Ibid.*

A reedos containing figures in relief representing the transfiguration and ascension of Christ, and the descent of the Holy Ghost, is lawful—affirming the decision of the Arches Court, *Boyd*

v. *Phillipotts*, 44 Law J. Rep. (n.s.) Ecc. 1; Law Rep. 4 Adm. & Ecc. 297.

The 35th article and the 46th and 49th canons, which give directions as to the reading of the homilies, must not be taken to do more than approve the doctrines contained therein. *Ibid.*

The absence of an episcopal faculty does not render the erection of a reredos in a cathedral illegal. *Ibid.*

#### (B) CATHEDRAL CLERGY.

[Provision made for the resignation of deans and canons incapacitated for the performance of their duties. 35 Vict. c. 8.]

[Previous Acts amended and provision made to facilitate the endowment of canonries by private benefaction. 36 & 37 Vict. c. 39.]

#### (C) ARCHDEACONRIES.

[The powers of re-arranging the boundaries of archdeaconries and rural deaneries, given by 6 & 7 Will. 4. c. 77, and 3 & 4 Vict. c. 113, extended. 37 & 38 Vict. c. 63.]

#### (D) COLONIAL CLERGY.

[Previous Acts repealed. Clergy not ordained by a bishop of one of the churches of England or Ireland not to officiate in England without permission from the archbishop, or to hold preferment or act as curates without consent of bishop. 37 & 38 Vict. c. 77.]

#### (E) RELINQUISHMENT OF ORDERS.

2.—A clergyman who commences proceedings for relinquishing his position under the 33 & 34 Vict. c. 91, has a *locus poenitentiae* until they are completed, and on his changing his intention after enrolment of the deed but before delivering a copy of it to the bishop, the Master of the Rolls may, on motion by him to that effect, order the enrolment to be vacated. *In re a Clergyman*, 42 Law J. Rep. (n.s.) Chanc. 260; Law Rep. 15 Eq. 154.

#### (F) BENEFICES.

[1 & 2 Vict. c. 106, and 13 & 14 Vict. c. 98, as to the union of benefices, amended. 34 & 35 Vict. c. 90.]

[Provisions for the resignation of their benefices by incumbents, and the payment to them of pensions charged on their benefices. 34 & 35 Vict. c. 44.]

#### (G) ADVOWSON.

[The law extended so as to facilitate the transfer of advowsons. 33 & 34 Vict. c. 39.]

##### (a) Presentation.

3.—The bishop having refused to admit and institute the owner of an advowson, who as patron had presented himself to a parish church in the diocese of Lincoln, the latter, in order to assert his right to admission and institution, commenced an action of *quare impedit* against the bishop in the Court of Common Pleas, and also instituted a suit of *duplex querela* in the Court of Arches. On the application of the bishop, the plaintiff was

ordered to elect in which suit he would proceed, the question raised in both being substantially the same, and it being contrary to justice and equity that the defendant should be harassed by a double litigation. *Walsh v. The Bishop of Lincoln*, 43 Law J. Rep. (n.s.) Ecc. 13; Law Rep. 4 Adm. & Ecc. 242.

4.—Under 5 Geo. 4. c. 103, a church building Act, where only one subscriber of 50*l.* is left surviving, and only one trustee by election, the incumbent of the parish becomes trustee *ex officio* jointly with the surviving trustee by election, and, on the death of the latter within forty years, entitled to nominate on the vacancy in the incumbency of the church. *Allen v. The Bishop of Gloucester and Bristol* (H. L.), 42 Law J. Rep. (n.s.) C. P. 299; Law Rep. 6 E. & I. App. 219.

*Advowson: next presentation: intestacy: construction of will.* [See WILL, CONSTRUCTION, I 33.]

##### (b) Simony.

5.—The words "next avoidance of, or presentation to, any benefice," as used in 12 Anne, st. 2, c. 13, s. 2, refer only to chattel interests, and do not extend to freehold estates in an advowson, and therefore a clerk in holy orders, who by payment of a pecuniary consideration becomes seised of an advowson for the life of another, and claims to be admitted when the benefice is subsequently vacant, does not commit simony within the meaning of that statute. *Walsh v. The Bishop of Lincoln*, 44 Law J. Rep. (n.s.) C. P. 244; Law Rep. 10 C. P. 518.

A clerk in holy orders who is seised of a freehold estate in an advowson, may by the common law offer himself to the ordinary and pray to be admitted whenever the benefice is vacant, and the bishop is bound to institute him. *Ibid.*

A declaration in *quare impedit* stated that S., being seised of an estate for his own life in an advowson within the defendant's diocese, sold the same for 3,000*l.* to the plaintiff; that during the lifetime of S. the benefice became vacant, and that the defendant would not permit the plaintiff to present a fit clerk. The defendant pleaded, first, that the plaintiff had presented himself, and that this presentation was void by reason of 12 Anne, st. 2, c. 12, s. 2; secondly, that the plaintiff had offered himself for admission, and prayed to be admitted, and that the defendant refused to admit him, although he was willing to admit a fit clerk other than the plaintiff:—Held, upon demurrer, that the pleas were bad. *Ibid.*

##### (d) Devise of.

6.—Devise of an advowson in Ireland:—Held, that the effect of section 18 of 32 and 33 Vict. c. 42, was to adeem the devise and that the compensation money was payable to the testator's executors. *Frewen v. Frewen*, Law Rep. 10 Chanc. 610.

[And see WILL, CONSTRUCTION, I 32.]

#### (H) DILAPIDATIONS.

[Amendment of the law as to ecclesiastical dilapidations. Provisions as to the inspection and

repair of houses of residence, &c., during vacancies of benefices as well as at other times, and as to advancements of money for that purpose by the Governors of Queen Anne's Bounty. 34 & 35 Vict. c. 43.

The above Act amended. 35 & 36 Vict. c. 96.]

#### (I) SEXTON.

*Right of sexton to dig graves and ring bell in new burial ground and chapel.* [See BURIAL, 6.]

#### (K) CHURCHWARDENS.

7.—A perpetual curate is a "minister" within the general custom founded on canon 89 by which churchwardens in every parish are to be chosen by the joint consent of the minister and the parishioners, and if they cannot agree, one by the minister and another by the parishioners. *The Queen v. Allen*, 42 Law J. Rep. (n.s.) Q. B. 37; Law Rep. 8 Q. B. 69.

#### (L) CHURCHYARD.

8.—The parish churchyard is the freehold of the incumbent, subject to the right of the parishioner or stranger happening to die in the parish to simple interment. The incumbent may altogether prohibit, or permit upon proper conditions, the placing of a gravestone in the churchyard, but the exercise of his right in the matter is subject to the control of the ordinary. *Keet v. Smith*, 44 Law J. Rep. (n.s.) Ecc. 70; Law Rep. 4 Adm. & Ecc. 398.

K. proposed to erect over the grave of his daughter, who was buried in the parish churchyard of Owston Ferry, in the diocese of Lincoln, a tombstone, the inscription on which described him as the "Rev. H. Keet, Wesleyan Minister." The Vicar having refused to grant permission for the erection of the tombstone, unless the words "Reverend" and "Wesleyan minister" were expunged from the inscription, Mr. Keet applied to the Consistory Court to issue a citation to the Vicar, calling upon him to shew cause why a faculty should not be granted for the erection of a tombstone with the inscription in full. The Court refused to issue the citation, holding that the Vicar was clearly entitled to object to the prefix "Reverend," as it implied, contrary to the fact, that Mr. Keet was in Holy Orders; and, on appeal, the judgment was upheld by the Court of Arches. *Ibid.*

[Reversed on appeal, 45 Law J. Rep. (n.s.) P. C. 10; Law Rep. 1 P. D. 73.]

*Right to compensation in respect of disused burial ground taken under parliamentary powers.* [See BURIAL, 2, 3.]

#### (M) FACULTY.

9.—A "baldacchino," or canopy, over the communion table in a parish church is a church ornament within the meaning of the rubrics, but as it is not prescribed by the rubrics, and cannot be regarded as in any way necessary or subsidiary to the performance of the services of the Church,

the Court declined to order a faculty to issue for its erection. *White v. Bowron*, 43 Law J. Rep. (n.s.) Ecc. 7; Law Rep. 4 Adm. & Ecc. 307.

10.—In granting a faculty, the Court will, in matters connected with the comfort and convenience of those who attend the church, give weight to the opinion of the majority of the parishioners who are members of the Church of England rather than to the majority of the vestry who are not members. *The Vicar of Tottenham v. Vine*, Law Rep. 4 Adm. & Ecc. 221.

11.—A faculty for erection of a school on portion of a parish churchyard closed by Order in Council allowed under special circumstances. *In re Bettison*, Law Rep. 4 A. & E. 294.

*Prayer for faculty in act on petition.* [See infra No. 27.]

#### (N) FEES.

[Baptismal fees made unlawful. 35 & 36 Vict. c. 36.]

*Right of incumbent to burial fees.* [See BURIAL, 4.]

#### (O) PRIVATE AND PROPRIETARY CHAPELS.

[Power to bishop to license clergymen to chapels belonging to colleges, schools, hospitals, &c. 34 & 35 Vict. c. 66.]

12.—The consent of the incumbent to a license to a clergyman to officiate in a proprietary chapel or unconsecrated building in the parish is revocable at the will of his successor, and when revoked the license ceases. *Richards v. Fincher*, 43 Law J. Rep. (n.s.) Ecc. 21; Law Rep. 4 Adm. & Ecc. 255.

#### (P) CHURCH BUILDING ACTS.

[8 & 9 Vict. c. 70 and 14 & 15 Vict. c. 97 amended as to the assignment of Consolidated Chapelry Districts. 34 & 35 Vict. c. 82.]

13.—Where real estate has been from time immemorial vested in and applied by the churchwardens of a parish for the use and repair of the parish church,—Held, that such a charity is not a charitable devise, bequest, or gift made or given for the use of the parish within the meaning of section 22 of 8 & 9 Vict. c. 70, and is therefore not apportionable, under the same section, on the parish being subdivided and other churches erected and new parishes constituted. *In re Wandsworth Church Estate Charity*, 40 Law J. Rep. (n.s.) Chanc. 157; Law Rep. 6 Chanc. 296.

*The Attorney General v. Love* (23 Beav. 499) approved and followed. *Ibid.*

14.—Section 6 of the 5 Geo. 4. c. 103, a church building Act, provides that the persons subscribing 50*l.* to the building of a church built under that Act, shall have power to elect three trustees from among themselves for the management of the temporal affairs of the church, and for the nomination to the bishop of a spiritual person to serve the same; such trustees to be called life trustees. Section 7 provides that, in case of the death or resignation of any of such trustees, the majority of the subscribers of 50*l.* present at a meeting, which the surviving trustee or trustees are

required to convene, may elect from among themselves another person to be a life trustee in the place of the trustee so dying or resigning. Section 12 limits the right of nomination by the life trustees elected under sections 6 and 7 to the first two turns, or to any number of turns that may occur within forty years after the consecration of the church. All subsequent nominations are to be in the incumbent of the parish in which such church shall be built, and if all the subscribers entitled to elect trustees die within the forty years, &c., the nominations are to be made by the incumbent during such period. "Provided also, that if all such subscribers shall die, so that no such election of any trustee can be made, and any one of the trustees for the time shall die or vacate, then, and in every such case, the incumbent for the time being shall be and become a trustee, to use and exercise all powers and authorities given to trustees under the provisions of this Act":—Held, that where only one subscriber of 50*l.* was left surviving, and only one trustee by election, the incumbent of the parish became trustee *ex officio*, jointly with the surviving trustee by election, and, on the death of the latter within the forty years, entitled to nominate on the vacancy in the incumbency of the church. *Allen v. The Bishop of Gloucester and Bristol* (H. L.), 42 Law J. Rep. (N.S.) C. P. 299; Law Rep. 6 E. & I. App. 219.

In 1830, F. and others, exceeding three in number, subscribed 50*l.* a-piece towards building a church which was built under the above Act. Three life trustees were duly elected, who all died, and fresh trustees were elected in their places. In April, 1866, only one of these new trustees thus elected in the place of the original trustees, viz., H., was living. In July, 1866, F., believing that he was the sole surviving subscriber of 50*l.*, and being unaware that H. was yet alive, went through the form of publishing a notice, in the mode prescribed by the Act, convening a meeting of the subscribers of 50*l.*, and at the time and place mentioned in the notice he elected himself a life trustee. In April, 1867, H., the survivor of the trustees, died, and F. thereupon became in fact the sole surviving subscriber of 50*l.* On the 11th of August, 1867, the incumbency of the church became vacant, and F., immediately, viz., on the 22nd of August, 1867, nominated the Rev. J. A. The bishop refused to accept that nomination, and approved, licensed and inducted another clerk, who had, on the 19th of August, 1867, been nominated by the incumbent of the parish. By this time F. had discovered that in July, 1866, he was not the sole surviving subscriber of 50*l.* He therefore went through the form of convening another meeting for the 20th of September, 1867, at which he again elected himself a life trustee in the place of H., the original trustee, and on the same day he again nominated the Rev. J. A. to the bishop:—Held, that prior to the incumbency becoming vacant in August, 1867, the incumbent of the parish had become a trustee jointly with the then surviving trustee, and had a right of nomination

of a spiritual person to serve the church, and that H. was not, either on the 22nd of August or on the 20th of September, 1867, a sole trustee either by election or by reason of his being the sole surviving subscriber of 50*l.*, and therefore he was not solely entitled to nominate to the living on either of those days. *Ibid.*

#### (Q) CHURCH SEATS.

[Provision for the free use of seats in certain churches. 35 & 36 Vict. c. 49.]

#### (R) OFFENCES.

##### (a) Rites, ceremonies, and ornaments.

[Facilities given for proceeding against clergymen offending against the laws ecclesiastical by the introduction of illegal ornaments of the church or minister, or offences against the rubric. Institution of a new Judge to supersede certain existing ecclesiastical offices on vacancies occurring. 37 & 28 Vict. c. 85.]

15.—The Act of Uniformity of Elizabeth provides (in clause 25), "that such ornaments of the church and the ministers thereof shall be retained and be in use as was in this Church of England by authority of Parliament in the second year of King Edward VI., until 'other order' shall be therein taken by authority of the Queen's Majesty, etc.":—Held, that the Advertisements of 1564, acted upon under Royal Commission, with the approval of the Metropolitan, was a taking "other order" within the meaning of that clause. *Hebbert v. Purchas*, 40 Law J. Rep. (N.S.) Ecc. 33; Law Rep. 3 P. C. 605.

The canons of 1603–4, relating to the vestments of the clergy, are not repealed by the Act of Uniformity of 1662. They had the same force after the passing of that statute as before, and are to be construed together with the statute. *Ibid.*

The cope is to be worn in ministering the Holy Communion on high feast days in cathedrals and collegiate churches as directed by the 24th canon, and the surplice in all other ministrations, as directed by the 58th canon. *Ibid.*

The use of a chasuble, alb, and tunic or tunicle in the administration of the Holy Communion is unlawful. So is the mingling water with the wine, and the use of wafer bread. *Ibid.*

The proper position for the officiating minister during the prayer of consecration in the Holy Communion is at the north end of the holy table, facing south, when the table is set at the east end of the church, and the minister must not turn his back upon the people, but must so stand that they may see him break the bread and take the cup into his hands. *Ibid.*

16.—The respondent, a clerk in orders, was monished to abstain from the elevation of the cup and paten above his head during the administration of the Holy Communion, and from kneeling or prostrating himself before the consecrated elements during the prayer of consecration. Upon motion to enforce this monition, it appeared that the respondent elevated and suffered an elevation of a

consecrated wafer of bread above his head, and of the cup so that the rim was above his head, and that during the prayer of consecration the respondent bowed down to the Communion table after replacing the wafer and cup upon it, and remained some seconds in that posture:—Held, first, that the elevation which is unlawful is the elevation of the consecrated bread, and not of the paten in which it is placed, and that the elevation of any part of the cup is an elevation of the cup itself, and their Lordships expressed an opinion that any elevation of the consecrated elements is unlawful; secondly, that a reverential bow is not an act of prostration, but that the posture assumed and maintained for some seconds by the respondent was not a mere bow but a prostration, and that the respondent had not complied with the monition in either respect, and their Lordships ordered him to be suspended from discharge of his clerical duties for three months. *Martin v. Mackonochie*, 40 Law J. Rep. (N.S.) Ecc. 1; Law Rep. 3 P. C. 409.

17.—The use of lighted candles on the communion table, or on a ledge above it, during morning prayer, when not required to give light, and the singing the hymn called the "Agnus" during the Holy Communion, after the prayer of consecration and before reception of the elements, declared unlawful. Observations on *Hebbert v. Purchas* (Law Rep. 3 P. C. 605; 40 Law J. Rep. (N.S.) Ecc. 33). *Martin v. Mackonochie*, Law Rep. 4 Adm. & E. 279.

*Baldacchino*. [See supra No. 9.]

*Images*. [See supra No. 1.]

#### (b) Doctrine.

18.—A clergyman is justified in refusing to administer the Holy Communion to a parishioner who avowedly and persistently denies the doctrine of the eternity of punishment and the personality of the devil, such denial constituting him, within the meaning of the Canons and Rubrics, "an evil liver" and "a depraver of the Book of Common Prayer and administration of the Sacraments," and therefore disqualifying him from partaking of the Sacrament. *Jenkins v. Cook*, 44 Law J. Rep. (N.S.) Ecc. 57; Law Rep. 4 Adm. & Ecc. 463.

Reversed on appeal, 45 Law J. Rep. (N.S.) P. C. 1; Law Rep. 1 P. C. 80.

19.—In a charge of heresy the Judicial Committee is not compelled to affix a definite meaning to any given Article of Religion the construction of which is fairly open to doubt, even if the Committee itself should be of opinion that a particular construction is supported by the greater weight of reasoning, and the accused ought to be allowed a reasonable latitude of opinion with reference to conformity to the Articles and formularies of the Church. *Voysey v. Noble*, 40 Law J. Rep. (N.S.) Ecc. 11; Law Rep. 3 P. C. 357.

It is not necessary to establish a charge of heresy that there should be a contradiction *totidem verbis* of some passages in the Articles. The publication of opinions repugnant or inconsistent with their clear construction is sufficient. *Ibid*.

It is not competent for any private clergyman of his own mere will, not founded upon any critical enquiry, but simply upon his own taste and judgment, to assert that whole passages of some canonical books are without authority, as being contrary to the teaching of Christ as contained in other canonical books. *Ibid*.

A clerk in orders was charged with opposing "commonly received doctrines," but the doctrines were not specified. The Judicial Committee rejected the charge, on the ground that the doctrines could not be assumed to be the same as those contained in the Articles of Religion or formularies of the Church. *Ibid*.

20.—The Church of England does not by her Articles or formularies affirm or require her clergy to accept any other presence in the Holy Communion than a presence in the soul of the faithful receiver; but the Articles and formularies of the Church do not exclude the maintaining a "real, actual, objective" presence in that sacrament, inasmuch as a presence other than spiritual is not thereby affirmed. *Sheppard v. Bennett*, 41 Law J. Rep. (N.S.) P. C. 1.

It is not lawful for a clergyman to teach that the sacrifice or offering of Christ upon the cross, or the redemption, propitiation, or satisfaction wrought by it, is or can be repeated in the ordinance of the Lord's Supper; nor that in that ordinance there is or can be any sacrifice or offering of Christ which is efficacious in the sense in which Christ's death is efficacious, to procure the remission of the guilt or punishment of sins. *Ibid*.

The Articles and formularies of the Church of England forbid all acts of adoration of the consecrated elements in the Holy Communion. *Ibid*.

The successive alterations and omissions in the Book of Common Prayer, by which words or passages inculcating particular doctrines, or assuming a belief in them, have been struck out, are evidence that the Church has ceased to affirm those doctrines; but the effect of such changes, when they stand alone, is that it ceases to be unlawful to contradict such doctrines, and not that it becomes unlawful to maintain them. *Ibid*.

#### (c) Disturbance in church.

21.—By 23 & 24 Vict. c. 32, s. 2, it is enacted, *inter alia*, that any person who shall molest, let, disturb, vex or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorised to preach therein, or any clergyman in holy orders, ministering or celebrating any sacrament or any divine service, rite or office, in any cathedral, church or chapel, or in any churchyard or burial-ground, shall, on conviction thereof before two justices of the peace, be liable to a penalty of not more than five pounds for every such offence. A clergyman in holy orders, after preaching the sermon in the course of the service in a parish church, descended from the pulpit, and proceeded with another clergyman to collect the alms whilst the offertory sentences were being read at the communion table by a third clergyman. The alms were to be devoted to the defraying of the

church expenses. In passing down the church in the course of his collection, he was stopped in a forcible manner by the defendants, who claimed to be the proper persons as churchwardens to perform that duty. Upon an information laid under the above portion of the section by the clergyman against the defendants, the justices dismissed the information:—Held, that the clergyman in collecting the alms under the above circumstances was not celebrating a part of the divine service, rite or office, and that the statute did not extend to protect the clergyman when performing other duties, and therefore that the decision of the justices was right. *Cope v. Barber*, 41 Law J. Rep. (N.S.) M.C. 137; Law Rep. 7 C.P. 393.

(S) ECCLESIASTICAL COURTS: PLEADING AND PRACTICE.

(a) *Statement of offence.*

**22.**—In a commission under the Church Discipline Act (3 & 4 Vict. c. 86) it is only necessary to state the general nature of the offence, sufficiently in order to found the Articles thereupon, and to give the party proceeded against notice of the general nature of the charges. *Sheppard v. Bennett*, Law Rep. 4 P.C. 350.

Articles charging publication of heresy in a book, by references to works of other authors, struck out, as the passages from other authors were not shewn to have been adopted by the party proceeded against. *Ibid.*

**23.**—It is not necessary, in order to establish a charge of heresy, that there should be a contradiction *totidem verbis* of some passages in the Articles. The publication of opinions repugnant or inconsistent with their clear construction is sufficient. A clerk in orders was charged with opposing “commonly received doctrines,” but the doctrines were not specified. The Judicial Committee rejected the charge, on the ground that the doctrines could not be assumed to be the same as those contained in the Articles of Religion or formularies of the Church. *Voysey v. Noble* (P.C.), 40 Law J. Rep. (N.S.) Ecc. 11; Law Rep. 3 P.C. 357.

**24.**—In a suit against a clergyman for using unlawful ceremonies and wearing unlawful dresses, Articles charging that the offences were committed on certain specified days and on “divers other days” within two years before suit, and charging the wearing of “divers dresses and things” other than the habits appointed by law, are not inadmissible for want of particularity. Defences that the suit was being promoted contrary to the wish of the parishioners, and that the promoter had a pew in an Independent chapel, struck out as irrelevant. *Combe v. Edwards*, Law Rep. 4 Adm. & Ecc. 390.

**25.**—Where articles charged a clergyman with doing a certain illegal acts “in a ceremonious manner, or as connected with and being part of the ceremonies of public worship,”—Held, that these words were allegations of fact, and not conclusions of law, or inadmissible as embarrassing.

An allegation that the incumbent sanctioned or permitted illegal acts is sufficient without charging that they were authorised by him. In an article charging a clergyman with an offence in administering the Communion when there were not a sufficient number of communicants, it is sufficient to follow the words of the rubric, and not to negative possible circumstances which might shew that there was no offence in fact. *Parnell v. Roughton*, Law Rep. 6 P.C. 46.

(b) *Act on petition.*

**26.**—Citation in a Consistory Court of vicar and a churchwarden, and parishioners and inhabitants of a parish, to shew cause why a faculty should not issue to remove articles alleged to have been placed in the church without a faculty. The vicar and churchwarden having appeared, brought an act on petition, ending with a prayer for the issue of a faculty, confirming the placing of the articles in the church. The Judge having struck the prayer out,—Held, that the prayer should stand, as the defendants were entitled to pray for a faculty without a fresh citation. *Gardner v. Ellis*, Law Rep. 4 Adm. & Ecc. 265.

(c) *Monition.*

**27.**—It is not necessary to the validity of a monition that it should shew on the face of it the interest, official or private, of the petitioner in the matter complained of. *Lee v. Ridsdale*, 42 Law J. Rep. (N.S.) Ecc. 1.

Where the object of the monition is to enforce obedience to the law, everyone has an interest, and is entitled to institute proceedings for that purpose. But a plaintiff in a civil suit must shew an interest, and the correct mode of objecting to his interest is, either by the party cited appearing under protest, or praying the Court to order the plaintiff to propound his interest, or by raising the objection on the admission of the libel, or by, or on, the subsequent pleadings. *Ibid.*

**28.**—A monition issued out of the Commissary Court of Canterbury, at the petition of L., described therein as of No. 2, Broad Sanctuary, in the city of Westminster, calling upon the incumbent and churchwardens of St. Peter's Church, Folkestone, in the diocese of Canterbury, to remove certain alleged unlawful ornaments in the church, or to appear and shew cause against such removal. The churchwardens appeared and prayed that they might be dismissed from the suit, on the ground that the monition did not shew the interest of L. in the matter, but the Court rejected the application:—Held, on appeal to the Arches Court of Canterbury, that the monition should disclose on its face such an interest in the person at whose instance it issued as would have entitled him to institute and carry on a civil suit commenced in the ordinary way by citation, and should therefore contain an allegation that the party taking proceedings had the *status* of a parishioner in the parish. The churchwardens were accordingly dismissed from the suit with costs.

*Fagg v. Lee*, 43 Law J. Rep. (N.S.) Ecc. 1; Law Rep. Adm. & Ecc. 135.

Affirmed on appeal to the Privy Council. *Lee v. Fagg*, 43 Law J. Rep. (N.S.) Ecc. 17; Law Rep. 6 P. C. 38.

(d) *Commission under Church Discipline Act.*

**29.**—Whether it is competent to the bishop to refuse to entertain an application for a commission of enquiry under section 3 of the Act 3 & 4 Vict. c. 86, made by any person whatever, *quære*. But at least it is in his discretion to issue such commission when he has been applied to for that purpose. Therefore an application by the accused person for a prohibition restraining the issuing of the commission until objections to the fitness of the promoter should be determined was refused as unfounded and frivolous. *Ex parte Edwards*, 43 Law J. Rep. (N.S.) Chanc. 350; Law Rep. 9 Chanc. 138.

(e) *Appeal.*

**30.**—An appeal from the Arches Court was heard *ex parte* and judgment was delivered. Before any report was presented to Her Majesty an application was made to rehear the appeal on the ground that the respondent was unable to instruct counsel at the hearing, or to appear in person through ill health, and on the ground that the judgment was binding upon all the clergy. Their lordships refused to rehear the appeal. *Hebbert v. Purchas*, 40 Law J. Rep. (N.S.) Ecc. 55; Law Rep. 3 P. C. 664.

**31.**—Before an appeal is presented to the Queen in Council in respect of an order directing the reformation of articles of charge or other pleadings, the actual reformation which appears to the Judge to be required should be made by him on the face of the order, so that on appeal the very passages omitted may be clearly brought under the judgment of the Judicial Committee. *Sheppard v. Bennett*, 41 Law J. Rep. (N.S.) P. C. 1.

(f) *Duplex querela and quare impedit.* [See supra No. 3.]

(g) *Sequestration.*

**32.**—During the vacancy of a benefice, and sequestration of the proceeds, by reason of the suspension of the clerk under the Church Discipline Act, the fruits of the sequestration belong to the bishop, subject to the duty of providing for the services. *In re Thakeham Sequestration Moneys*, Law Rep. 12 Eq. 494.

(h) *Suspension.*

**33.**—Persistent contempt by a clerk in orders in disobeying a monition prohibiting certain ceremonies and the use of certain vestments punished by sentence of suspension *ab officio et a beneficio*. *Hebbert v. Purchas*, Law Rep. 4 P. C. 301.

(i) *Proctor.*

**34.**—A defendant in a suit in the Arches Court of Canterbury cannot appear by a solicitor; DIGEST, 1870-1875.

he must appear either in person or by a proctor. *Burch v. Reid*, Law Rep. 4 Adm. & Ecc. 112.

*Ecclesiastical Law of Canada.* [See COLONIAL LAW, 17, 18.]

*Church bells: Scotland.* [See SCOTCH LAW, 11.]

## CHURCH RATES.

**1.**—The 5 Geo. 4. c. 36, sect. 1, authorising the churchwardens and overseers of a parish to borrow money for repairing the church on the security of rates (to be levied in the same way as church rates), and so as to secure the repayment with interest by "annual or half-yearly instalments within the period of twenty years at furthest from the advancing of the loan".—Held, to forbid both expressly and impliedly the making of a rate after the twenty years had elapsed to enforce payment of instalments which had for many years remained unpaid. *The Queen v. The Churchwardens of All Saints, Wigan* (Exch. Ch.), Law Rep. 9 Q. B. 317.

**2.**—The 5 Geo. 4. c. 36, by sec. 1, provides that it shall and may be lawful for the churchwardens and overseers of any parish, with the consent of the major part of the inhabitants and occupiers assessed to the relief of the poor, in vestry assembled, to make application to commissioners authorised to make advances for public works, for a loan to defray the expense of "rebuilding, repairing, and enlarging" the church or chapel of any parish, and from and after the grant of such loan, it "shall be lawful for the churchwardens and overseers of the poor of the parish, in respect of which such loan shall be advanced, to make such annual and half-yearly rates for the repayment of the sum, &c., advanced, with interest." Section 2 provides, that it shall be lawful for any churchwarden, &c., in any parish in which any rate shall be made under the provisions of the Act, &c., to levy and recover all such rates, by all such ways and means as any church-rate may by law be sued for or levied".—Held, that the owner of tithe rent-charge in a parish where money has been borrowed under the provisions of the Act, is liable to be assessed to the rate made for repayment of the money. *Smallbones v. Edney*, 40 Law J. Rep. (N.S.) Ecc. 8; Law Rep. 3 P. C. 444.

## CHURCHWARDEN.

[See CHURCH AND CLERGY.]

## CIVIL CODE.

[See COLONIAL LAW, 10-16; CONTRACT, 41.]

R

## CLERGY.

[See CHURCH AND CLERGY.]

## COAL MINES.

[Provisions made for the regulation of coal mines and metalliferous mines. 35 and 36 Vict. cc. 76 & 77.]

The owners of a colliery who have appointed a certificated manager under the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 26, are not liable for an injury to a workman in the colliery caused by the negligence of the manager, as there is nothing in the statute to make him other than fellow workman of the person injured. *Howells v. Landore Siemens Steel Company*, 44 Law J. Rep. (N.S.) Q. B. 25; Law Rep. 10 Q. B. 62.

## COIN.

[The laws relating to the coinage and the mint consolidated and amended. Tender of payment in coins to be legal if made in gold to any amount, if in silver up to 40s., if in bronze up to 1s. And other enactments passed regulating the pecuniary proceedings against offenders against the Act. 33 Vict. c. 10.]

1.—An indictment charged a felonious uttering of counterfeit coin after a previous conviction for the offence of uttering of counterfeit coin, and the prisoner was arraigned and tried upon the subsequent offence and found guilty, and then upon arraignment as to the part of the indictment which charged that he had been previously convicted, denied that he had been so previously convicted, and the jury after enquiry found that he had not been so previously convicted:—Held, that the prisoner could not be convicted of the misdemeanour of uttering the counterfeit coin. *The Queen v. Thomas*, 44 Law J. Rep. (N.S.) M. C. 42; Law Rep. 2 C.C.R. 141.

2.—By 24 & 25 Vict. c. 99, s. 24, whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall knowingly make or vend, or begin or proceed to make or vend, or buy or sell, or have in his custody or possession any die impressed with the apparent resemblance of the sides of any of the Queen's current gold coin, shall be guilty of felony. The prisoner was convicted on an indictment which alleged that he "knowingly and without lawful excuse feloniously had in his custody," &c. The evidence was that he ordered of a die sinker two dies to be made for him. The sinker thereupon communicated with the police, who under the direction of the Mint authorities gave him permission to make them and give them to the prisoner. The prisoner paid for them when made, and received them from the sinker, and he was taken into custody with the dies in his possession:—Held, that the indictment was sufficient, without other allegation, to negative a lawful

authority as well as excuse. That the Judge on the above evidence was right in neither ruling nor asking the jury whether the possession of the dies was without lawful authority or excuse, and further that it was not a question for the jury whether the prisoner had a guilty intention in reference to the possession and use of the dies (though there was evidence as to this both ways), and that the Judge rightly left to the jury no other questions than whether the dies were found on the prisoner, and whether they had an apparent resemblance to the two sides of a sovereign. *The Queen v. Harvey*, 40 Law J. Rep. (N.S.) M. C. 63.

## COLONIAL CLERGY.

[See CHURCH D.]

## COLONIAL LAW.

## (A) ACTION HERE FOR WRONGS COMMITTED IN COLONY.

## (B) LAW OF PARTICULAR COLONIES.

## (a) Canada.

- (1) Provincial legislature.
- (2) Canadian Courts.
- (3) *Avoué*.
- (4) *Usufructuary*.
- (5) *Testamentary law*.
- (6) *Civil Code*.
- (7) *Ecclesiastical law*.

## (b) Cape Colony.

- (1) *Insolvent Ordinance, 1843*.
- (2) *Roman Dutch law*.

## (c) Ceylon.

## (d) East India.

## (e) Gibraltar.

## (f) Jersey.

## (g) Malta.

## (h) Mauritius.

## (i) Natal.

## (k) New South Wales.

## (l) New Zealand.

## (m) Penang.

## (n) South Australia.

## (o) Victoria.

## (A) ACTION HERE FOR WRONGS COMMITTED IN COLONY.

1.—An Act passed by a colonial Legislature, indemnifying persons against the consequences of anything done in the suppression of a rebellion in the colony may be pleaded in bar to civil proceedings in this country, as such a statute is neither contrary to any positive law of this country nor to the principles of natural justice. *Phillips v. Eyre* (Exch. Ch.), 40 Law J. Rep. (N.S.) Q. B. 28; Law Rep. 6 Q. B. 1.

The validity of such a statute is not affected by the fact, that the governor of the colony, who necessarily joined in passing it, was thereby



enabled to indemnify himself from the consequences of illegal acts committed by him. *Ibid.*

A confirmed Act of the Local Legislature, lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament. *Ibid.*

## (B) LAW OF PARTICULAR COLONIES.

### (a) Canada.

#### (1) Provincial legislature.

2.—An Act to relieve the financial embarrassment of a local society relates to a "matter merely of a local or private nature in the province," within section 92 of the British North America Act, 1867, and as such is within the legislative capacity of the Quebec Provincial Legislature, and does not fall within the category of bankruptcy or insolvency, or the other matters excepted by section 91. *L'Union St. Jacques de Montreal v. Belisle*, Law Rep. 6 P. C. 31.

3.—"The British North America Act, 1867," by section 91, declares that "the exclusive legislative authority of the Parliament of Canada extends to all matters relating to the raising of money by any mode or system of taxation." Section 92 provides that "in each province the Legislature may exclusively make laws in relation to local works and undertakings other than railways extending beyond the province," and "to all matters of a merely local or private nature." Before the passing of this Act a company had been incorporated by an Act of a provincial Legislature, with powers to construct a railway from a place in the province to a place out of the province. After the passing of the Imperial Local Act, an Act of the same provincial Legislature was passed enabling such company to connect their railway with a certain town in the province; and that Act provided that the inhabitants of such town should contribute a sum of money to such works, to be raised by assessment on the property of the inhabitants:—Held, that the provincial Act was not "a raising of money by taxation," within the meaning of section 91 of the Imperial Act, and that such Act did not relate to a railway within the meaning of section 92, but was "a matter of a merely local or private nature," and was, therefore, within the powers of the provincial Legislature. *Dow v. Black*, 44 Law J. Rep. (N.S.) P. C. 52; Law Rep. 6 P. C. 227.

[And see next case.]

#### (2) Canadian Courts.

4.—By statutes of Quebec (31 Vict. c. 32 and 32 Vict. c. 29) commissioners were appointed to investigate the origin of any fires in the cities of Quebec and Montreal, with power to compel attendance of witnesses and to examine them on oath:—Held, that the constitution of such Courts was within the power of the Provincial Legisla-

ture. *The Queen v. Coote*, 42 Law J. Rep. (N.S.) P. C. 45; Law Rep. 4 P. C. 599.

5.—A Judge of the Court of Queen's Bench in Lower Canada, whilst sitting alone in the exercise of the criminal jurisdiction, has no power, under section 72 of the Consolidated Statutes of Canada, to pronounce a counsel in contempt for publishing letters reflecting upon the conduct of such Judge, or to impose a fine. The counsel so fined was allowed to petition the Crown for a reference to the Judicial Committee under 3 & 4 Will. 4. c. 41, s. 4. *In the matter of Thomas Kennedy Ramsay*, Law Rep. 3 P. C. 427.

#### (3) Avoué.

6.—By the law of Canada an "avoué" has no general power to bind his client by a "transaction." *King v. Pinsoneault*, 44 Law J. Rep. (N.S.) P. C. 42; Law Rep. 6 P. C. 245.

The appellant having commenced an action against the respondent, the respondent entered into a "transaction" with the avoué of the appellant, to settle the action on certain terms. The appellant afterwards, without discontinuing the first action, brought another action to enforce the "transaction":—Held, that as the first action was not for the same cause as the second, an action might be maintained to enforce the "transaction" without discontinuing the first action. *Ibid.*

#### (4) Usufructuary.

7.—Under the old law of Canada a usufructuary of land with power of sale for a rent-charge if judged advantageous by experts may sell without the sanction of the Court, and if he does apply to the Court he is not bound by any additional conditions which the decree of the Court may impose. A sale of his life-interest by the usufructuary will not extinguish his power of sale. An appointment of tutor to those entitled in substitution is not necessary. Construction of document. *Leclerc v. Beaudry*, Law Rep. 5 P. C. 363.

#### (5) Testamentary law.

8.—By the imperial statute 14 Geo. 3. c. 83, it is provided that it shall be lawful for the owner of any lands or goods in the province of Quebec to bequeath or devise the same by will, "such will being executed either according to the laws of Canada or according to the forms prescribed by the laws of England." A testator being ill, sent for a notary for the purpose of making his will. The notary came, and the testator, in the presence of the notary and two witnesses, expressed his wishes in respect of his property, including the gift of an annuity to the appellant. The notary proceeded to write the will, and whilst doing so, and when he had completed the clause relating to the annuity, the testator died. The will was then completed by the notary, and was attested by the witnesses, and, the heir having been first cited to appear and having appeared, was admitted to probate:—Held that the practice and usage of Canadian Courts does not attach to the grant of

probate the conclusive character which it has in England, and that the validity of the will might therefore be impugned. Secondly, that the paper containing the instructions written out by the notary was a valid will according to the law of England at the time of the passing of the Act, 14 Geo. 3. c. 83. Thirdly, that the law which introduced into the colony the English law of wills introduced at the same time the admissibility of oral evidence in support of them. *Migneault v. Malo*, 41 Law J. Rep. (N.S.) P. C. 11; Law Rep. 4 P. C. 123.

9.—The English Act, 14 Geo. 3. c. 83, and the Canadian Act, 41 Geo. 3. c. 4, have the effect of validating testamentary dispositions in favour of adulterine bastards. In the case of limitations by way of substitution, the time when the substitution opens is the time when the capacity of the substituted to take is to be determined. *King v. Tunstall*, Law Rep. 6 P. C. 55.

[See also *infra* No. 16.]

(6) *Civil Code.*

10.—By a donation *inter vivos* certain land in Lower Canada was conveyed by the donor to his son. The deed of gift, after reserving the usufruct to the donor for life, and afterwards to the son for life, and after his death to his children born in wedlock, contained the following provision: "Et à défaut d'enfants nés en légitime mariage du dit Maître Joseph Roy, la propriété demeurera et appartiendra aux autres héritiers du dit donateur qui en jouiront et disposeront conformément à ce qu'il en aura disposé et ordonné par son testament et ordonnance de dernière volonté."—Held, first, that under the Civil Code of Lower Canada the word "héritier" has a signification wider and different from its meaning under the old French law; secondly, that the words "autres héritiers" did not designate the legal heirs of the donor at the date of the deed of gift, but the persons who the donor should by will constitute his heirs; thirdly, that the clause gave the property to the son of the donor, with a substitution in favour of his children; but that, in default of such children, it created no further estate, and that such a provision was a valid resolute condition within the provisions of the Civil Code of Lower Canada. *Herse v. Dufaux*, 42 Law J. Rep. (N.S.) P. C. 1; Law Rep. 4 P. C. 468.

11.—Article 1,190 of the Civil Code of Lower Canada provides that "Compensation takes place, whatever be the cause or consideration of the debts, or either of them, except in the following cases" (amongst others) "a debt which has for its object an alimentary provision not liable to seizure." A testator bequeathed his estate to his sons in trust to apply the revenue thereof as an alimentary provision for the whole of his children until the accomplishment of the majority of his youngest grandchild. At the death of the testator one of the sons, who was also a trustee under the will, was indebted to the estate:—Held, that the fact that such son was a trustee created no exception to the rule as to compensation, and that such son was entitled to be paid his alimentary allow-

ance without any deduction in respect of his debt. *Muir v. Muir*, 43 Law J. Rep. (N.S.) P. C. 7; Law Rep. 5 P. C. 66.

12.—By the Civil Code of Lower Canada, art. 366, corporations are declared to be prohibited from acquiring immovable property without the permission of the Crown. Art. 1,507 declares that "legal warranty is implied by law in the contracts of sale without stipulation." Art. 1,509 declares "that, although it be stipulated that the seller is not obliged to any warranty, he is, nevertheless, obliged to a warranty against his personal acts." Art. 1,510 declares that "When there is a stipulation excluding warranty, the seller, in case of eviction, is obliged to return the price of the thing sold." The appellants, a mining corporation, purchased land in Canada from F., who had purchased from the respondents. The deed of sale from the respondents to F. limited the transfer to the rights and interest of the respondents, and guaranteed F. "against all mortgages, debts and dowers whatever." Neither the respondents nor F. had any title to the land, and the appellants were evicted. In an action by the appellants against the respondents, as *arrièregarant*, under art. 126 of the Civil Code,—Held, first, that the appellants, being a corporation, were incapable of acquiring title to the land, and that a legal warranty, under Art. 1,507, can only apply to a valid sale, and was therefore not implied in the sale from F. to the appellants; secondly, that the "legal warranty" was excluded by the express warranty on the sale by the respondents to F.; and thirdly, that the right to the restitution of the price, under Art. 1,510, is independent of warranty, and can only be enforced between the immediate parties to a sale. *Chaudière Gold Mining Company of Boston v. Desbarats*, 42 Law J. Rep. (N.S.) P. C. 73; Law Rep. 5 P. C. 277.

13.—Article 2,108 of the Civil Code provides that "Le vendeur privilégié conserve son privilège par la transcription du titre qui a transféré la propriété à l'acquéreur, et qui constate que la totalité ou partie du prix lui est due; à l'effet de quoi la transcription du contrat faite par l'acquéreur vaudra inscription pour le vendeur et pour le prêteur qui lui aura fourni les deniers payés, et qui sera subrogé aux droits du vendeur par le même contrat; sera néanmoins le conservateur des hypothèques tenu, sous peine de tous dommages et intérêts envers les tiers, de faire d'office l'inscription sur son registre, des créances résultant de l'acte translatif de propriété, tant en faveur du vendeur qu'en faveur des prêteurs, qui pourront aussi faire faire, si elle ne l'a été, la transcription du contrat de vente, à l'effet d'acquiescer l'inscription de ce qui leur est dû sur le prix." Article 2,109 provides that "Le co-héritier ou co-partageant conserve son privilège sur les biens de chaque lot ou sur le bien licité, pour les soule et retour de lots, ou pour le prix de la licitation, par l'inscription faite à sa diligence, dans soixante jours à dater de l'acte de partage ou de l'adjudication par licitation, durant lequel temps aucune hypothèque ne peut avoir lieu sur le bien chargé de soule ou adjudgé par licitation au préjudice du

créancier de la soule ou du prix." The appellants, being part owners of an estate in the colony, and creditors of other part owners, a sale of the estate was ordered by licitation, and the appellants became the purchasers. An "inscription" was made by the proper officer on behalf of the "co-licitants" but no other "inscription" was made by the appellants. The estate was afterwards seized by creditors of the appellants, whose debts were duly inscribed, pursuant to Article 2,148, and was sold to the respondent:—Held, first, that the sale by "licitation" was not a sale within the provisions of Article 2,108, so as to give the appellants the privilege of unpaid vendors, but was a sale by co-proprietors subject to the provisions of Article 2,109; secondly, that the inscription by the officer did not satisfy the provisions of that Article, and that the claim of the respondent took priority over that of the appellants. *Courtaux v. Hewelson*, 44 Law J. Rep. (N.S.) P. C. 86; Law Rep. 6 P. C. 407.

14.—The anterior possession of property which can be the subject of a "don manuel" is equivalent to delivery at the time of gift. The fact of gift may be proved by parol evidence. *Quære*—whether bank deposit certificates in Canada are negotiable instruments. Reasons given by a Judge for his decision in the Canadian Appeal Court should be stated publicly and sent to the registrar of the Privy Council, or that tribunal will not recognise them. *Richer v. Voyer*, Law Rep. 5 P. C. 461.

15.—A suit to recover a sum of money payable by instalments, and secured on land is not a suit "concerning titles to land or tenements, annual rents, or other matters, in which the rights of future parties may be affected" as to which an appeal may be granted under article 1,178 of the Civil Code. Course to be adopted where an appeal has been irregularly granted. *Sauvageau v. Gauthier*, Law Rep. 5 P. C. 494.

16.—The Civil Code is the primary source from which the law of Lower Canada is now to be drawn. When it contains rules on any subject complete in themselves they are binding, and cannot be controlled by the pre-existing law. When it refers to existing laws not formulated in its articles, or in so far as it is silent on any subject, enquiry is permissible into the old law. The second article of the edict of 1743 is abrogated by the Code. Article 366 provides, with respect to the disabilities of corporations, that "The disabilities arising from law are those comprised in the general laws of the country respecting mortmain or bodies corporate, prohibiting them from acquiring immovable property, or property so reputed, without the permission of the Crown." The Civil Code, Article 836, provides that "Corporations or persons in mortmain can only receive by will such property as they may legally possess." A testator devised and bequeathed all the residue of his estate, moveable or immovable, to trustees in trust to establish an institute or free public library, and he directed his trustees to procure a charter of incorporation for such institute:—Held, that the devise being to trustees, and not to a

corporation, existing at the death of the testator, did not contravene the laws of Canada respecting mortmain. *Abbott v. Fraser*, 45 Law J. Rep. (N.S.) P. C. 26; Law Rep. 6 P. C. 96.

*Civil Code of Canada: marine insurance: acceptance of abandonment.* [See MARINE INSURANCE, 37.]

### (7) Ecclesiastical law.

17.—Although the Roman Catholic Church of Canada may on the conquest have ceased to be an Established Church in the full sense of the term, it nevertheless continues to be a Church recognised by the State, retaining its endowments and continuing to have certain rights and obligations enforceable at law. *Brown v. The Curate and Churchwardens of Montreal*, 44 Law J. Rep. (N.S.) P. C. 1; Law Rep. 6 P. C. 157.

The Quebec ritual, which regulates the Roman Catholic Church of Lower Canada, provides that "on doit refuser la sépulture ecclésiastique, à ceux qui auraient été nommément excommuniés ou interdits, si ce n'est qu'avant de mourir ils aient donné des marques de douleur, auquel cas on pourra leur accorder la sépulture ecclésiastique, après que la censure aura été levée par nos ordres; aux pecheurs publics qui seraient mors dans l'impénitence; tels sont les concubinaires, les filles ou femmes prostituées, les sorciers et les farceurs, usuriers," &c., &c. G., a Roman Catholic in Canada, being a member of a literary society, the members of which had been decreed by the bishop to be deprived of the sacraments of the Church, died. The respondents, who had the control of the parish cemetery, refused to permit his body to be buried in that part of the cemetery which was devoted to Roman Catholics:—Held, that G., not being "un pecheur public" within the meaning of the above ritual, and not having been "nommément excommuniés" at the time of his death, was entitled to be buried in that part of the cemetery, and that a mandamus should issue commanding the respondents to permit such burial. *Ibid.*

18.—The municipal council of an unincorporated village being about to form a street across a portion of the "fabrique," the curé and marguilliers of the parish at a meeting at which certain former marguilliers were present, but at which no other parishioners were present, resolved to take legal proceedings to restrain the making of such street, and an action was brought for this purpose by the curé and marguilliers. The corporation pleaded that the curé and marguilliers were not competent to bring such action:—Held, that the curé and marguilliers were not competent to bring such action without the consent of the parishioners, and that the plea was a bar to the action. *Les Curé et Marguilliers de la Paroisse de Verchères v. La Corporation de la Paroisse de Verchères*, 44 Law J. Rep. (N.S.) P. C. 34; Law Rep. 6 P. C. 330.

French jurisprudence is admissible in the construction of Canadian law, or the interpretation of Canadian usage. *Ibid.*

(b) *Cape Colony.*(1) *Insolvent Ordinance, 1843.*

19.—The Placaat of Charles V., sec. 6, is in force in the Cape Colony, and is not repealed by the Colonial Insolvent Ordinance of 1843, and applies to all wives, no matter where their marriage be celebrated or what their domicile may be at the time of marriage; and, where there is a sequestration in that colony against a husband, the wife's claims under her marriage settlement are postponed until his other creditors have been paid; but, if he be a member of a firm, her claim is only postponed to his separate creditors under such sequestration, and not to the claims of joint creditors under a joint sequestration against the firm. *Thurburn v. Stewart*, 40 Law J. Rep. (n.s.) P. C. 5; Law Rep. 3 P. C. 478.

(2) *Roman Dutch law.*

20.—By the Roman Dutch law the mutual will of a husband and wife, notwithstanding its form, is to be read as the separate will of each. The dispositions of each spouse are to be treated as applicable to his or her half of the joint property. Each is at liberty to revoke his or her part of the will during the co-testator's lifetime, with or without communication with the co-testator, and after the co-testator's death, but where a spouse who dies first has bequeathed any benefit in favour of the survivor, and has afterwards limited the disposal of the property in general after the death of such survivor, then such survivor, if he or she accepts such benefits, may not afterwards dispose of his or her share in any manner at variance with the will of the deceased spouse. *Denyssen v. Mostert*, 41 Law J. Rep. (n.s.) P. C. 41; Law Rep. 4 P. C. 236.

(c) *Ceylon.*

21.—By the Roman Dutch law in Ceylon an executor has the power of an English executor extended to immovables as well as moveables. *Gavin v. Hadden*, Law Rep. 3 P. C. 707.

The Supreme Court of Ceylon is a Court of law and equity, and it is in accordance with the practice in Ceylon that for moneys *bonâ fide* advanced to an executor for the purposes of the estate a suit may be sustained against him in his representative capacity. *Ibid.*

(d) *East India.*

22.—The child born in India of a father who is a European British subject and Christian, has the religion and civil and social status of his father, and the guardian ought to bring him up in that religion. *Skinner v. Orde*, Law Rep. 4 P. C. 61.

23.—A decree of the Court of First Instance in India for a divorce *à vinculo*, being binding only on confirmation by the decree of the Chief Court, is not to be considered as a separate judgment from such latter decree, so as to bring into operation the rule that the Privy Council will not reverse the concurrent findings of Indian Courts on matters of fact. Such a decree by the Chief Court

reversed on the ground of delay in bringing the suit, and of the refusal by the Court to hear further evidence on the appeal to rebut the plaintiff's case. The reservations contained in the Limitations of Suits Act, No. XIV. of 1859, s. 1, c. 16, do not apply to suits for divorce *à vinculo*. *Hay v. Gordon*, Law Rep. 4 P. C. 337.

24.—In reference to the annexation of Oudh in 1856:—Held, (1) that a debt not recoverable against the King of Oudh before the annexation did not become enforceable after the annexation, (2) that the annexation of Oudh being a sovereign act could not create any civil rights enforceable in any municipal Court. *Doss v. The Secretary of State for India*, Law Rep. 19 Eq. 509.

(e) *Gibraltar.*

25.—The Supreme Court of Gibraltar has jurisdiction, in a suit for specific performance, where it appears that the plaintiff ought to have proceeded at law, to amend the pleadings and proceed as in an action at law. *Larios v. Bonamy y Gurety*, Law Rep. 5 P. C. 346.

(f) *Jersey.*

26.—The 15th and 16th articles of the Jersey Act of 1867, "Loi sur les Arrangements entre Debiteurs et leur Creditors," must be read together, and the Royal Court is only entitled to register a composition which is signed by the number of creditors required by Art. 15, and it is only in reference to such a composition that its decision is final. Therefore a petition for leave to appeal against such a composition on the ground that a certain claim had been omitted, and that by reason of this and another error of computation the requisite assents had not been obtained, was allowed; but other grounds of appeal relating to the mode of proceeding, &c., were struck out. Leave to proceed by *adoleance* will not be readily granted. *Credit Foncier of England v. Amy*; *Baily v. Amy*, Law Rep. 6 P. C. 146.

27.—The Coutumes Reformées de Normandie are not written laws. They are written illustrations and evidence of what the common law or custom of Normandy was, and unless some new principle has been introduced into the Duchy of Normandy since the separation of Jersey from the Duchy, they are evidence of the law of Jersey. *La Cloche v. La Cloche*, 41 Law J. Rep. (n.s.) P. C. 51; Law Rep. 4 P. C. 325.

The principle of the law of Jersey that a father cannot make a gift *inter vivos* of his real estate to one of his several co-heirs, applies to the case of a sole heir and to the child of a sole heir. *Ibid.*

(g) *Malta.*

28.—A villa residence with out-houses and ornamental grounds held to be property which could not be "conveniently divided and without disadvantage" between co-heirs, and that therefore according to the law of Malta such residence was properly sold by auction and the proceeds divided. *Bugeja v. Camilleri*, Law Rep. 3 P. C. 258.

**29.**—The Ordinance of Malta, No. 5, 1867, by Art. 46, provides that "Ciascuno dei coniugi può domandare la separazione per eccessi, sevizie, minacce a ingiurie gravi dell' altro, contro l' attore medesimo, o contro qualunque dei suoi figli":—Held, that the words "ingiurie gravi" leave a large discretion to the tribunal having to consider the facts, and that words as well as acts designed to wound the feelings of the party complaining may amount to "ingiurie gravi." *Sant v. Sant*, 43 Law J. Rep. (n.s.) P. C. 73; Law Rep. 5 P. C. 542.

(h) *Mauritius.*

**30.**—Testator having "enfants naturels reconnus" made his will, and bequeathed one moiety of the estate of which he should die possessed to these children. Testator subsequently married the mother of the children and died, not having revoked the will:—Held, that the will must be construed by the circumstances of testator at the date of the will, and that the legacy given to the children was a moiety of the whole succession and not of the "quotité disponible." *Lagesse v. Allard*, 42 Law J. Rep. (n.s.) P. C. 37; Law Rep. 4 P. C. 553.

(i) *Natal.*

**31.**—An ordinance of the Natal Legislature directing that shareholders of a partnership who had executed a partnership deed should be and continue joint-stock proprietors of the sum of 10,000*l.* (the capital of the partnership) for the purposes mentioned in their deed and constitute and be a company:—Held, not to convert the co-partnership into a body corporate, or to exempt shareholders from individual liability in respect of the company's debts. *Aldridge v. Cato*, Law Rep. 4 P. C. 313.

(k) *New South Wales.*

*Crown lands.* [See CROWN LANDS.]

*Colonial law: New South Wales: Customs Regulation Acts.* [See CUSTOMS.]

(l) *New Zealand.*

**32.**—The power to cancel a license or lease from the Crown in respect of lands on which gold is discovered, given by the Gold Fields Act, 1866, s. 16, applies to a lease granted in lieu of a license after the passing of the Act. The words "shall have been" in the earlier part of the section are equivalent to "shall be." *Maclean v. Macandrew*, 43 Law J. Rep. (n.s.) P. C. 69.

(m) *Penang.*

**33.**—The general law of England, such as the rule against perpetuities and the exception to that rule as to charitable uses, is the law of the colony of Penang; but not English statutes in their nature inapplicable to that colony. *Neo v. Neo*, Law Rep. 6 P. C. 381.

Consideration of the powers of appeal from the Supreme Court of Penang. *Ibid.*

(n) *South Australia.*

**34.**—An Act of South Australia, 1855-6, No. 4, by section 1 provides "that in all cases where any person shall make any *bond fide* advance of money, &c., to any proprietor of sheep, on condition of receiving in payment or as security, &c., the wool of the then next ensuing clip of such proprietor, and where the agreement relating to such security shall be made in the form prescribed, and shall be duly registered, &c., the possession of such wool by the said proprietor shall be, to all intents and purposes in the law, the possession of the person or persons making such advance." A partner in a firm having sheep runs in Australia obtained certain advances from a banking company in the colony, on the security of the next ensuing clip of wool of the sheep on the run; and the agreement was in the proper form, and was duly registered. The bank was incorporated by charter, which provided that it should not make advances on merchandise:—Held, 1st. That any person who is in possession of the sheep either as principal or agent, and who has authority to deal with the sheep, is the proprietor within the meaning of the statute, and that the firm were therefore bound by the act of the partner. 2nd. That the provision contained in the bank charter did not prevent the property in the wool passing under the conveyance to the bank, and that inasmuch as the person who has made an advance is to be deemed in possession, an action of trover might be brought by the bank. *Ayres v. The South Australian Banking Company*, 40 Law J. Rep. (n.s.) P. C. 22; Law Rep. 3 P. C. 548.

**35.**—"The Fencing Act, 1865" (South Australian Statutes, 1865, No. 6), does not apply to waste lands in the colony demised by the Crown for pastoral purposes. *Brown v. McLachlan*, 42 Law J. Rep. (n.s.) P. C. 18; Law Rep. 4 P. C. 543.

**36.**—Under the Northern Territory Act, 1863, No. 23 of South Australia, certain lots of waste lands in Australia were sold. Section 6 provided that every land order issued under the Act should entitle the purchaser within five years from the date thereof to select from and out of the surveyed lands the particular land whereof he would become purchaser. No survey of the lands was made within five years, but another Act was passed substituting other provisions in respect of the selection of the lands:—Held, that the Colonial Government had entered into a contract with the purchasers of land orders under the Act of 1863 to have the lands surveyed and to give the purchasers the selection provided by the Act, and that the purchasers of land orders were entitled to a return of their purchase money with interest from the time of payment. *Blackmore v. North Australia Company*, 43 Law J. Rep. (n.s.) P. C. 1; Law Rep. 5 P. C. 24.

(o) *Victoria.*

**37.**—The Mining Statute, 1865 (Statutes of Victoria, No. 228), which defined the powers of the Court of Mines, and created a Chief Judge of that Court, by s. 172 gives an appeal to such

Judge to any party who shall be dissatisfied with any decree or order of the said Court; and by section 244, no "proceedings under that Act shall be removed or removable into the Supreme Court save and except as therein before provided:"—Held, first, that the Court of Mines is, in relation to the Supreme Court, an inferior Court, but that the power to issue a writ of *certiorari* to such Court had been taken away by the above section. Secondly, that a winding-up order under the "Mining Companies Limited Liability Act, 1864," is a proceeding under the Mining Statute, 1865, and is there fore within the provisions of section 244. *The Colonial Bank of Australasia v. Willan*, 43 Law J. Rep. (N.S.) P. C. 39; Law Rep. 5 P. C. 417.

An order was made by a Court of Mines under the Mining Companies Limited Liability Act, 1864, for the winding up of a company. The order upon the face of it was regular, but it was objected that the petitioning creditor's debt was not proved:—Held, that, although, notwithstanding the provisions of section 244 of the above statute, the Supreme Court had power to issue a writ of *certiorari* in case of manifest defect of jurisdiction in the Court of Mines, or of manifest fraud in the party procuring an order, yet that the objection to the order did not justify the exercise of such jurisdiction. *Ibid*.

**38.**—By a Mining Act of Victoria, 1865, No. 201, Courts for mining purposes are constituted, composed of a warden and assessors, and it is provided by section 193 that a minute of the decision of the assessors shall be entered in the register, and that the warden shall make an order in accordance therewith. The appellants occupied land in Victoria for mining purposes, and obtained a Crown lease of the land. A small part of the land occupied by the appellants was omitted from the lease. The respondents took possession of so much of the land as was not included in the lease. The appellants then sued the respondents in the Court of Mines to remove them and to recover damages. A majority of the assessors found that the respondents had not encroached on the land. This finding was not entered in the register, nor did the warden make any order in accordance therewith:—Held, first, that intentional abandonment is only to be proved by cogent evidence of the existence of such intention, and that the fact that the lease did not include all the land occupied by the appellants was not sufficient evidence of abandonment. Secondly, that the finding of the assessors in the Court of Mines not being followed by any order or adjudication by the warden was in effect a verdict not followed by any judgment, and was therefore a nullity. *The Walkalla Gold Mining Company v. Mulcahy*, 40 Law J. Rep. (N.S.) P. C. 41.

**39.**—The 18 & 19 Vict. c. 55, by section 35, provides "that it shall be lawful for the legislature of Victoria by any Act, &c., to define the privileges, immunities and powers to be held, enjoyed and exercised by the Council or Assembly, and by the members thereof respectively: provided that no such privileges, &c., &c., should exceed

those then held, enjoyed and exercised by the House of Parliament or the members thereof." The 20 Vict. (Victoria Acts), No. 1, after reciting the above statute, provides that "the privileges, immunities, and powers of the said Council and Assembly respectively, &c., are hereby defined to be the same as at the time of the passing of the said recited Act, were held, enjoyed and exercised by the Commons House of Parliament of Great Britain, &c.":—Held, that the House of Assembly in Victoria had power under these statutes of judging itself what is contempt, and of committing for contempt by warrant, stating generally that a contempt had taken place. *The Speaker of the House of Assembly of Victoria v. Glass*, 40 Law J. Rep. (N.S.) P. C. 17; Law Rep. 3 P. C. 560.

**40.**—The Land Acts of Victoria provide that land in the colony shall be set out for selection. That every selector shall be entitled to purchase one moiety of land selected in fee, and shall receive a lease of the other moiety at an annual rent to be applied in the purchase in fee of the other moiety. The leases are subject to forfeiture for non-payment of rent and to penalties for non-performance of other conditions. Grants are directed to bear date from the day when the grantees became entitled to such grant. Section 101 of the Land Act, 1869, provides that the notices heretofore published in the Government Gazette, purporting to declare that the Government had revoked, &c., any lease, &c., issued under any of the Land Acts, &c., should be received in all Courts of justice as conclusive evidence that the lease, &c., was lawfully revoked, &c. S. became a grantee under the Land Acts, but failed to perform certain conditions. The first was, however, with knowledge of such failure received by the Crown. Subsequently the allotment was declared forfeited, and notice thereof was published in the Government Gazette. The respondent became the purchaser of the allotment under the knowledge of the Crown, and a lease was granted to the respondent dated the day on which S. became entitled. The respondent completed the purchase, and obtained a certificate of title under the Land Transfer Act:—Held, first, that section 101 applies only to cases where the Governor has power of his own will to declare a forfeiture, and that such power did not apply to such a lease; secondly, that the failure to perform the conditions did not of itself avoid the lease, and that the failure of S. was waived by the grant to the respondent; thirdly, that the grant to S. was not forfeited, but that the respondent was liable to all penalties incurred by S., together with interest on any suit in answer. *The Attorney-General of Victoria v. Ettershank*; *Ettershank v. The Attorney-General of Victoria*, 44 Law J. Rep. (N.S.) P. C. 65; Law Rep. 6 P. C. 354; and *The Attorney-General of Victoria v. Glass*, Law Rep. 6 P. C. 375.

*Penal servitude: sentence for manslaughter on high seas.* [See PENAL SERVITUDE.]

## COMMON EMPLOYMENT.

[See MASTER AND SERVANT, 13, 14.]

## COMMON.

- (A) RIGHTS OF COMMONERS.
- (B) EVIDENCE OF RIGHT.
  - (a) *Appurtenant or in gross.*
  - (b) *Exclusive right of pasturage.*

## (A) RIGHTS OF COMMONERS.

1.—A custom for all the owners and occupiers of lands within a forest comprehending numerous manors to have rights of common over all the waste lands within the forest is not bad in point of law, and such a right may be established against all the lords of manors within the forest who dispute it by one single suit; for if the plaintiff claim one and the same right under one and the same title against them all, the bill is not rendered multifarious by the fact that they may raise different defences. *The Commissioners of the Sewers of the City of London v. Glasse—Epping Forest Case*, 41 Law J. Rep. (N.S.) Chanc. 409; Law Rep. 7 Chanc. 456.

2.—A right of common over any district, however large, may be claimed by prescription. *The Commissioners of the Sewers of the City of London v. Glasse—Epping Forest Case*, 44 Law J. Rep. (N.S.) Chanc. 129; Law Rep. 19 Eq. 134.

In common because of vicinage the cattle must always be turned out in the commoner's own manor; therefore, if a right be proved to turn out in another manor, it proves a right of common direct, and not merely because of vicinage. *Ibid.*

The lords of manors within a forest contended that they had customs to enclose the wastes within their manors with the consent of the homages of their respective manors. It appears that other persons, strangers to the manors, had rights of common over the lands claimed to be enclosed:—Held, that the enclosures were bad as against the commoners. *Ibid.*

*Boulcott v. Winnill* (2 Campb. 261) dissented from. *Ibid.*

3.—If cattle which are *levant* and *couchant* upon a common stray on to another, there being no inclosure, a commoner upon the latter common has no right to distrain them; he has no right to take the law into his hands, the cattle being upon the common under some colour of right. *Cape v. Scott*, 43 Law J. Rep. (N.S.) Q. B. 65; Law Rep. 9 Q. B. 269.

4.—In 1835 certain bye-laws of a manor were passed, which provided "that every copyholder and freeholder of lands and tenements within the manor should be entitled to common of pasture for one head of cattle for every 10*l.* annual value of his lands and tenements, provided always that the whole number of cattle to any one copyholder or freeholder should not exceed thirty, and

that each copyholder or freeholder should, on or before the 12th of August in every year, claim such right; in default of such claim the same should be transferable to the occupiers of such lands or tenements respectively in rateable proportions, in addition to their own rights as occupiers; and that every occupier of any copyhold or freehold lands or tenements within the manor should be entitled to common of pasture, when his or her rent or annual value was at or under 10*l.* a year, to three head of cattle, and so on in proportion of three head of cattle up to the value of 50*l.*, after which there was to be only one head of cattle for every 5*l.* of value." Portions of the common lands were purchased by the East London Waterworks Company and other companies, and the purchase-money, amounting to about 4,000*l.*, paid into Court. A suit was instituted to determine the rights of the parties in the 4,000*l.*:—Held, that the fund was divisible among the copyhold tenants of the manor and the freeholders within it, according to the "stint" fixed by the first of the above clauses. *Fox v. Amherst*, 44 Law J. Rep. (N.S.) Chanc. 666; Law Rep. 20 Eq. 403.

*Compensation under Lands Clauses Act for extinction of commonable rights.* [See LANDS CLAUSES ACT, 23.]

*Inclosure Act: rights of pasturage.* [See INCLOSURE ACT.]

## (B) EVIDENCE OF RIGHT.

(a) *Appurtenant or in gross.*

5.—A claim of exclusive right of common for cattle, sheep, and other commonable animals, *levant* and *couchant*, is not conclusive that the right claimed is in its nature appurtenant, but such right may have had its origin in a grant in gross. If such right be shewn by evidence to have existed in gross without question for a long period of time, it ought to be sustained. The recognition and repetition of releases from the sixteenth century downwards without question, is evidence that the right admitted of severance by its original grant. Therefore, where a municipal corporation claiming an exclusive right of common for cattle, &c., *levant* and *couchant*, in certain lands, lying scattered round the town, had in the reign of Henry VIII. and thenceforward exercised the right of releasing such right of common over part of the lands subject thereto, and had continued to exercise their rights over the rest as before, whilst the grantees of such released rights had exercised the right of common instead of the corporation:—Held, in an action by the tenant of a part of the lands subject to the claim of right of common, against a person claiming under a grant of the right from the corporation for exercising such right; that the evidence established a right of common in gross, with power of severance, and to grant or release any part, and that the grantee of such a right was justified in entering upon the land in question in the exercise thereof. *Johnson v. Barnes*, 41 Law J. Rep. (N.S.) C. P. 250; Law Rep. 7 C. P. 592.

(b) *Exclusive right of pasturage.*

**6.**—Where an exclusive right of pasturage had been enjoyed for a long series of years, but was described in various documents as a right of common, the Court held as a conclusion of fact that such description did not cut down the exclusive right so established by user. *Johnson v. Barnes*, 42 Law J. Rep. (N.S.) C. P. 259; Law Rep. 8 C. P. 527.

*Production of documents in suit to establish common right.* [See PRODUCTION, 24.]

## COMPANY.

[See FRIENDLY SOCIETY; PARTNERSHIP; RAILWAY COMPANY.]

## (A) PROMOTER'S RIGHTS AND LIABILITIES UNDER CONTRACT.

## (B) PROSPECTUS.

## (C) REGISTRATION OF COMPANIES.

(a) *Under Joint Stock Companies Acts, 1856 and 1857.*

(b) *Mutual insurance association.*

(c) *Company whose constitution is inconsistent with the Act.*

## (D) MANAGEMENT AND CONSTITUTION OF COMPANY.

(a) *Memorandum and articles of association.*

(b) *Jurisdiction of equity to interfere.*

(c) *Liability of company for acts of agent.*

(1) *Contracts and agreements.*

(2) *Fraud by agent.*

(d) *Remedy against company transgressing parliamentary limits.*

(e) *Officers.*

(f) *Authority to enter appearance for trustee of banking company.*

(g) *Directors.*

(1) *Powers.*

(i) *As to funds of company.*

(ii) *Purchases.*

(iii) *As to contracts to take shares.*

(iv) *Powers individually.*

(v) *Inequitable use of powers.*

(2) *Liabilities.*

(i) *Personal liability under contract.*

(ii) *Liability for breach of trust.*

(iii) *Liability for misrepresentation or omission in prospectus.*

(iv) *Incapacity of director to profit by his office.*

(v) *Liability in respect of overdrawn banking account.*

(vi) *Liability for solicitor's costs.*

(3) *Liability of directors as shareholders.*

(i) *Director's qualification.*

(ii) *Payment for shares.*

(h) *Borrowing powers.*

(i) *Debentures.*

(k) *Acts ultra vires.*

(1) *Contracts and agreements.*

(2) *Ratification by shareholders.*

(l) *Register of shares.*

(1) *Rectification of register.*

(2) *Suit to remove name.*

(3) *Description of firm.*

(m) *Powers of majority of shareholders.*

(n) *Capital.*

(1) *Reduction and redistribution.*

(2) *Expenditure chargeable to capital.*

(o) *Right of preemption as against company.*

(p) *Scheme of arrangement under Joint Stock Companies Arrangement Act, 1870.*

## (E) AMALGAMATION AND TRANSFER OF BUSINESS.

(a) *Validity of amalgamation.*

(1) *Variation between two parts of contract.*

(2) *Reconstruction under sec. 161.*

(b) *Effect of amalgamation on rights of companies.*

(c) *Effect of setting aside amalgamation.*

(d) *Novation of contract by policy-holder or annuitant.*

(e) *Application for or acceptance of shares in new company.*

(f) *Dealings with shares after amalgamation.*

## (F) SUITS AND PROCEEDINGS.

(a) *Bill by one shareholder.*

(b) *Plaintiff company ordered to give security for costs.*

(c) *Debtor's summons by secretary of company.*

## (G) SHAREHOLDERS.

(a) *Allottees.*

(1) *Persons who have signed the memorandum of association.*

(2) *Persons who have applied for shares.*

(i) *Scrap holders.*

(ii) *Application in name of married woman.*

(iii) *Conditional application for shares.*

(1) *Officer of company.*

(2) *Condition as to liability of applicant.*

(iv) *Allotment of shares to directors for distribution.*

(3) *Notice of allotment.*

(i) *What notice sufficient.*

(ii) *Notice through post.*

(4) *Rescission of ultra vires allotment.*

(b) *Agreement to take shares.*

(1) *What amounts to.*

(2) *Right of repudiation.*

(c) *Fully paid-up shares.*

(1) *Subscription of memorandum.*

(2) *Payment in bonds.*

(3) *Payment "in cash" within sec. 25 of the Companies Act, 1867.*

(4) *Transferee of bonus shares, with notice.*



- (5) *Rectification of register where contract not registered.*
  - (d) *Contributories entitled to set-off.*
  - (e) *Transfer of shares.*
    - (1) *Liability of person taking transfer in name of infant.*
    - (2) *Right of transferee to indemnity.*
      - (i) *Implied contract by transferee.*
      - (ii) *Right against real purchaser where transferee an infant.*
    - (3) *Effect of guaranty by transferor.*
    - (4) *Purchase of shares in name of trustee.*
    - (5) *Shares held in joint names.*
    - (6) *Registration and validity of transfers.*
      - (i) *Transfer or registration after winding up, or calls being due.*
      - (ii) *Misdescription and mistake.*
      - (iii) *Irregularity: directors interested.*
      - (iv) *Enforcement of equitable right to be registered as shareholder.*
    - (7) *Rules of Stock Exchange.*
  - (f) *Bankrupt contributory.*
  - (g) *Forfeiture of shares.*
  - (h) *Liability limited by contract.*
  - (i) *Shares subject to lien by company.*
  - (k) *Preference shares.*
  - (l) *Past members.*
    - (1) *Extent of their liability.*
    - (2) *Debt to bank: appropriation of payments.*
    - (3) *Transfer to infant.*
    - (4) *Transfer more than a year before winding-up.*
    - (5) *Application of contributions of past members.*
    - (6) *Relative rights of past and present members.*
    - (7) *Affidavit by official liquidator: compromises.*
  - (m) *Shareholder in foreign company.*
  - (n) *Distribution of surplus.*
  - (o) *Scire facias against shareholder.*
- (H) **CREDITORS.**
- (a) *Proof of debts.*
    - (1) *Secured creditors.*
      - (i) *Right of proof.*
      - (ii) *Amount of proof: deductions.*
    - (2) *Bill holders.*
      - (i) *Acceptance by director pending winding up.*
      - (ii) *Double proof.*
      - (iii) *Authority to accept bills.*
    - (3) *Bond holders: notice: equities.*
    - (4) *Debenture holders.*
    - (5) *Policy holders.*
    - (6) *Judgment creditors.*
    - (7) *Improper loan.*
    - (8) *Prospective claims and claims for damages.*
    - (9) *Proof by officer of company.*
    - (10) *Claim for professional services.*
    - (11) *Statute of Limitations.*
    - (12) *Interest.*
    - (13) *Proof by nominee of company.*
  - (b) *Effect of winding-up order or amalgamation on rights of creditors.*
- (I) **WINDING UP.**
- (a) *On petition.*
    - (1) *Right to order ex debito justitiæ.*
      - (i) *Creditors.*
      - (ii) *Shareholders.*
    - (2) *Liability to winding-up order.*
      - (i) *Number of members.*
      - (ii) *Company unable to pay debts.*
      - (iii) *Disputed debt.*
    - (3) *Benefit building society.*
    - (4) *Unregistered company.*
    - (5) *Railway company.*
    - (6) *Question of advantage.*
    - (7) *Demurrable petition: petitioner in arrears of calls.*
    - (8) *Petition of debenture holder.*
    - (9) *Right to have petition dismissed.*
  - (b) *Jurisdiction.*
    - (1) *In voluntary winding up.*
    - (2) *Winding up under supervision: rights of single shareholder.*
  - (c) *Practice.*
    - (1) *Branch of Court: concurrent proceedings.*
    - (2) *Advertisement of petition.*
    - (3) *Service.*
    - (4) *Production of documents.*
    - (5) *Examination of witnesses.*
    - (6) *Evidence on hearing of summons.*
    - (7) *Enrolment of order.*
  - (d) *Liquidator.*
    - (1) *Appointment and removal.*
    - (2) *Powers.*
    - (3) *Liability to action by creditor.*
    - (4) *Costs of.*
  - (e) *Compromises and arrangements.*
    - (1) *Deed purporting to release debts.*
    - (2) *Compromises under secs. 160-163.*
    - (3) *Sale of assets abroad and release of a class of contributories.*
    - (4) *Lien on shares.*
  - (f) *Costs.*
    - (1) *Priorities.*
    - (2) *How payable.*
    - (3) *Security for costs.*
  - (g) *Effect of winding-up order.*
    - (1) *Staying execution or other proceedings.*
    - (2) *Leave to proceed.*
    - (3) *Distress for rent.*
    - (4) *Protected transaction.*
    - (5) *Sequestration.*
    - (6) *Lien under previous agreement.*
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- (A) **PROMOTER'S RIGHTS AND LIABILITIES UNDER CONTRACT.**
- 1.—Where an agreement, entered into with the promoter of a company for payment of expenses incurred, was recited in the articles of association of the company:—Held, that the company had

adopted the agreement, and that the parties entitled could maintain a suit against the company and directors (of whom the promoter was one), and need not sue in the name of the promoter. The agreement was conditional on the company's being in a position to carry on their undertaking before a certain day:—Held, that it was not therefore contingent on their actually commencing business. *Touche v. The Metropolitan Railway Warehousing Company*, Law Rep. 6 Chanc. 671.

2.—A provision in the articles of association of a company incorporated under the Companies Acts, 1862 and 1867, that preliminary expenses shall be defrayed by the company, does not enable the promoters to sue the company after its formation in respect of expenditure necessary for its establishment; for no privity of contract exists between it and the promoters. *Melhado v. The Porto Alegre and New Hamburg and Brazilian Railway Company*, 43 Law J. Rep. (N.S.) C.P. 253; Law Rep. 9 C.P. 503.

3.—Persons subscribed to a scheme for the purchase and resale of a theatre. The association was wound up. The subscriptions amounted to over 5,000*l.*, and were attached to a form appended to a prospectus which falsely stated that out of 12,000*l.* 5,000*l.* only remained for subscription:—Held, that the promoters who issued the prospectus were contributories to an extent proportionate to the amount not subscribed for. *In re the Victoria Palace Theatre Syndicate*, 43 Law J. Rep. (N.S.) Chanc. 751; Law Rep. 18 Eq. 661.

4.—M. agreed with a patentee to purchase a patent for 65,000*l.*, to be paid in cash and shares, and to form a company to work it. Two months after he sold the patent to a trustee for a company, which was then forthwith to be formed, for 125,000*l.* to be paid in cash and shares mostly defered. He became a director of the company. A prospectus was issued, which disclosed the second agreement but not the first. On the faith of this prospectus G. took shares, but as soon as she discovered the first agreement she applied to have her name removed from the register of members, on the ground that the omission to disclose the first agreement made the prospectus fraudulent within the meaning of the 38th section of the Companies Act, 1867:—Held, that M. was not proved to have been a "promoter" at the time the first agreement was entered into; and that even if he had been the contract with the company to take shares would not have been avoided, and the only remedy of G. would have been against M. *In re the Coal Economising Gas Company (Lim.)*; *Ex parte Gover*, 44 Law J. Rep. (N.S.) Chanc. 323; Law Rep. 20 Eq. 114: affirmed, on appeal, Law Rep. 1 Chanc. Div. 182.

5.—In adjusting the rights of contributories under the 109th section of 25 & 26 Vict. c. 89, the Court will not enforce an alleged contract of indemnity by promoters of a company. Consideration how far a railway company is bound by a representation made by its solicitor to persons signing the subscription contract, that they would not be called upon to pay unless the line was

made and opened. *In re the Brompton and Longtown Railway Company*; *Addison's case*, Law Rep. 20 Eq. 620.

#### (B) PROSPECTUS.

*Liability of promoters for misrepresentation or omission in prospectus.* [See supra A 3, 4.]

*Liability of directors for the like.* [See infra D 25, 26.]

#### (C) REGISTRATION OF COMPANIES.

##### (a) Under Joint Stock Companies Acts, 1856 and 1857.

1.—By section 2 of the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), it is enacted that the Act shall not apply to persons associated together for the purposes of banking or insurance, and by the 107th section, the Joint Stock Companies Act of 1844 (7 & 8 Vict. c. 110) is repealed; but by the 20 & 21 Vict. c. 80, it is enacted that that Act should not be deemed to have been repealed as to companies already formed for the purpose of carrying on the business of insurance thereunder, or as to companies thereafter to be formed for the said purpose:—Held, that the Legislature had by this Act put a construction upon the Act of 1856, and by sweeping out of the repeal two classes of companies, had in effect declared that as to all other associations the Act was repealed. Therefore, an insurance association formed as a common law partnership between the passing of the Acts of 1856 and 1857, and never completely registered, not being within either of the exceptions, was liable to be wound up under the Companies Act, 1862, as an unregistered company. *In re the Bank of London and National Insurance Association, and Companies Acts, 1862 and 1867*; *Durham's Petition*, 40 Law J. Rep. (N.S.) Chanc. 562; Law Rep. 6 Chanc. 421.

2.—A foreign railway company and partnership is not within the scope of the English Joint Stock Companies Acts, 1856, 1857. *Bulkeley v. Schutz*, Law Rep. 3 P.C. 764.

Therefore such a company need not be registered as one of limited liability. *Ibid.*

##### (b) Mutual insurance association.

3.—A mutual insurance association is an association for the acquisition of gain, so as to require registration under the Companies Act, 1862, if it consists of more than twenty members. *In re the Arthur Average Association*; *Ex parte Cory*, 44 Law J. Rep. (N.S.) Chanc. 569; Law Rep. 10 Chanc. 542, *nom. Ex parte Hargrove & Co.*

Seemle—that a company which ought to be but is not registered under the Companies Act, 1862, is not an "unregistered company" that can be wound up under section 190. *Ibid.*

A call having been made to answer debts found by the chief clerk's certificate, the contributories applied to vary the certificate. The application was allowed, though six months had elapsed since the certificate was filed. *Ibid.*

(c) *Company whose constitution is inconsistent with the Act.*

4.—After a company has been regularly registered under the Companies Act, 1862, although it appear by the light of subsequent events, coupled with the registered articles of association, that its objects, or its constitution, are in truth inconsistent with those intended by the Act of Parliament to belong to companies registered under the Act—so that it may even be surmised that the incorporation of the company was colourably or evasively obtained—the registration ought not to be vacated, but the company, whether solvent or insolvent, ought to be wound up. *The Princess of Reuss v. Bos* (H. L.), 40 Law J. Rep. (N.S.) Chanc. 665; Law Rep. 5 E. & I. App. 176.

There are no means by which such a company can be got rid of, except by a winding-up under the Act; and the Court has jurisdiction to order it to be wound up under the 79th section of the Companies Act, 1862. *Ibid.*

(D) MANAGEMENT AND CONSTITUTION OF COMPANY.

(a) *Memorandum and articles of association.*

1.—The rights and powers of a company incorporated by registration under the Companies Act, 1862, are not in all respects such as are by common law inherent in corporations created otherwise than under that Act, but are limited by reference to the objects and purposes specified in the memorandum of association as those for which the company was established. The company exists only for those objects and purposes, and any act done or contract made by the company in attempt to extend them, or which is at variance with or goes beyond the scope of the memorandum of association, is *ultra vires* of the company, and absolutely void and incapable of ratification, though the whole body of shareholders should assent to such extension act or contract, and although such extension, with such assent, may be expressly contemplated by the articles of association; for the office of the articles of association is only to define and regulate the internal management of the company and the duties of the directors in carrying on its business. *The Ashbury Railway Carriage and Iron Company (Lim.) v. Riche* (H. L.), 44 Law J. Rep. (N.S.) Exch. 185; Law Rep. 7 E. & I. App. 653.

The articles of association may be varied by the whole body of shareholders, so that an act *ultra vires* of the directors under them may be authorised or ratified if it be not *ultra vires* of the company, that is to say, if it be within the scope of the memorandum of association. *Ibid.*

The memorandum of association cannot be varied, except in the particulars provided for by the 12th section of the Act, with regard to the increase or consolidation of capital or shares, or by the 13th section, with regard to changing its name, with the approval of the Board of Trade. *Ibid.*

General words are to be taken and explained with reference to the words which immediately

precede them, and with which they are connected in sense. Therefore, where the memorandum of association specified that a company was formed to carry on the business of mechanical engineers and general contractors, also to purchase, lease, work and sell mines and minerals, lands and buildings,—Held, that the words, “general contractor,” were limited by their association with the words, “mechanical engineers,” and only authorised the making of such contracts as mechanical engineers in the ordinary course of their business are in the habit of making, and that the generality of the words, “lands and buildings,” was limited by their connection with the words, “mines and minerals,” and meant that the lands, &c., were only to be acquired, &c., for purposes connected with the mines or minerals, and did not authorise the company to contract or pay for the construction of a railway. *Ibid.*

The memorandum of association of a company incorporated under the Companies Act, 1862, stated that it was formed for certain objects and purposes. One of the articles of association of the same company provided that the objects and purposes specified in the memorandum might be extended by a resolution passed at a general meeting of the company:—Held, that this article was wholly inoperative, and the directors having entered into a contract for a purpose not specified by nor within the scope of the memorandum of association, it was also held that it was wholly immaterial whether any resolution had or had not been passed authorising such an extension of its business as that contemplated by the contract or ratifying the contract when made; for as the object of the contract was beyond the scope of the memorandum of association, the contract itself was *ultra vires* of the company, wholly void, and incapable of ratification, and that an action brought upon it against the company could not be sustained. *Ibid.*

*Alteration of articles of association.* [See *infra* D 69, E 3, 8.]

(b) *Jurisdiction of equity to interfere.*

2.—The Court has no jurisdiction to compel directors of a company to summon a general meeting for any purpose connected with the management, where the company's articles contain provisions for the summoning of such meetings. *Macdougall v. Gardiner*, Law Rep. 10 Chanc. 606.

3.—Injunction and receiver granted to protect the property of a company where disputes existed between the members of the governing body of such a nature as to prevent its affairs being properly carried on. The interference of the Court in such a case will only be continued for the least possible time. *Featherstone v. Cooke*; *The Trade Auxiliary Company v. Vickers*, Law Rep. 16 Eq. 298.

[And see *infra* D 19.]

*Jurisdiction to rectify register.* [See *infra* D 58–63.]

(c) *Liability of company for acts of agent.*[And see *infra*, *Officers, Directors.*](1) *Contracts and agreements.*

4.—By deed under seal P. entered into a contract with the managing director of a company (who had power to enter into contracts on behalf, and for the benefit of the company) under which, in consideration of certain assignments, the director bound himself to pay a sum of money, but no mention of the company was made in the deed, although P. was well aware that the contract was on their behalf and for their benefit:—Held (affirming *Stuart, V.C.*), that P. had elected to charge the director alone, and had no equity against the company. *In re the International Contract Company*, Law Rep. 6 Chanc. 525.

5.—Where the managing director of a company, being aware that by agreement between the company and the defendant, certain funds owing to A. were to be appropriated to the payment of a debt due from A. to the company for which the defendant was surety to the company, procured payment out of such funds of a private debt owing to such director from A.:—Held, that the company were not responsible for the act of their managing director, as he was not acting within the scope of his employment. *McGowan & Co. (Limited) v. Dyer*, Law Rep. 8 Q. B. 141.

6.—An agreement for the sale of leaseholds belonging to a company was signed by the secretary on their behalf. It appeared from the memorandum of association that one of the objects of the company was to sell houses:—Held, that under section 37 of the Companies Act, 1867, the secretary in signing was acting under the implied authority of the company, and that the contract satisfied the Statutes of Frauds. An allegation that the secretary was the company's agent, held sufficient allegation that he was their agent for this special purpose. *Semble*—a contract by an auctioneer for an undisclosed principal is valid under the Statute of Frauds. *Beer v. The London and Paris Hotel Company*, Law Rep. 20 Eq. 412.

*Liability for neglect of officer to register bond.* [See *infra* H 11.]

(2) *Fraud by agent.*

7.—An action of deceit will lie against an incorporated company for the fraud of their agent, if the fraud of the agent is the fraud of the company, and the company is benefited thereby. *Mackay v. The Commercial Bank of New Brunswick*, 43 Law J. Rep. (N.S.) P. C. 31; Law Rep. 5 P. C. 394.

L., a merchant at New Brunswick, consigned goods to the appellants at Liverpool. The appellants accepted L.'s bills, sometimes for goods received and sometimes on the guarantee of the respondents, an incorporated banking company. The appellants telegraphed to L. that certain of these bills would not be accepted unless certain guarantees were remitted. The manager of the bank telegraphed a reply, "Sent last mail, L." This was true, but at this time L. had become insolvent. The appellants accepted the

bills, and their acceptances were placed to the credit of the respondents:—Held, that the respondents were liable to make good the amount of the bills so accepted. *Ibid.*

*Liability of company for representation by solicitor to persons signing subscription contract.* [See *supra* A 5.]

(d) *Remedy against company transgressing parliamentary limits.*

8.—The plaintiffs and the defendants, two neighbouring gas companies, were by their respective Acts empowered to make and supply gas within certain defined limits. The defendants proceeded to supply gas to buildings beyond their own parliamentary limits and within those of the plaintiffs, who thereupon filed a bill to restrain the defendants from so doing. The bill alleged that by the unauthorised acts of the defendants, the plaintiffs would be deprived of the profits arising from the sale of gas to the buildings illegally supplied or about to be supplied by the defendants, and that great loss would be sustained by the plaintiffs if such illegal acts were allowed to continue. A demurrer by the defendants for want of equity was allowed, on the ground that the bill had not alleged such a private injury as a Court of Equity could take notice of, and that the question of excess of parliamentary powers could only be determined upon an information by the Attorney-General. *The Stockport District Waterworks Company v. The Mayor, &c., of Manchester* (9 Jur. N.S. 266) followed. *The Pudsey Coal Gas Company v. The Mayor, &c., of Bradford*, 42 Law J. Rep. (N.S.) Chanc. 293; Law Rep. 15 Eq. 167.

(e) *Officers.*

9.—The manager of a company is not entitled to sign the name of the partnership. So held in the case of a manager appointed by trustees representing three-fourths of the property of the partnership. *Beveridge v. Beveridge*, Law Rep. 2 Sc. App. 183.

10.—The appellant was appointed secretary of a joint stock company, registered on the 31st of July, 1872. Before the formation of the company, the appellant had entered into several contracts to enable the company to acquire patents to carry out its objects, and he was a contracting party to a subsequent agreement, dated the 29th of December, 1872. He called a general meeting of the directors which was held on the 9th of December, 1872, and on the 13th of January, 1874, he threatened to call a general meeting. No general meeting was held in the year 1873, and no list of members as required by section 26 of 25 & 26 Vict. c. 89, was forwarded during that year:—Held, first (per Blackburn, J., and Lush, J.; Quain, J., dissentiente), that there was evidence upon which the appellant might be held to be a "manager," liable within the meaning of the 26th and 27th sections for not forwarding the list of members. Secondly (per Blackburn, J., and Lush, J.; Quain, J., dis-

*sentiente*), that inasmuch as he did not take any steps to call a general meeting in 1873, he could not defend himself against the information for not forwarding the list, by saying that no meeting had been held. Thirdly, that a general meeting of the company ought to be held once in each calendar year. *Gibson v. Barton*, 44 Law J. Rep. (N.S.) M. C. 81; Law Rep. 10 Q. B. 329.

11.—Although a charge on the property of a company is not made void by want of registration, yet no officer of the company having such a charge can avail himself of it unless it is registered, as it is his duty to see that every charge affecting property of the company is registered. So held in the case of a solicitor, only employed by the company for a particular purpose, and who had taken a charge as security for his costs. *In re the Patent Bread Machinery Co.; Ex parte Valpy and Chaplin*, Law Rep. 7 Chanc. 289.

[And see *infra* H 1.]

*Liability of company in respect of acts of managing director.* [See *supra* D 4, 5, and *infra* D 14.]

(f) *Authority to enter appearance for trustee of banking company.*

12.—The deed of settlement of a banking company, provided that where property was vested in trustees, the directors should have power to direct any actions or suits to be commenced or defended on account of the property of the bank, and to direct the necessary parties to such actions and suits to carry them on or defend them, and that such parties should be indemnified:—Held, that the solicitors of the bank were justified in entering an appearance without his knowledge for a trustee who had executed the deed, and who was made a co-defendant, by persons claiming adversely to the bank. *Heinrich v. Sutton*, Law Rep. 6 Chanc. 220.

(g) *Directors.*

(1) *Powers.*

(i) *As to funds of company.*

13.—The governing body of a corporation, which is in fact a trading partnership, cannot in general use the funds of the community for any purpose other than those for which they are constituted, whether that governing body is exclusively directors, or a council general, or the majority at a general meeting of the company. Therefore the special powers given either to the directors or to a majority by the statutes or other constituent documents of the association, are always to be construed as subject to a paramount and inherent restriction, that they are to be exercised in subjection to the special purposes of the original bond of association. That is not a mere canon in the English Municipal Law, but a great and broad principle, which must be taken (in the absence of proof to the contrary) as part of any given system of jurisprudence. *Pickering v. Stevenson*, 41 Law J. Rep. (N.S.) Chanc. 493; Law Rep. 14 Eq. 322.

The costs of a prosecution for libel instituted by the directors of a trading company are not properly payable out of the assets of the company. Such payments will accordingly be restrained for the future; but it does not follow that the directors will be ordered to repay past costs so discharged by them. *Ibid.*

(ii) *Purchases.*

14.—The articles of association of a loan and discount company gave the directors power to purchase, with the company's moneys, the shares of any shareholder, and also gave them power to appoint a general manager to perform such duties as they might determine:—Held, that the power to purchase shares, which was expressly given to the directors themselves, could not be delegated by them to the manager. Held also, that the manager could not, by implication, bind the company by a contract to purchase shares, such an act not being within the ordinary scope of the authority of the manager of such a company. *In re the County Palatine Loan and Discount Co. (Lim.)*; *Cartmell's case*, 43 Law J. Rep. (N.S.) Chanc. 588; Law Rep. 7 Chanc. 691.

In 1871 the manager told one of the shareholders that the company would purchase his shares. The shareholder thereupon executed a transfer to two trustees for the company. They, however, knew nothing of the transfer, and had not authorised the making of it. It was registered in the books of the company, and thenceforth the transferor was not treated as a shareholder, but received interest on the purchase money, which he left on deposit with the company. In 1873 the company was ordered to be wound up:—Held, that the transferor had not ceased to be a shareholder, and that he was liable as a contributory. *Ibid.*

15.—Bill by a company in liquidation against its surviving directors, and the executors of a deceased director, seeking to make them liable for all loss sustained by reason of their having purchased the goodwill and undertaken the liabilities of a bill-broking and money-dealing business, which had turned out a losing concern. The bill shewed that the directors were authorised by the memorandum and articles of association to purchase the business in question upon such terms and under such stipulations as to guarantee or otherwise as might be agreed upon, but alleged that under the circumstances of the case the directors ought not to have completed the transaction without the sanction of a general meeting, and that they had in fact exercised their function so imprudently, with such want of wisdom and judgment, both in purchasing the business at all and in not taking mortgages on the private property of the vendors, that they ought to be fixed with the consequences thereof. The bill raised no implication of fraud, *mala fides* or personal misconduct against the directors; nor did it distinctly charge them with gross negligence:—Held, affirming the judgment of the Lord Chancellor (Hatherley), on demurrer by the executors of the deceased director, that a bill could not be maintained in a Court of Equity for any loss beyond

the money which had passed into the directors' hands; that as the main object of the company was to purchase a business necessarily of a hazardous and speculative character, the charges in the bill did not amount to such a breach of trust on the part of the directors as to fix the estate of the deceased director with liability for the loss which had accrued. That the purchase of the business being strictly *intra vires* of the directors, being in fact the object for which they were called into existence, they were not responsible for the ruinous results of that purchase. That as the prospectus was issued after the purchase, the liability of the directors for having made the purchase was not affected by any statements in the prospectus. That the power to purchase under such stipulations as to guarantee as might be agreed upon did not imply that the directors were bound to take mortgages on the property of the vendors. *Overend, Gurney & Co. (Lim.) v. Gibb* (H.L.), 42 Law J. Rep. (N.S.) Chanc. 67; Law Rep. 5 E. & I. App. 480.

(iii) *As to contracts to take shares.*

16.—By the 48th clause of the articles of association, general powers of management were given to the directors, including power to "alter, rescind, or abandon contracts," and generally to act as they thought fit for the benefit of the company. By another clause it was declared that the company might, "with the sanction of a special resolution previously given in general meeting," decrease its capital by purchasing its own shares, or cancelling unincreased shares, or postpone the issue of shares. T., the secretary of the company, agreed to take up 1,000 shares, "for the purpose of providing money for the working of the concern," 100 shares to be taken up per month. When he had taken up 850 shares, the directors without the sanction of a general meeting agreed, in consideration of his immediately resigning the secretaryship, to release him from his obligation to take the remaining 150 shares:—Held, that they had power to do so, and that T.'s name must not be on the list of contributories in respect of the 150 shares. *In re Nantios Consols Mining Co.; Thomas's Case*, 41 Law J. Rep. (N.S.) Chanc. 365; Law Rep. 13 Eq. 437.

17.—Directors having power to compromise claims made against, or owing to, their company, or to settle disputes arising between the company and any other body or person, have power to compromise a *bona fide* claim by a shareholder to be removed from the list of contributories, and to annul the allotment to him, provided the claim is fairly a matter of dispute and no ulterior purpose is sought to be accomplished by the compromise. *Dixon v. Evans* (H.L.), 42 Law J. Rep. (N.S.) Chanc. 139; Law Rep. 5 E. & I. App. 606.

(iv) *Powers individually.*

18.—The concurrence of directors in an act which they are empowered to do may be given separately and without any meeting of the directors in one place. *In re Bonelli's Electric*

*Telegraph Co. (Lim.)*; *Collié's Claim*, 40 Law J. Rep. (N.S.) Chanc. 567; Law Rep. 12 Eq. 246.

Therefore where the directors of a Telegraph Company (limited) were empowered by the articles of association to manage all the affairs of the company, and amongst other things to sell any property of the company, and to employ agents to transact business relative to the objects of the company at such remuneration as they should think fit, and the company in general meeting passed a resolution for the sale of their undertaking to the government, and then all the directors separately, and without any meeting or resolution of the board, entered into an agreement with a certain person to employ him as their agent in negotiating the sale, and pay him for his services a commission graduated in a rising scale, and which, at the price for which the sale was ultimately effected, amounted to 25 per cent. on that price,—Held, that the agreement was valid and binding on the company, and the agent was entitled to his commission under it. *Ibid.*

(v) *Inequitable use of powers.*

19.—Where directors call the annual meeting of a company earlier than usual, in order to disqualify certain transferees of shares from voting, the directors were restrained from calling the meeting before the transferees were qualified. *Cannon v. Trask*, 44 Law J. Rep. (N.S.) Chanc. 772; Law Rep. 20 Eq. 669.

(2) *Liabilities.*

(i) *Personal liability under contract.*

20.—The plaintiff lent money to a building society, established under 6 & 7 Will. 4. c. 32, and received the following certificate—"I. P. Benefit Building Society. This is to certify that R. has this day deposited the sum of 70l. with the I. P. Benefit Building Society, for a period of three months certain, upon which interest at the rate of 5l. per cent. per annum will be allowed." This certificate was signed "W., L. (the defendants), directors." The plaintiff afterwards discovered that the rules of the society did not empower it to borrow money, and sued the defendants:—Held, the Court having power to draw inferences of fact, that the defendants were personally liable, as the certificate amounted to a warranty on their part that the society had power to borrow money. *Richardson v. Williamson*, 40 Law J. Rep. (N.S.) Q. B. 145; Law Rep. 6 Q. B. 276.

21.—The plaintiff advanced money for the purposes of a joint-stock company in which he was a shareholder, and received a promissory note: "We, the directors of the Isle of Man, &c., Co. (limited), do promise to pay to John Dutton the sum of 1,600l. sterling, with interest at the rate of," &c. It bore the seal of the company, and was signed by four directors. The plaintiff had stated that he would lend the money to the directors only:—Held, that the directors who signed the note were personally liable upon it. *Dutton v. Marsh*, 40 Law J. Rep. (N.S.) Q. B. 175; Law Rep. 6 Q. B. 361.

[And see *infra* D 29, 50.]

(ii) *Liability for breach of trust.*

**22.**—The infant children of W., a director of a company, by their father's advice applied for shares in the company which were allotted to them, the amount due upon allotment being paid by W. The whole number of shares in the company was subscribed for. The company was subsequently wound up, and the children, who at the date of the winding-up order were still on the register, were taken to have repudiated the shares allotted to them:—Held, that W.'s conduct in allowing the allotment of shares to his infant children was a breach of trust within the meaning of the 165th section of the Companies Act, 1862, and that W. was consequently liable to contribute to the assets of the company by way of compensation for the loss sustained by the company by reason of the non-payment of the calls by the infant allottees. Also, that the fact that all the other shares had been allotted was sufficient to support the presumption that these shares would have been taken by other persons, and consequently that the company had sustained loss by reason of their having been allotted to the infants. *In re the Crenver and Wheel Abraham United Mining Company (Lim.)*, 42 Law J. Rep. (n.s.) Chanc. 81; Law Rep. 8 Chanc. 45.

**23.**—Shares in a company which had no power to hold shares were placed in the name of a director in trust for the company. He paid calls on the winding up of the company; and he recovered contributions from those of his co-directors who were privy to the facts. A director who attended a meeting was held to be affected with notice of a resolution confirmed at that meeting. But a director who approved a transfer was held to be not affected with notice of circumstances relating to the transfer. *Ashurst v. Mason and Ashurst v. Fowler*, 44 Law J. Rep. (n.s.) Chanc. 337; Law Rep. 20 Eq. 225.

**24.**—A bill was filed by a shareholder in a waterworks company, incorporated by Act of Parliament, on behalf of himself and the other shareholders, except the defendants, against the company, the directors, and the promoters of a rival bill, withdrawn in the session of 1874, alleging that the withdrawal of the bill was the result of a corrupt agreement (which was stated in the bill) between the directors and the promoters; that the directors had paid to the promoters, out of the funds of the company, the sum of 5,500*l.* in pursuance of the agreement; that the promoters well knew that that sum was paid out of the funds of the company, and the directors had no authority to pay it; and that no resolution was ever passed at any meeting of the shareholders authorising or confirming such payments; and charging that the sum of 5,500*l.* was illegally paid out of the funds of the company to the promoters, with notice that the same was so paid to them illegally and by a breach of trust, and that they concurred therein; and praying a declaration that the agreement and the payment of the 5,500*l.* was not binding on the company; that an account might be taken of the moneys so paid, and that the directors and promoters might repay the same,

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with interest:—Held, on demurrer, that the bill could not be sustained, for the company were the proper plaintiffs in a suit to bring back the fund, and it was not alleged that they refused to institute a suit, or that there was anything to prevent their doing so. Leave to amend was given. *Russell v. The Wakefield Waterworks Company*, 44 Law J. Rep. (n.s.) Chanc. 496; Law Rep. 20 Eq. 474.

[And see supra D 15.

(iii) *Liability for misrepresentation or omission in prospectus.*

**25.**—In proceedings in equity for damages, by one who has been deceived to his own injury by the misrepresentations of another, made in a prospectus, the only amount of delay which is a bar to relief is that fixed by the Statute of Limitations as to actions for deceit at law. *Peek v. Gurney (H.L.)*, 43 Law J. Rep. (n.s.) Chanc. 19; Law Rep. 6 E. & I. App. 377.

Non-disclosure of material facts, though a ground for setting aside an allotment or purchase of shares, is not a ground for an action for deceit or for proceedings in equity in the nature of such an action. *Ibid.*

The office of a prospectus is to invite persons to become allottees, and, the allotment having been completed, such office is exhausted and the liability to allottees does not follow the shares into the hands of subsequent transferees—*Bedford v. Bagshaw* (4 Hurl. & N. 538; s. c. 29 Law J. Rep. (n.s.) Exch. 59), and *Bagshaw v. Seymour* (18 Com. B. Rep. 903; s. c. 29 Law J. Rep. (n.s.) Exch. 60, note), disapproved; *Scott v. Dixon* (29 Law J. Rep. (n.s.) Exch. 62, note), and *Gerhard v. Bates* (2 E. & B. 476; s. c. 22 Law J. Rep. (n.s.) Q.B. 364) distinguished. *Ibid.*

A company was formed for taking to a bill broking business of long standing and high credit. The prospectus stated that the good-will of the old firm had been purchased for 500,000*l.*, half to be paid in cash, half in shares with 15*l.* per share credited; and that the vendors guaranteed the company against loss on the assets or liabilities transferred. The liabilities of the old firm exceeded its *bond fide* assets by upwards of 4,000,000*l.*, or, including the value of the private estates of the members of the old firm, by upwards of 2,000,000*l.* Upwards of 4,000,000*l.* of almost hopelessly bad debts were entered in the balance-sheet prepared by the old firm with a view to the transfer as assets worth 20*s.* in the *l.* By a deed executed between the company and the old firm, referred to in the prospectus, power was given to the directors of the company to reserve such accounts as they should think fit, to be wound up by the old firm. And by a second deed which was executed soon after the prospectus was issued, these bad or suspicious accounts were excepted and were left for collection in the hands of the old firm during three years and a half, at the end of which time, if these accounts should have realised more than the 4,000,000*l.*, the old firm was to have the benefit of the excess, and if they realised less than the 4,000,000*l.* the old firm was to

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make good the deficiency. In the meantime the 250,000*l.* cash, and the whole of the shares allotted to the members of the old firm as the price of the goodwill of their business, were to be held in suspense:—

Held, that this prospectus not only intentionally concealed material facts, but also contained statements amounting to an actual misrepresentation, for which the promoters who signed it would be personally liable either at law or in equity to one who, on the faith of the prospectus, had applied for and obtained an allotment of shares in the company. But Held, affirming the Master of the Rolls, 41 Law J. Rep. (N.S.) Chanc. 436; Law Rep. 13 Eq. 79, that one who purchased shares in the open market had no remedy against the promoters, though he bought on the faith of the representations contained in the prospectus. *Ibid.*

One who took no part in the preparation or issuing of the prospectus, but, with full knowledge of all the facts, consented to be a director and allowed his name to remain unchallenged at the foot of the prospectus, and signed the memorandum and articles of association which referred to the prospectus was held as liable as the other directors who prepared and issued the prospectus. *Ibid.*

One of the directors having died before the suit was instituted,—Held, that as the suit was, not to recover profits derived by their testator or by his estate, but to recover damages for the wrong done by him, the suit could not be sustained against the executors of such deceased director, either in a Court of Equity or in a Court of Law, on the principle *actio personalis moritur cum persona*. *Ibid.*

Where the judgment of the Court below was affirmed on appeal, though on totally different grounds, the appeal was dismissed with costs. *Ibid.*

Directors may not be liable to a criminal prosecution under 24 & 25 Vict. c. 96, s. 84, and yet may be liable in a Court of Equity to indemnify persons taking shares on the faith of representations made by them in a prospectus. *Ibid.*

26.—The 38th section of the Companies Act, 1867 (30 & 31 Vict. c. 131), enacts that “every prospectus of a company” “shall specify the dates and names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof before the issue of such prospectus;” “and any prospectus” “not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract.” A declaration, after alleging the defendant to have been director of a certain corporation, and that before the issue of the prospectus the promoters of the said corporation had entered into a contract with the defendant, by which, in consideration of the defendant’s name appearing in the prospectus as such director, the promoters were to pay him a certain sum, averred that such contract was not specified upon the pro-

spectus, and that the defendant knew of the said contract, and knowingly issued the prospectus with fraudulent intent to induce the plaintiff to take bonds of the said corporation; and that the plaintiff took such bonds on the faith of the said prospectus, without having had notice of the said contract; and by reason of the aforesaid fraud of the defendant the plaintiff lost the value of the said bonds:—Held, that the declaration was bad as a declaration on the 38th section, since that section does not apply to the case of a bondholder, and that the declaration if treated as a declaration at common law for a fraudulent representation, was embarrassing, and likely to delay the fair trial of the action, within the meaning of section 52 of the Common Law Procedure Act, 1862. *Cornell v. Torrens*; *Same v. Hay*; *Same v. Massey*, 42 Law J. Rep. (N.S.) C. P. 136; Law Rep. 8 C. P. 328.

Quære—if section 38 of 30 & 31 Vict. c. 131, gives a cause of action where a prospectus is issued contrary to that section. *Ibid.*

(iv) *Incapacity of director to profit by his office.*

27.—The rule that neither a director or other person holding a fiduciary position with regard to a company, nor any firm of which he is a member, may derive profit from any contract with the company, or from the employment of the company’s funds in any matter in which he or his firm has an interest, can only be set aside by express stipulation between the parties and on a clear explanation of the full extent and nature of such interest. *The Imperial Mercantile Credit Association v. Coleman* (H.L.), 42 Law J. Rep. (N.S.) Chanc. 644; Law Rep. 6 E. & I. App. 189.

By one of the articles of association of the I. company, it was provided that the office of a director should be vacated if he should contract or participate in the profits of any contract with the company, or in the profits of any work done for the company without declaring his interest, and no director so interested should vote at any meeting or on any committee of the directors on any question relating to such contract or work. C., who was a member of a firm of stockbrokers, and also a director of the I. company, proposed to sell to his company a contract for placing railway debentures at a price considerably higher than the price at which his firm had agreed to place them for the railway company. At the meeting of the directors, at which his proposal was taken into consideration, he stated that he had an interest in the sale of the debentures and retired from the board-room; but he did not state distinctly either the nature or the amount of his interest. The proposal was accepted, and C.’s firm cleared a large profit out of the transaction:—Held, that he and his firm must refund to the company the whole of the profit derived by him or them from the transaction, with interest at four per cent. *Ibid.*

The decision of the Lord Chancellor (40 Law J. Rep. (N.S.) Chanc. 262; Law Rep. 6 Chanc. 558) reversed. *Ibid.*

28.—A director of a company formed to pur-



chase certain oil-works received from the vendor out of the purchase money paid under the contract, which was approved and carried out with his concurrence, the sum of 1,000*l.* to pay up shares for which he had signed the memorandum of association. There was some question whether the 1,000*l.* was paid under a previous general agreement for his indemnity, or whether the agreement was only that his director's qualification should be found in vendor's fully paid-up shares, but afterwards, as an act of grace, the vendor supplied the money to satisfy his liability, when it was found that his subscription shares must be paid in cash. The money was paid at a board meeting, where cheques for 68,000*l.* were handed to the vendor's agent on account of the purchase money, the contract having been approved, and part of the purchase money paid some time previously. The director in question joined in signing all the cheques but one for 1,000*l.*, which being handed to the vendor's agent, was then and there indorsed to the director, who paid it into his banking account, and next day drew a cheque in payment of his shares:—Held, that in either view of the doubtful circumstances, the company could reclaim the money. *In re the Canadian Oilworks Corporation; Hay's case*, 44 Law J. Rep. (N.S.) Chanc. 721; Law Rep. 10 Chanc. 593.

The director had subsequently paid for the company's use a sum exceeding 1,000*l.*, and, in the winding up of the company, claimed a right of set-off;—Held, that the company might elect to treat the 1,000*l.* as their own, and say that the shares paid up therewith were never paid at all. Their present claim being thus for calls, no right of set-off was allowed. *Ibid.*

(v) *Liability in respect of overdrawn banking account.*

29.—Directors of a company are not to be held personally liable to find cash for cheques drawn by them as officers of their company upon the company's bank, and which the bank may choose to honour when the company has no funds at the bank. A letter written by such directors, at a time when the company has funds at the bank, requesting the bankers to honour cheques of the company drawn in a particular manner, is only an intimation not to treat cheques as cheques of the company, unless signed in that manner; it is not any representation either of any authority in the directors to overdraw the account or that there will be funds forthcoming to answer the cheques, and it does not imply any undertaking on the part of any director signing it that he will personally pay or be answerable for any cheques, though drawn in that particular manner, if they should not be paid by the company. *Beattie v. Ebury* (H.L.), 44 Law J. Rep. (N.S.) Chanc. 20; Law Rep. 7 E. & I. App. 103.

As neither the directors who signed such letter nor those who, by cheques drawn in conformity therewith, subsequently overdraw the account incur any personal liability, so neither do such directors as at subsequent meetings confirm the

letter, or acquiesce in the cheques drawn in conformity with it. *Ibid.*

Bankers, to whom on such cheques large sums were owing by a railway company, having obtained a transfer to two of their number of preference shares, on which nothing had been paid, as a collateral security for the advances made by them,—Held, that as on the literal construction of the correspondence which resulted in the transfer there was nothing to shew that the shares were to be fully or at all paid up, there was no misrepresentation or liability on the part of the directors to pay what was due upon the shares. But that under the circumstances the bankers were entitled to be relieved from liability in respect of such shares, and to have their names cancelled in the register of the shareholders of the company. The House refused to delay the order for payment by the appellants, the bankers, of the respondents' costs until after their names should have been taken off the register. *Ibid.*

Decision of the Court below (41 Law J. Rep. (N.S.) Chanc. 804; Law Rep. 7 Chanc. 777) affirmed. *Ibid.*

(vi) *Liability for solicitor's costs.*

30.—A director is not liable to his solicitor for legal expenses incurred by his company, nor is a liquidator in a voluntary winding up. But a director is liable for costs of defending a suit to which he is made party as director, and for costs of opposing a winding up petition in his own name. *In re Trueman; Hooke v. Piper*, 41 Law J. Rep. (N.S.) Chanc. 585; Law Rep. 14 Eq. 278.

(3) *Liability of directors as shareholders.*

(i) *Director's qualification.*

31.—A special Act of Parliament forming a company provided that there should be four directors, and that the qualification of a director should be the possession of twenty-five shares in the company, and it named K. as one of the first directors. K. signed the bill in parliament, which subsequently passed as the Act, but never applied for nor had allotted to him any shares in the company:—Held, in the winding up of the company, that K. was a contributory to the extent of twenty-five shares. *In re the North Kent Railway Extension Co. (Lim.)*; *Kincaid's case*, 40 Law J. Rep. (N.S.) Chanc. 19; Law Rep. 11 Eq. 192.

32.—A person who accepts the office of director of a public company, and acts in that capacity, will be held to have contracted to take the minimum number of shares which constitute a director's qualification. *In re the Great Oceanic Telegraph Company (Limited)*; *Harward's case*, 41 Law J. Rep. (N.S.) Chanc. 283; Law Rep. 13 Eq. 36.

The name of H. was advertised as a director of a public company, he attended a meeting of directors at which a committee was appointed, who subsequently allotted to him fifty shares, being the number required by the articles of association as a director's qualification, and he signed a cheque as a director; but he never otherwise

acted as a director and never applied for shares or received notice of the allotment to him:—Held, that H. must be considered as having applied for and contracted to take the number of shares constituting a director's qualification, and that consequently he was a shareholder, and must be placed upon the list of contributories in respect of fifty shares. *Ibid.*

**33.**—The name of an acting director qualified by an allotment to him of fifty shares as fully paid was removed from the list of contributories on the ground that the payment was really collusive, and only by means of fictitious cheques. *In re the Empire Assurance Corporation; Leeke's case*, 40 Law J. Rep. (N.S.) Chanc. 254; Law Rep. 6 Chanc. 469.

**34.**—The subscribers of the memorandum of a limited company passed a resolution allotting to F. and others twenty-five shares each (the director's qualification), and appointed them directors. F. attended the next board meeting, and a few days later applied for twenty shares. On the company being wound up, he was put on the list of contributories for forty-five shares. He stated that he applied for the shares as his director's qualification, which he knew to be 500*l.* worth of shares, but thought it was twenty 25*l.* shares, and not twenty-five 20*l.* shares; and that he did not know till some time after of the previous allotment of twenty-five shares. He was willing to remain on the list for five of the twenty-five shares, so as to make twenty-five in all:—Held, that he was a contributory in respect of the whole number. *In re the British and American Telegraph Company; Fowler's case*, 42 Law J. Rep. (N.S.) Chanc. 9; Law Rep. 14 Eq. 316.

**35.**—The first directors of a company registered, under the Companies Acts, 1862 and 1867, without any articles of association, were named in the memorandum of association. Before any ordinary general meeting of the company had been held, and within four months from the registration of the company, two extraordinary general meetings were held, at which special resolutions were passed, postponing the first ordinary general meeting of the company for three years, and providing that the "future qualification" of a director should be the holding so many shares in his own right:—Held, that the provision as to the directors' qualification did not affect the existing directors, who continued subsequently to act as such, so as to put them under any liability to take shares. The word "qualification" means requirement at the time of election. *In re the La Mancha Irrigation and Land Company (Lim.)*; *In re Hamilton*, 42 Law J. Rep. (N.S.) Chanc. 465; Law Rep. 8 Chanc. 548.

*Semble*—It is not required by the law that a director of a company registered under the Companies Acts, 1862 and 1867, should hold any shares in the company. *Ibid.*

**36.**—In March, 1865, G. was asked to become a director of a company. He then attended three board meetings of the directors, and his name was entered in the minute book as attending, but he alleged he merely came as a visitor,

and to see how the company was managed. He allowed a prospectus to be issued on which his name appeared as a director. In May, 1865, he wrote to the secretary, requesting that his name might be withdrawn, and though he afterwards acted for the company as auctioneer, he never again interfered as director. No shares were allotted to G., and his name did not appear on the register of members. In 1870 the company was ordered to be wound up. In July, 1873, the official liquidator, for the first time, fixed G. on the list of contributories, in respect of twenty shares, the number required by G. for his qualification as director:—Held, that having regard to the lapse of time, and as G. had entered into no actual contract to take shares his name was improperly placed upon the list. *In re the Freehold and General Investment Company (Lim.)*; *Green's case*, 43 Law J. Rep. (N.S.) Chanc. 629; Law Rep. 18 Eq. 428.

**37.**—By articles of association of a joint stock company the qualification for a director was fixed at fifty shares. The promoter of the company applied to B. to become a director, and promised to provide his qualification out of some fully paid up shares to which the promoter was entitled. B. consented and was appointed a director, and took his seat at the board. The promoter then requested the directors to allot to B. fifty of the promotion shares, which was done, the shares being entered in the register as fully paid up. B. never had any other shares. On the winding up of the company,—Held, affirming the decision of Wickens, V.C., that no contract to take shares other than the fully paid-up shares registered in his name could be inferred from B.'s acceptance of the office of director, and therefore he was not liable as a contributory. *Leeke's case* (40 Law J. Rep. (N.S.) Chanc. 172, 254; Law Rep. 11 Eq. 100, 6 Chanc. 469) explained. *In re the Metropolitan Public Carriage and Repository Company (Lim.)*; *Brown's case*, 43 Law J. Rep. (N.S.) Chanc. 153; Law Rep. 9 Chanc. 103.

**38.**—By the private Act of a Railway Company (with which the Companies Clauses Act, 1835, was incorporated) it was enacted that certain persons mentioned *nominatim* in the Act, and all other persons and corporations who had already subscribed or should thereafter subscribe to the undertaking, should be united into a company; that the directors should be six in number; that the qualification of a director should be the possession of fifty shares; that the persons specified by the Act and one other should be the first directors; and that at the first ordinary meeting of the company the shareholders might elect new directors, or continue in office the directors appointed by the Act, such directors being "if qualified" eligible for re-election. A. was one of the persons mentioned in the Act. He never applied for any shares in the company, nor had he any allotted to him, nor did he pay any money on account of a share. He was not re-elected a director at the first ordinary meeting, nor had anything to do with the company after that date. The company was ordered to be

wound up:—Held, that there was no difference between this case and *In re the North Kent Railway Extension Company*; *Kincaid's case* (40 Law J. Rep. (N.S.) Chanc. 19; Law Rep. 11 Eq. 152; No. 31 supra); and that A. was a contributory in respect of fifty shares. *In re the Teme Valley Railway Company*; *Forbes' case*, 44 Law J. Rep. (N.S.) Chanc. 356; Law Rep. 19 Eq. 353.

39.—Articles of association of a limited company provided that K. and two other persons should be the first directors of the company, that the qualification of a director should be the holding of fifty shares, and that the office of a director should be vacated if he ceased to hold the prescribed number of shares. K. signed the memorandum of association for ten shares, and also signed the articles of association. The prospectus of the company was published, containing K.'s name in the list of directors, but within three days after publication he gave to the secretary written notice of his withdrawal from the company, on the ground of misrepresentations of its character and objects made by the promoter, and he never acted as a director, nor applied for shares, nor had any shares allotted to him. The company was ordered to be wound up; and on an application by the official liquidator that K. should be settled on the list of contributories for fifty shares, including the ten shares for which he signed the memorandum of association,—Held, that the mere acceptance of the office of a director did not amount to a contract to take shares from the company, but that he was entitled to a reasonable time to qualify himself, and that having retired without acting as a director before the reasonable time for qualifying himself had expired, he must be placed on the list of contributories for ten shares only. *In re the Pelotas Coffee Company*; *Karuth's case*, 44 Law J. Rep. (N.S.) Chanc. 622; Law Rep. 20 Eq. 506.

40.—Where directors of a company adopted an agreement for the purchase of property from W., partly in cash, and partly in fully paid-up shares, and after completion of the contract each of them accepted on the nomination of W., the vendor, an allotment of 30 paid-up shares (being a director's qualification):—Held, that the transaction was the same as if the shares had been allotted to W., and transferred by him, and that whatever might be the liability of the directors for breach of trust under 25 & 26 Vict. c. 89, s. 165, or otherwise, they could not be fixed as contributories in respect of unpaid shares. Decision of the M. R. (Law Rep. 20 Eq. 580) reversed. *In re the Western Canada Oil Company*; *Carling, Hespler and Walsh's cases*, 45 Law J. Rep. (N.S.) Chanc. 5; Law Rep. 1 Chanc. D. 115.

[And see *infra* G 3.]

(ii) *Payment for shares.*

41.—The Companies Act, 1862, contains nothing to countenance the notion of anything but "money" being a satisfaction of the limited liability. *In re the Empire Assurance Corporation (Lim.)*; *The case of "The Executors of Leeke"*, 40

Law J. Rep. (N.S.) Chanc. 172; Law Rep. 11 Eq. 100: affirmed, on appeal, 40 Law J. Rep. (N.S.) Chanc. 254; Law Rep. 6 Chanc. 469.

The name of an acting director, qualified by an allotment to him of fifty shares, as fully paid up, was removed from the list of contributories on the ground that the payment was really collusive, and only by means of fictitious cheques. *Ibid*,

42.—Articles of association provided that each director should hold at least twenty-five shares of 10*l.* each; and that all the shares in the company should be fully paid-up. The directors were empowered to purchase the business of D. for 170,000*l.* in fully paid up shares. At the request of D. eight persons agreed to become directors, on condition that the shares necessary for their qualification should be provided by D. The directors agreed to purchase the business of D. for 168,000*l.* in shares, and 2,000*l.* in cash. D. drew eight cheques for 250*l.* each, and delivered them to the respective directors, who handed them to the secretary as payment in full for their shares. The company delivered the cheques back again to D., in payment of the 2,000*l.* cash, part of the purchase money. The company having been wound up,—Held, that this arrangement was nugatory, and that the directors were shareholders who had paid nothing on their shares, and were contributories on that footing. *In re Disderi & Company*, 40 Law J. Rep. (N.S.) Chanc. 248; Law Rep. 11 Eq. 242.

43.—The directors of a company by the articles of association were empowered to receive payments in advance of calls, and were to be paid a certain amount for their fees. The company fell into a state of utter insolvency, and the directors knowing this, in order to get rid of their liability on shares not fully paid up held by them, passed a resolution authorising any director to pay calls in advance. Under this resolution the directors from time to time paid to the account of the company large sums purporting to be advances on calls, and immediately afterwards they drew against these sums for their fees. The company was afterwards wound up. Upon summons by the official liquidator to enforce a second payment of the calls purported to have been paid under this arrangement,—Held, that the arrangement being a contrivance only for the benefit of the directors could not stand, the pretended payments in anticipation of calls were invalid, and the calls must be enforced. *In re the European Central Railway Company*; *Sykes' case*, 41 Law J. Rep. (N.S.) Chanc. 251; Law Rep. 13 Eq. 255.

44.—A., a director of a company, had taken shares in the company in order to obtain a certain agreement as to freight. The agreement was beneficial to A., but at the end of two years the company, which was then in difficulty, found the agreement onerous and entered into another agreement with A. that the first agreement should be annulled in consideration of a payment to A. of 1,800*l.* in cash, 200*l.* by a bill, and 10,000*l.* in shares, the shares being subject to a condition under which, in the events which happened, they were never issued. The 1,800*l.* was paid by credit-

ing that sum to the shares held by A. and his friends in the books of the company, thereby making all their shares in the company fully paid up. Two months after the second agreement a petition was presented for winding up the company, and subsequently an order for winding up was made on this petition:—Held, that the second agreement amounted to a payment in cash within the meaning of section 25 of the Companies Act, 1867, and that there was no further liability upon the shares. *In re the Paraguassu Steam Tramroad Company (Lim.)*, *Adamson's case*, 44 Law J. Rep. (n.s.) Chanc. 125; Law Rep. 18 Eq. 670.

(h) *Borrowing powers.*

45.—A company in difficulties, but not in the immediate prospect of a winding up, deposited the deeds of some freehold property with their bankers, to secure their current account, then largely overdrawn. They afterwards continued to draw upon their account, and to pay in moneys for a period of two months until the bank stopped payment. The company resolved upon a voluntary winding-up rather more than six months after the transaction:—Held, that the mortgage was valid. *In re the Patent File Company (Lim.)*, *The Birmingham Banking Company's Claim*, 40 Law J. Rep. (n.s.) Chanc. 190; Law Rep. 6 Chanc. 83.

The articles of association provided that the company might, with the sanction of a general meeting, borrow money not exceeding in amount one half of the nominal capital, upon mortgage:—Held, that the express power did not negative the general power, the rule being that a company may mortgage its property unless expressly prohibited by its articles from so doing. *Ibid.*

46.—It was provided by the articles of association of a limited company that the directors might, from time to time, borrow, on behalf of the company, any sum of money not exceeding one half of the nominal capital, for the time being, of the company, and might secure the repayment thereof, or raise any money authorised to be borrowed by them by mortgage of the undertaking, or by the issue, on behalf of the company, of debentures, promissory notes or bills of exchange, or in such manner as the directors deemed expedient:—Held, that the directors were thereby authorised to raise money by the issue of debentures at a discount. *In re the Anglo-Danubian Steam Navigation Company*; *Ex parte the International Financial Association*, 44 Law J. Rep. (n.s.) Chanc. 502; Law Rep. 20 Eq. 339.

47.—Where contemporaneous documents can be read in two ways, in one of which they appear consistent and in the other inconsistent, the construction is to be preferred which will render them consistent. *In re the Phoenix Bessemer Steel Company*, 44 Law J. Rep. (n.s.) Chanc. 683.

If one of two contemporaneous documents is ambiguous in its terms, and the other is clear, force is to be given to the document whose terms are clear, so as to interpret the one containing ambiguous terms. *Ibid.*

The memorandum of association of a limited

company stated one of the objects of the company to be the raising of money for the purposes of the company upon mortgage or charge of any property of the company, or upon the debentures, bonds, bills, notes, or any other security of the company, and the articles gave express power to mortgage future calls:—Held, to authorise a mortgage of future calls. *Ibid.*

48.—A charge on future book-debts, under a power to mortgage the property of a company, was upheld. *Bloomer v. The Union Coal and Iron Company*, 43 Law J. Rep. (n.s.) Chanc. 96; Law Rep. 16 Eq. 383.

49.—The deed of settlement of a joint-stock company gave power to the directors to mortgage the "property" of the company:—Held, that such power did not enable the directors to charge the unpaid capital of the company. *The Bank of South Australia v. Abrahams*, 44 Law J. Rep. (n.s.) P. C. 76; Law Rep. 6 P. C. 562.

[And see *infra* H 1.]

(i) *Debentures.*

50.—The directors of a railway company which had exhausted its statutable powers of borrowing money on debentures, published an advertisement in which they stated they were prepared to receive proposals for loans on debentures of the company "to replace loans falling due," the intention of the directors being to apply the money so raised in discharge of an equal amount of the then existing debentures. In consequence of such advertisement W. offered to lend 500*l.* on the debentures of the company. The directors accepted such offer and promised to issue a debenture to him when he was prepared with the money. On the faith of this W. paid the 500*l.*, and the directors gave the money to H., who had held debentures of the company, and directed him to transfer a debenture for 500*l.* to W., but H. kept the money without transferring any debenture, upon which the directors issued a new debenture of the company in favour of W., but which was not binding on the company as it was in excess of its borrowing powers:—Held, that on these facts the directors were to be deemed to have given W. a warranty that they had power to issue a debenture to him which was binding on the company, and they were therefore personally liable for the breach of such warranty. *Weeks v. Propert*, 42 Law J. Rep. (n.s.) C. P. 129; Law Rep. 8 C. P. 427.

51.—A company incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89), issued a debenture under the seal of the company, and countersigned by two of the directors and the secretary. By it the company promised, subject to conditions indorsed, to pay to the bearer the sum of 100*l.* upon the 1st of May, 1872, or upon any earlier day upon which it should be entitled to be paid off or redeemed according to the conditions. By the conditions the company contracted not only to pay the money, but also to cause a portion of the debentures to be drawn in a stipulated manner. Of late years a custom of trade

had prevailed to treat such bonds as negotiable instruments:—Held, that the debenture was not a negotiable instrument, and that therefore where it had been stolen from the owner, no action could be maintained upon it against the company by a person who claimed through the thief. *Crouch v. The Credit Foncier Company*, 42 Law J. Rep. (N.S.) Q. B. 183; Law Rep. 8 Q. B. 374.

*Issue of debentures at discount.* [See *supra* D 46.]

(k) *Acts ultra vires.*

(1) *Contracts and agreements.*

52.—An agreement between companies A. and B. (neither being registered under the Companies Act, 1862) for the transfer of the business of A. to B., although wholly *ultra vires* of company A. under its deed of settlement, may be carried out by registering company A. under that Act, and then passing resolutions for a voluntary winding up, and directing the liquidator to adopt the agreement. *Southall v. The British Mutual Life Assurance Society*, 40 Law J. Rep. (N.S.) Chanc. 97; Law Rep. 11 Eq. 65: affirmed, on appeal, 40 Law J. Rep. (N.S.) Chanc. 698; Law Rep. 6 Chanc. 614.

53.—The W. Company being formed for the purpose of making wharves, &c., covenanted by deed with the I. company, formed for the purpose of contracting for public works, that the latter company should construct the works, and should have the privilege of nominating future directors on the board of the W. Company, and the I. Company agreed to perform the works, also to pay until the works were finished seven per cent. on the capital from time to time paid up by the shareholders in the W. Company. The I. Company was to act as bankers for the W. Company, and all moneys received by the W. Company were to be paid to the I. Company, which company was to render a monthly account of all moneys paid by it by direction and on account of the W. Company, and the W. Company was to repay such moneys, together with a commission of thirty-five per cent. thereon. Both companies came to a winding-up before the contemplated works were commenced. But the I. Company received 72,000*l.* from the W. Company, and paid 50,000*l.* to the order of this company for the purchase of land:—Held, that the I. Company was not entitled to the commission of thirty-five per cent. on the 50,000*l.* paid to the order of the W. Company, for the whole deed was void, the W. Company having no power to allow another company to nominate its directors:—Held also, that the provision as to paying interest on the paid-up capital was illegal, was equivalent to a paying of dividends out of capital, and that the I. Company was not entitled to recover from the W. Company the amount of interest it had actually paid to the W. shareholders under that provision. *James v. Eve* (H. L.) 42 Law J. Rep. (N.S.) Chanc. 793; Law Rep. 6 E. & I. App. 335.

54.—Where during negotiations for, and with a view to the carrying out of, an amalgamation

between two companies, a shareholder in the company whose business is to be transferred applies through that company for shares in the transferee company, and the transaction ultimately fails of completion, there the applicant does not become a contributory to the transferee company. But it is otherwise where the shareholder makes a personal application for shares in the transferee company. *In re the Empire Assurance Corporation (Lim.)*; *Dr. Dougan's case*, 42 Law J. Rep. (N.S.) Chanc. 460; Law Rep. 8 Chanc. 540.

A power given to a special general meeting of a company "to sell, dispose or otherwise deal with" the business, &c., of the company, does not authorise a transfer of the business to another company upon the terms of an exchange by the members of the transferring company of their shares in that company for shares in the transferee company. *Ibid.*

55.—A resolution to sell a company's business under section 161 of the Companies Act, 1862, in consideration of shares in another company, must be an agreement to sell to such other company itself; and, therefore, an agreement to sell to an individual in consideration (in part) of shares in a company he intends to form is *ultra vires*, even if such agreement is intended to be followed by a resolution to wind up, and *a fortiori* if it is not. *Bird v. Bird's Patent Sewage Company*, 42 Law J. Rep. (N.S.) Chanc. 399; Law Rep. 9 Chanc. 358.

*Amalgamation ultra vires.* [See *infra* E 1-4.]

(2) *Ratification by shareholders.*

56.—The directors of a limited liability company, incorporated under the Companies Act, 1862, entered, on behalf of the company, into contracts with R., which were *ultra vires* and beyond the scope of the memorandum of association:—Held, per Blackburn, J., Brett, J., and Grove, J. (affirming the judgment of the Court of Exchequer), that as the contracts, although unauthorised, were not expressly or impliedly prohibited by the memorandum and the statute, they were capable of ratification by the unanimous shareholders. Per Archibald, J., Keating, J., and Quain, J. (*dissentientes*), that the contracts being *ultra vires* of the company were incapable of ratification. *Riche v. The Ashbury Railway Carriage and Iron Company, Lim.* (Exch. Ch.), 48 Law J. Rep. (N.S.) Exch. 177; Law Rep. 9 Exch. 224.

57.—Where directors of a company accepted and cancelled the shares of a shareholder, in a manner which was *ultra vires* as amounting to a purchase of the shares, and afterwards at a general meeting of the company the fact that the shares had been "forfeited" was mentioned to the shareholders and published in a circular, and the books of the company were open for inspection, but no objection was made:—Held, that the shareholders had ratified the directors' acts and could not open the transaction anew after profiting by the increased dividend arising therefrom. Where a shareholder has the means of knowing that directors have acted *ultra vires*, and makes no objection, he will be held bound by their acts. *The Phos-*

*phate of Lime Company v. Green*, Law Rep. 7 C. P. 43.

[And see *supra* D 1.]

(*l*) Register of shares.

(1) Rectification of register.

58.—Where directors in the exercise of a discretionary power have refused to register a transfer of shares, the Court will not compel them to give the reasons for their refusal unless the existence of some improper motive is alleged and proved against them; and the onus of such proof lies on the transferring shareholder. The jurisdiction of the Court to rectify a register under the Companies Act, 1862, s. 35, is general, but the exercise of it is discretionary. Order of the Master of the Rolls reversed. *In re the Gresham Life Assurance Society; Penney's Case*, 42 Law J. Rep. (N.S.) Chanc. 183; Law Rep. 8 Chanc. 446.

59.—A company issued fully paid-up shares as part of the consideration under a contract, before the registration of the contract. Upon proof that the persons to whom the shares were issued did not know at the time of issue that the contract had not been registered, the register of shareholders of the company was ordered to be rectified by striking out their names to the intent that the shares might be validly re-issued to them as fully paid-up shares. *In re the New Zealand Kapanga Gold Mining Company (Lim.)*; *Ex parte Thomas*, 42 Law J. Rep. (N.S.) Chanc. 781.

60.—Where there is no reason to the contrary under the articles of association of a company, it is the duty of directors to receive and register transfers at once, and this, although the object of the transfers is to distribute the shares and so to obtain a larger number of votes, and command greater influence at a meeting of shareholders already summoned. *In re the Stranton Iron and Steel Company*, 43 Law J. Rep. (N.S.) Chanc. 215; Law Rep. 16 Eq. 559.

61.—Where a holder of fully paid-up shares in a limited company applied by motion under the 35th section of the Companies Act, 1862, to have his name struck off the register of shareholders, on the ground that he had been induced to take the shares through misrepresentation and concealment of material facts in the prospectus, and his application had been granted in the Court below, the Lords Justices on appeal declined to dispose of the case, on the grounds that the effect of granting the application would be to entitle the applicant to recover from the company as of course the money he had paid for his shares, that the question would be more properly heard and determined in an action or suit than in a summary way upon an application of this kind, and that since the applicant's shares were fully paid up he would be subjected to no liabilities by being retained on the register pending such proceedings. They accordingly directed the motion in the Court below to stand over, with liberty to the applicant to take such proceedings as he might be advised. *In re the Ruby Consolidated Mining Company (Lim.)*; *Askeu's case*, 43 Law J. Rep. (N.S.) Chanc. 633; Law Rep. 9 Chanc. 664.

62.—A new company was formed under the Companies Acts, 1862 and 1867, for purchasing the assets, and carrying on the business of an old one. The members of the two companies were the same persons. The transaction was to be effected, and the purchase-money satisfied, by fully paid up shares. The shares were issued by the new to the old company; but no contract in writing was filed as required by the Companies Act, 1867, s. 25. The question, therefore, was whether, under that section, the shares could be considered as fully paid up? A motion was made by the new company to rectify its register by striking out the names of all the allottees in order to file the contract, and then replace the names:—Held, that the register might be rectified accordingly. *In re the Droitwich Salt Company (Lim.)*, 43 Law J. Rep. (N.S.) Chanc. 581.

63.—When, in performance of an agreement to allot fully paid-up shares, the shares have been allotted before the agreement has been filed with the Registrar of Joint Stock Companies, the company may cancel the shares and issue new ones without coming to the Court. *In re the Poole Fire Brick and Blue Clay Company*; *Hartley's case*, 44 Law J. Rep. (N.S.) Chanc. 95; Law Rep. 18 Eq. 542; affirmed, on appeal, 44 Law J. Rep. (N.S.) Chanc. 240; Law Rep. 10 Chanc. 157.

(2) Suit to remove name.

64.—The plaintiff applied for and received an allotment of scrip certificates to bearer under a prospectus which stated that "on registration of the scrip, of which due notice will be given," the certificates would be divided into five shares of 10*l.* each:—Held, that he could not be registered as a shareholder without his consent. *McIlwraith v. The Dublin Trunk Connecting Railway Company*, 40 Law J. Rep. (N.S.) Chanc. 652; affirmed, on appeal, 41 Law J. Rep. (N.S.) Chanc. 262; Law Rep. 7 Chanc. 134.

After his name had been wrongfully put on the register, new directors were appointed, who, when asked to remove the name, replied that they knew nothing of the circumstances under which it was put on, and through the change of officials were unable to ascertain, and they could not undertake the responsibility of removing the name. To a bill filed against the company alone, they refused to enter an appearance:—Held, that they were properly made parties by amendment, and must pay the costs of the suit. *Ibid.*

(3) Description of firm.

65.—L., as security for a loan, transferred shares in a company to a firm. At date of transfer L. had no shares standing in his name, though subsequently a sufficient number were transferred, but these were not registered at the date of registration of the transfer of shares to the firm. Upon repayment of the loan the firm re-transferred the shares. Two books were kept by the company, one called "Register of Members," which however referred to the other, called "Shareholders' Register;" in the latter only was inserted the name of M. H. W. & Co. The company was wound up

before return made to registration office, whereupon M. H. W. & Co. were placed upon the B list of contributories, L. having previously died insolvent:—Held (affirming the decision of the Master of the Rolls), that the fact of the transfers from L. having been registered before the registration of transfers to him did not render the transfer by L. invalid, and that the entry in the register of shareholders was sufficient. *In re the Land Credit Company of Ireland (Lim.)*; *Weikersheim & Co.'s case*, 42 Law J. Rep. (n.s.) Chanc. 435; Law Rep. 8 Chanc. 831.

*Duty of officer to see that charge is registered.* [See supra D 11.]

(m) *Powers of majority of shareholders.*

66.—A shareholder in a joint stock company entered into an agreement with the majority of the shareholders to amalgamate the company with another company, and it was provided that the shares of any shareholder who refused to enter into this agreement should be divided amongst the majority:—Held, that this agreement was not binding on any shareholder who was not a party to it, and that the allottees were trustees in respect of their shares. *Smith v. The Bank of Victoria*, 41 Law J. Rep. (n.s.) P. C. 34.

67.—Though a shareholder in a company is entitled to vote with an exclusive view to his own interest, yet where the majority of shareholders deal with the assets of the company for their own benefit, to the exclusion of the minority, the Court will, at the instance of the minority, restrain such dealing, and compel the majority to account in respect of such dealings. *Menier v. Hooper's Telegraph Works*, 43 Law J. Rep. (n.s.) Chanc. 330; Law Rep. 9 Chanc. 350.

A telegraph company instituted a suit against one of their directors, asserting a claim to a concession which he had obtained for his own benefit. Afterwards, by the influence of one shareholder, who held a majority of the shares in the company, the suit was compromised and a release of the claim was executed. It was also resolved to wind up the company voluntarily, and a liquidator was appointed. A bill was filed by one of the minority of shareholders (on behalf of himself and the rest of the minority) against the company, the liquidator, and the holder of the majority of the shares, alleging that the motive for entering into the compromise was the obtaining by that shareholder of a secret benefit to himself, and praying that he might be ordered to account for that which he had so received. On demurrer,—Held (affirming a decision of Bacon, V.C.), that the suit was sustainable, and that the bill was properly filed in the name of a shareholder. *Ibid.*

(n) *Capital.*

(1) *Reduction and redistribution.*

68.—Before a resolution can be passed for reduction of a capital of a company whose regulations do not authorise such reduction, there must  
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be a separate special resolution varying the regulations. *In re the West India and Pacific Steamboat Company*, Law Rep. 9 Chanc. 11, n.

69.—Creditors, including the holders of debentures payable to bearer, who do not oppose an order to confirm reduction of capital, are deemed to consent. Where a company, at the date of an order confirming reduction of capital, had used the words, “and reduced,” as part of its title, for more than three months, it was ordered to use those words for a fortnight longer. In the absence of special circumstances, the order for confirmation was ordered to be advertised once in the *London Gazette*, and twice in each of three London daily papers. *In re the Credit Foncier of England*, 40 Law J. Rep. (n.s.) Chanc. 187; Law Rep. 11 Eq. 356.

70.—A company not authorised by its original articles of association to accept surrenders of shares, by special resolutions altered their articles so as to authorise the cancellation of existing shares, and the issue of new shares in lieu thereof under an arrangement which varied the liability of the respective shareholders, diminishing the liability of some of them on their shares, and increasing that of others, but which in the ultimate result materially increased the amount of capital raiseable on all the shares collectively:—Held, that the alteration was *intra vires* and effectual, and that a surrender of the old shares under the altered articles was valid. *In re the County Palatine Loan and Discount Co.*; *Thasdale's case*, 43 Law J. Rep. (n.s.) Chanc. 578; Law Rep. 10 Chanc. 54.

[And see supra D 16].

(2) *Expenditure chargeable to capital.*

71.—A waterworks company constructed their works themselves in preference to entrusting them to a contractor in the ordinary manner. In the course of construction they expended large sums, which they were compelled to raise by borrowing, or by the issue of preference shares, which respectively bore interest or dividends from the time of issuing them, while the works upon which the money was expended being yet incomplete, were unproductive. The preference shareholders had an option of converting their shares into ordinary shares during a period which would not expire until after the completion of the works. If the works had been executed by a contractor in the usual manner, he would have been paid by stated sums at deferred periods, and the interest on the moneys advanced by him during the progress of the works would in effect have been paid out of capital:—Held, that the interest or dividends accruing due in respect of the money borrowed or raised by preference shares, and expended during the progress of the works, ought, as between the ordinary and the preference shareholders, to be charged to capital, and not to income. *Bardwell v. The Proprietors of the Sheffield Waterworks*, 41 Law J. Rep. (n.s.) Chanc. 700 Law Rep. 14 Eq. 517.

[And see supra D 53, and *infra* I 23.]

(c) *Right of pre-emption as against company.*

**72.**—An Act of Parliament gave a company power to buy lands for the purpose of its undertaking, and to re-sell any lands which it might purchase but not make use of, and directed it before selling any land, to offer the same to the person or persons of whom it was purchased, but it fixed no limit of time within which the sale of surplus land was to be made:—Held, that the right of pre-emption thus given was merely personal to an individual from whom land was purchased, and was extinguished on his death. *The Highgate Archway Company v. Jeakes*, 40 Law Rep. (N.S.) Chanc. 408; Law Rep. 12 Eq. 9.

(p) *Scheme of arrangement under Joint Stock Companies Arrangement Act, 1870.*

**73.**—The A. Life Assurance Company had, during the period of its existence, absorbed a number of other similar companies, undertaking their liabilities. The A. Company and several of the absorbed companies were ordered to be wound up. Numerous policies issued by the absorbed companies were still current, some only of the holders of these having accepted the A. Company in lieu of the absorbed company. In order to put an end to the liquidation, a scheme of reconstruction was proposed and accepted by large majorities, at meetings held, both of the shareholders and creditors of the A. Company, and also of the policy-holders of the absorbed companies. The outline of the scheme was, that the contributories of the A. Company should pay up something more than the full amount of their shares; the contributories of the absorbed companies should pay such an additional sum as would be sufficient to raise the whole fund to the amount of the claims, less five per cent., and that the creditors should give up five per cent. of their claims. The fund thus raised was to be handed over to trustees for a new assurance company, which was to take over all the business, and undertake to fulfil all liabilities, the trust fund being held in trust to secure payment:—Held, that as it was practically impossible to ascertain the true amount of the valid claims upon all the current policies, the Court could not be judicially satisfied that majorities, in number representing three-fourths in value of the creditors of the several companies, had respectively assented to the scheme, and therefore the Court had no power, under the Joint Stock Companies Arrangement Act, 1870, to sanction the scheme. *In re the Albert Life Assurance Company*, 40 Law J. Rep. (N.S.) Chanc. 505; Law Rep. 6 Chanc. 381.

Held, also, that as regards the absorbed companies, the 95th, 159th and 160th sections of the Companies Act, 1862, did not apply. *Ibid.*

## (E) AMALGAMATION AND TRANSFER OF BUSINESS.

(a) *Validity of amalgamation.*(1) *Variation between two parts of contract.*

**1.**—An agreement was entered into for an amalgamation of the P. Company, Limited, with the U. Company, Unlimited, upon the terms that

the U. Company should purchase the business and property of the P. Company for a sum of money, and should issue to shareholders in the P. Company shares in the U. Company to the same value and with the same amount considered as paid up thereon as the shares previously held by such shareholders in the P. Company, and should take upon itself and indemnify the officers of the P. Company against all the debts and liabilities of the P. Company. This agreement was reduced into writing, and engrossed in duplicate for the purpose of one part being executed by each of the two companies. Before executing their part the U. Company inserted in it, without notice to the P. Company, a clause limiting the liability of the U. Company under the agreement to the amount of its capital stock and property. The part executed by the P. Company contained no such provision.

W., a paid-up shareholder in the P. company, applied for 100 shares in the U. Company upon the terms of the above agreement. In reply he received a letter from a person purporting to be the general manager of the U. Company stating that the directors had allotted him a certain number of shares in pursuance of the arrangement between the companies, and that the amount to be credited on such shares would be the proportionate amount of the net assets of the P. Company. W. received this letter at the end of August whilst absent from home. In the beginning of October he came to London and asked for an explanation about the letter, but could not learn by whose authority it was written. He also saw the chairman and solicitor of the U. Company, and told them that he objected to take the shares, when they both assured him his name was not on the register. It turned out that his name had been placed on the register. On the 15th of October he wrote to the secretary of the company and formally repudiated the shares. In November the U. Company was ordered to be wound up on a petition presented before W.'s repudiation of the shares:—Held, that the variation between the two parts of the agreement for amalgamation rendered it invalid; that under the circumstances there was no contract between W. and the company to take the shares allotted, and that W. was not bound by acquiescence or laches, and his name must be removed from the register. *In re the United Ports Insurance Company; Wynne's case*, 43 Law J. Rep. (N.S.) Chanc. 138; Law Rep. 8 Chanc. 1602.

(2) *Reconstruction under sect. 161.*

**2.**—A company was wound up voluntarily for the purpose of re-construction, by the formation of a new company with new articles:—Held (in *Vining's case*) that the company so re-constructed was "another company" within the 161st section of the Companies Act of 1861, and that a shareholder in the old company was entitled to give notice of dissent (though he was not the equitable owner of the shares) and to have his shares cancelled and bought under the provisions of that section:—Held (in *Jeaffreson's case*), that the



arrangement for re-construction did not bind creditors so as to absolve a shareholder in the new company from paying calls required for payment of debts on the shares in the old company which he had given up. *In re the Imperial Land Company of Marseilles; Vining's case, and Jeaffreson's case*, 40 Law J. Rep. (N.S.) Chanc. 3; Law Rep. 11 Eq. 109.

3.—An English company whose operations were entirely confined to France, became involved in considerable difficulties, financially and otherwise. Arrangements were made by the directors for the constitution of a French Société Anonyme, for the purpose of taking over the assets of the company in consideration of the discharge of the company's obligations, and the allotment of shares to the shareholders of the English company. In order to carry this arrangement into effect, a special resolution was passed for the purpose of inserting in the articles of association a clause providing for the sale, in a voluntary winding-up, of the assets to another company, or to a Société Anonyme. At the same meeting at which this resolution was passed, resolutions were also passed for a voluntary winding-up, and for giving authority to the liquidators to sell the assets to a new French company. These resolutions for working out the sale to the French company were, as the Court held, except the resolution to wind up, irregular. One shareholder (whose shares were fully paid up), however, alone dissented:—Held, confirming the decision of one of the Vice-Chancellors, that the desired arrangement, though incapable of being carried out by virtue of the clause affected to be inserted in the articles, could be effected under the 161st section of the Companies Act, and that a petition for winding up compulsorily or under supervision, presented by the dissentient shareholder, must, so far as it prayed such winding-up, be dismissed, but that the petitioner had a right to require his interest in the company to be valued under the 161st section. *In re the Irrigation Company of France, Ex parte Fox*, 40 Law J. Rep. (N.S.) Chanc. 433; Law Rep. 6 Chanc. 176.

A resolution to wind up a company was passed amongst a series of resolutions for effecting a desired reconstruction of the company, which were attempted to be supported under section 161, but were considered to be irregularly passed under that section:—Held, that nevertheless the resolution to wind up was valid. *Ibid.*

Leave refused to file a bill in the name of the company to set aside the reconstruction scheme, upon the ground that though the resolutions authorising it were irregular through defect of the notices convening the meeting, yet they were capable of confirmation, and might, but for the irregularity, have been validly passed. And per Mellish, L.J.—It is not competent for a company, having in view an immediate voluntary winding up, to insert a provision in its articles for the purpose of authorising that which may be done under section 161, with the omission of the proviso in favour of dissentient shareholders contained in that section. *Ibid.*

4.—An agreement between companies A. and B. (neither of them being registered under the Companies Act, 1862), for the transfer of the business of A. to B., was held to be *ultra vires* on the part of company A., there being no power in its deed of settlement authorising such an agreement. Nevertheless company A. having been registered under the Act, and resolutions for winding-up voluntarily passed, and the transfer, carried out according to the terms of the agreement, under s. 161, the transaction was upheld. *Southall v. The British Mutual Life Assurance Society*, 40 Law J. Rep. (N.S.) Chanc. 698; Law Rep. 6 Chanc. 614: affirming the decision of the Master of the Rolls, 40 Law J. Rep. (N.S.) Chanc. 96; Law Rep. 11 Eq. 65.

A mutual assurance society may, like any other company, be registered under the Companies Act, 1862. *Ibid.*

[And see supra D 54, 55, infra G 13.]

(b) *Effect of amalgamation on rights of companies*

5.—The W. Society, in pursuance of a power contained in their deed of settlement, transferred to the A. Company all their business assets and liabilities, under an arrangement whereby the A. Company took upon itself all debts, engagements, and liabilities of the W. Society. Four years afterwards the A. Company became insolvent, and was ordered to be wound up. The W. Society was also ordered to be wound up. Certain creditors of the W. Society in respect of assurances and annuities, who had not accepted the A. Company as their debtors, remained unpaid, and the liquidator of the W. Society claimed, on the ground of the vendor's lien, and of a right as between principal and surety, to be entitled to certain property formerly belonging to the W. Society, which remained unrealised in the hands of trustees, and to the benefit of certain reassurance policies which had been effected by the W. Society with other offices to meet part of their liability in respect of original assurances effected with themselves, and which had been handed over by them to the A. Company:—Held, that, inasmuch as the transaction between the A. Company and the W. Society amounted to an amalgamation of both societies under which the assets of both were to form one common stock, subject to the liabilities of both companies, and also on the ground that no such rights had been expressly reserved or could be inferred from the agreement, the claim of the W. Company to a lien upon a distinct portion of the common assets could not be sustained. Held, also, that the A. Company had not become liable as principal debtors to those creditors of the W. Society who had refused to substitute the A. Company for the W. Society as their debtors, and therefore the W. Society could have against the A. Company no such rights as existed between principal and surety. *In re the Albert Life Assurance Company, and Ex parte the Western Life Assurance Society*, 40 Law J. Rep. (N.S.) Chanc. 166; Law Rep. 11 Eq. 164.

(c) *Effect of setting aside amalgamation.*

6.—Upon a summons in the winding-up of Company A., money paid for shares in Company B. under an amalgamation of Company B. with company A., which amalgamation had been declared by a Court of Common Law to be void, through a common mistake of fact and law, was ordered to be returned, together with interest at 5l. per cent. from the date of the summons. *In re the Bank of Hindustan, China and Japan; Ex parte Alison*, 42 Law J. Rep. (N.S.) Chanc. 505; Law Rep. 15 Eq. 394. [See No. 8 *infra*.]

7.—Money paid for shares issued, without fraud, under an amalgamation, held subsequently to have been *ultra vires* of the amalgamating companies, will be repaid with interest and costs; unless the party seeking such repayment has so dealt with the shares allotted to him, as to render himself otherwise liable in respect of them. A transferee or a purchaser from a transferee, has no right to repudiate the shares. *In re the Bank of Hindustan, China and Japan (Lim.)—Campbell's case; Hippeley's case; Croom's case*, 42 Law J. Rep. (N.S.) Chanc. 771; Law Rep. 16 Eq. 416.

An amalgamation of two large companies is not like a contract between persons, which can be nullified by their consent when its validity becomes doubtful, or its invalidity is discovered; but exists, *de facto*, till a competent Court pronounces against it. *Ibid*.

The right of a person dealing with a company to set aside (as against the company) a contract, founded on the latter's unintentional misrepresentation, may be waived or released, expressly or indirectly; but cannot be easily waived by anything the person does, or omits, while the falsehood of the misrepresentation remains doubtful. *Alison's Case* (42 Law J. Rep. (N.S.) Chanc. 505; Law Rep. 15 Eq. 394) followed. [See next case.]

8.—In 1864 an agreement was entered into between the H. Company and the I. Company, for an amalgamation and transfer of the property and business of the I. Company to the H. Company, and special resolutions were passed and approved of, and confirmed at general meetings of the H. Company, pursuant to the 50th and 51st sections of the Companies Act, 1862, for the increase of their capital by the issue of new shares to the shareholders of the I. Company. A. was a shareholder in the I. Company, and applied for and was allotted shares in the H. Company, and paid 150l. for deposit and on account of premium thereon; but the shares were afterwards declared forfeited for non-payment of calls. In December, 1866, the H. Company was ordered to be wound up. In May, 1868, at the hearing of a cause instituted by shareholders in the I. Company, who dissented from the amalgamation, for the purpose of setting it aside, one of the Vice-Chancellors held the amalgamation to be *ultra vires*. No decree was drawn up, compromises were effected with the dissentient shareholders, and all proceedings in the suit stayed, and the H. Company retained possession of the assets of the I. Company, which had been

handed over to them under the agreement. An action at law was commenced against A. for the unpaid calls upon his shares, and upon a special case, in which it was incorrectly stated that a decree had been made in the Chancery suit, and no mention was made of the subsequent compromise, it was held by the Court of Common Pleas, and affirmed in the Exchequer Chamber, that the amalgamation being void A. never was a shareholder in the H. Company. A. then took out a summons in the winding-up of the H. Company for repayment of the money paid by him in respect of the shares:—Held (by the full Court of Appeal), affirming the decision of the Court below, that he was entitled to recover the money paid for deposit and on account of premium, with interest at 5l. per cent. from the date of the summons. *In re the Bank of Hindustan, China and Japan (Lim.)—Campbell's case; Hippeley's case; and Alison's case*, 43 Law J. Rep. (N.S.) Chanc. 1; Law Rep. 9 Chanc. 1.

C. and H. were original shareholders in the I. Company, and they also accepted and had allotted to them shares in the H. Company upon the terms of the amalgamation, and paid the deposit, premiums and calls upon them. Upon summonses taken out by C. and H.,—Held, reversing the decision of one of the Vice-Chancellors, that the Court was not bound by the decision of the Court of law pronounced in A.'s case upon a case erroneously stated, and that C. and H. having entered voluntarily into the contracts of which they had had the full benefit, and which had become binding on the company before anything was done to avoid them, were not now entitled to be relieved therefrom. *Ibid*.

Held also that the increase of capital was well effected by the resolutions without altering the articles of association. *Ibid*.

9.—In May, 1865, resolutions were passed for amalgamating the F. Company with the O. Bank, and to wind up the F. Company voluntarily for enabling the amalgamation to be carried out. The two plaintiffs, who had recently purchased shares in the F. Company (the one the day before the resolutions for amalgamation were confirmed, the other shortly after) in the same month of May contracted to sell their shares and executed transfers thereof. On the 2nd of June following, and before the transfers were sent in for registration, the liquidators under the voluntary winding-up passed a resolution that they would not register any more transfers, except upon the terms of the transferors executing a deed by which they should guarantee the payment of all calls by their transferees. The plaintiffs not being able to obtain transfers otherwise executed the deeds in April, 1866. In 1866 the voluntary winding-up was superseded by a compulsory winding-up. In July, 1868, actions were commenced against the plaintiffs on their deeds to recover the amounts due from them for calls and for damages, and thereupon the plaintiffs filed bills, alleging that the liquidation was invalid, and that the deeds were obtained from them without consideration, by misrepresentation and concealment, and praying

that they might be cancelled, and the actions stayed. In another suit against the same company it had been decided, and confirmed on appeal, that the amalgamation was *ultra vires* and void:—Held, that the liquidation proceedings were valid and could not be set aside, because the amalgamation, for which they had been instituted, had been declared void. Also that there was ample consideration for the deeds, and that there was no evidence of misrepresentation or concealment, and that the liquidators were justified in refusing to sanction the transfers except upon such terms as they thought were for the benefit of the company. *Cleve v. The Financial Corporation; and Williams v. The Same*, 43 Law J. Rep. (N.S.) Chanc. 54; Law Rep. 16 Eq. 363.

It is not the effect of a compulsory winding-up order to nullify proceedings which have been taken under a previous voluntary winding-up. *Ibid.*

10.—Two limited banking companies, the H. Bank and the I. Bank, entered into an agreement of amalgamation, whereby the I. Bank was to transfer its business and assets to the H. Bank, and the shareholders of the I. Bank to be entitled to shares additionally issued by the H. Bank. There was power given, by the articles of association of the H. Bank, to the directors to pay for the amalgamation with or purchase of any similar business by shares, and the directors resolved to approve of the agreement and issue additional shares, and a meeting of the company resolved to adopt the agreement and issue such shares, and a second meeting confirmed this. Defendant, a shareholder in the I. Bank, received a circular announcing the amalgamation, and offering him shares on the terms of the arrangement, and he applied for shares on those terms, and paid a certain sum as premium and deposit. The shares were allotted, notice given to him, and certificates prepared, but he did not apply for them, and took no notice of three calls made in the ensuing year. About a year afterwards the amalgamation was set aside in equity:—Held, first, that the amalgamation was the foundation of the whole matter, and that the shares (even if lawfully created) fell with it; second, that the defendant was not a shareholder by estoppel; third, that the shares were not lawfully created, as the above-mentioned article of association only applied to existing and did not authorise additional shares, and there was no valid issue of additional shares under 25 & 26 Vict. c. 89, s. 12, because there had been no preliminary meeting authorising the alteration of the articles of association. *The Bank of Hindustan, China, and Japan (Lim.) v. Alison* (Exch. Ch.), 40 Law J. Rep. (N.S.) C. P. 117; Law Rep. 6 C. P. 222; affirming the Court of Common Pleas, 40 Law J. Rep. (N.S.) C. P. 1; Law Rep. 6 C. P. 54.

(d) *Novation of contract by policy-holder or annuitant.*

11.—S. was holder of a policy of the M. Assurance Society, and entitled under it to participation in profits. The M. Society amalgamated with the A. Company, handing over its assets, and the

A. Company undertaking its liabilities, a fund, part of the M. assets, being set apart as a trust-fund to guarantee certain policies of the M. Society, including S.'s policy. Under the arrangement for the amalgamation proposals were made to S. to cancel his policy, and accept in substitution a policy upon similar terms of the A. Company. This S. did not accede to; he simply paid his premiums to the A. Company, which company was, according to the arrangement between the companies, authorised to receive the premiums. Two years after the amalgamation a division of profit for the three preceding years was declared by the A. Company. A bonus was declared upon S.'s policy, notice of which was given to S. S. accepted the bonus in the form of a reduction of the premiums upon his policy, and he subsequently paid the reduced premiums. The M. Society being (as well as the A. Company) ordered to be wound up, S. claimed to prove as a creditor in respect of his policy:—Held, affirming one of the Vice-Chancellors, that he had by taking the bonus accepted the A. Company as his debtors in lieu of the M. Society, and his claim was disallowed. *In re the Medical and Invalid and General Life Assurance Society; Spencer's case*, 40 Law J. Rep. (N.S.) Chanc. 455; Law Rep. 6 Chanc. 362.

12.—Where upon the amalgamation of the N. & B. Insurance Companies, a deed of settlement, reciting the agreement for amalgamation, was executed, by which the B. Company was constituted as a common law partnership:—Held, that a policy holder of the N. Company who executed the deed of settlement, had accepted the liability of the B. Company, and could not claim as creditor against the N. Company. *In re the National Provincial Life Assurance Society; Fleming's case*, Law Rep. 6 Chanc. 393.

13.—G. effected three life policies with the M. Society without participation of profit. The M. Society afterwards amalgamated with the A. Company, transferring its assets and liabilities to that company. A notice of the amalgamation was sent to G.'s assignees, requesting them to send in their policies to be indorsed by the A. Company. To this no reply was made. Afterwards a more specific request was made, asking them to send in the policies to be indorsed. This was done, but upon the company further asking the assignees to sign a memorandum that they agreed to the amalgamation, the assignees refused to do so, and the policies, though they had been sent into the company, were not indorsed, but returned without any alteration. Meanwhile the premiums were paid to the A. Company, which under the terms of the amalgamation was authorised to receive them. The M. Company and the A. Company having both been ordered to be wound up, the assignees sent in a claim against the M. Company in respect of the policies:—Held, reversing the decision of one of the Vice-Chancellors, that they had not accepted the A. Company in place of the M. Company, and the claim was allowed. *In re the Medical and Invalid and General Life Assurance Society; Griffith's case*, 40 Law J. Rep. (N.S.) Chanc. 464; Law Rep. 6 Chanc. 374.

14.—The I. Life Insurance Company had by its deed of settlement a power to dissolve itself and transfer its business and liabilities to another approved company, but "without prejudice to the rights of the parties then assured." The I. Company, in 1860, under this provision, transferred its business to the E. Society. D., the grantee of an annuity in the I. Company, objected to the transfer, and refused a policy in the E. Society, but he took no proceedings in the matter and went to the office of the E. Society and received his annuity regularly from that society until 1871, when the E. Society was wound up insolvent:—Held, that there was no novation of contract as between D. and the E. Society, and that D. was entitled to recur to the I. Company for payment, and to have that company wound up for the purpose of going against the uncalled-up share capital of the company. *In re the India and London Life Assurance Company; Dyke's case*, 41 Law J. Rep. (n.s.) Chanc. 601; Law Rep. 7 Chanc. 651.

15.—Where there was an agreement for the transfer of the business and assets of Company A. to Company B., and a transferee of a life policy in Company A., after the decease of the assured, obtained from Company B. a memorandum, duly signed and sealed, indorsed on his policy, that the property of Company B. was alone to be liable for the payment of the sum assured, and a further memorandum stipulating for payment to the transferee by instalments; but it appeared that shortly after the agreement for transfer, and before the death of the assured, a compulsory order for winding-up had been made against Company A.:—Held, that there was good consideration for the memorandum, and a complete novation of contract with Company B. *In re the United Ports and General Insurance Company; Evens's Claim*, Law Rep. 16 Eq. 354.

(e) *Application for or acceptance of shares in new company.*

16.—Upon an agreement for the amalgamation of the company with the E. Corporation, it was arranged that the shareholders in the company should surrender their shares, receiving in return shares in the corporation to an equivalent amount, and accordingly certificates of shares in the corporation were sent to the several shareholders of the company, with a request that they would return printed receipts for the same. C., F. and S. were shareholders in the company, and severally received certificates of shares in the corporation, and C. and F. signed and returned receipts for such certificates. S. retained the new certificates but signed no receipt, and the names of C., F. and S. were returned to the Registrar of Joint Stock Companies as members of the corporation. On winding up the corporation,—Held, that C. and F. were liable as contributories, but not S. *In re the Empire Assurance Corporation; Challis's case, Fordyce's case, Somerville's case*, 40 Law J. Rep. (n.s.) Chanc. 431; Law Rep. 6 Chanc. 266.

17.—The B. Company agreed to transfer their

business to the P. Company. One of the terms of such agreement (which was sanctioned by the Court under the winding-up of the B. Company) was that the holders of shares in the B. Company should receive an equal number of shares in the P. Company. A circular letter was sent by the P. Company to the shareholders in the B. Company, referring to these terms, and requesting the B. shareholders to fill in a form of application for the shares to which they were entitled under the arrangement. A., a holder of fifty shares in the B. Company, filled in and returned this form, applying for fifty shares in the P. Company. The directors of the P. Company by resolution allotted to him that number of shares. Before receiving notice of allotment, A. wrote to withdraw his application. After considerable delay the solicitor of the P. Company, to whom the question of A.'s withdrawal had been referred by the directors, wrote to A., stating (erroneously as now appeared) that by a resolution of the board the allotment of shares to him had been cancelled. The company had no share register, but A.'s name was entered in their allotment book for fifty shares, though no particular shares were appropriated to him:—Held, that as soon as A.'s application had been accepted by the company, there was a binding contract between them without any notice of allotment being given to A.; that even if the resolution cancelling the allotment had been passed the directors had no power under a general authority to compromise proceedings, &c., contained in the articles of association, to sanction A.'s withdrawal; and that as between A. and the company the entry in the allotment book was sufficient. *In re the United Ports Company; Adams's case*, 41 Law J. Rep. (n.s.) Chanc. 270; Law Rep. 13 Eq. 474.

18.—Where during negotiations for, and with a view to the carrying out of, an amalgamation between two companies a shareholder in the company whose business is to be transferred applies through that company for shares in the transferee company, and the transaction ultimately fails of completion, there the applicant does not become a contributory to the transferee company, but it is otherwise where the shareholder makes a personal application for shares in the transferee company. *In re the Empire Assurance Corporation (Lim.)*; *Dougan's case*, 42 Law J. Rep. (n.s.) Chanc. 460; Law Rep. 8 Chanc. 540.

A power given to a special general meeting of a company "to sell, dispose or otherwise deal with" the business, &c., of the company, does not authorise a transfer of the business to another company upon the terms of an exchange by the members of the transferring company of their shares in that company for shares in the transferee company.

The S. Company agreed for the sale of its business to the E. Company upon the terms that the S. shareholders should exchange their shares for an equal number of shares in the E. Company. With a view to carrying out this agreement the secretary of the S. Company collected the share certificates of the members of his company, and forwarded them to the E. Company to be exchanged for shares in that company. D., a director of the

S. Company, who took a leading part in the negotiations for amalgamation, thus sent in his share certificates to the E. Company through the secretary of the S. Company, and received in exchange for them certificates of an equal number of shares in the E. Company. These he retained, but without having acknowledged them. The amalgamation failed to be carried out both because the agreement was invalid and *ultra vires* of the S. Company, and also because the E. Company was wound up before the transaction had been completed:—Held, that D. was not a contributory to the E. Company.

(f) *Dealings with shares after amalgamation.*

19.—Company A. transferred its business to Company B., and the shareholders of A. received shares of B. in exchange for their shares in A.:—Held, by James, L.J., affirming the Master of the Rolls, that Company A. was virtually dissolved and that its shares could no longer be dealt with. But held, by Mellish L.J., that Company A. not having been formally dissolved, or wound up, the shares might still be dealt with. *In re the Accidental Death Insurance Company; Chappel's case and Lancaster's case*, Law Rep. 6 Chanc. 902.

20.—A company with the consent of all the shareholders made over its business and all its assets to another company. Afterwards an arrangement was made between the second company and the directors of the first company for rescinding the amalgamation, and the directors of the first company thereupon elected several new directors, of whom A. was one, and at a meeting of directors at which A. was present a transfer of 200 shares out of A.'s name was sanctioned. The transfer was registered, and the company was now being wound up. The articles only gave the directors powers to refuse to sanction a transfer on condition of their getting some other transferee to take the shares at the market price. But at the time of A.'s transfer the shares were worse than valueless:—Held, that the transfer by A. was invalid, and he was properly placed on the list of contributories for the 200 shares. *In re the Accidental Death Insurance Company; Allin's case*, 43 Law J. Rep. (N.S.) Chanc. 116; Law Rep. 16 Eq. 449.

21.—A company was wound up voluntarily for the purpose of reconstruction by the formation of a new company with new articles:—Held, that a shareholder in the old company who had given notice of his dissent from the arrangement, and had under section 161 of the Companies Act, 1862, required the liquidators to purchase the interest held by him in the old company, could only sell his interest in the assets of the company in liquidation, and not his shares in it; and, therefore, that a transfer by him of his shares to the liquidators was *ultra vires*, and did not discharge him from his liability to be put on the list of contributories of the old company. *In re the Imperial Land Company of Marseilles; Vining's case*, 40 Law J. Rep. (N.S.) Chanc. 79; Law Rep. 6 Chanc. 96.

(F) SUITS AND PROCEEDINGS.

(a) *Bill by one shareholder.*

1.—Where there is a corporate body capable of suing, that body only is the proper plaintiff in a suit for the recovery of property, whether from its officers or directors or from any other person, and a bill for that purpose cannot be sustained by one shareholder on behalf of himself and all others except the defendants. *Gray v. Lewis and Parker v. Lewis*, 43 Law J. Rep. (N.S.) Chanc. 281; Law Rep. 8 Chanc. 1035.

The only exception to this rule is where the directors or majority of shareholders are doing something fraudulent against the minority, who are overwhelmed by them. *Ibid.*

In order to obtain the sale of a business to a projected limited company, the L. Company, and to procure a settling day for the company on the Stock Exchange, it became necessary that 40,000 shares in the company should be subscribed for, with 5% paid upon each. To effect this purpose, it was arranged between the directors of the L. Company, the I. Company—who were promoting the L. Company—and the N. Bank, that the N. Bank should discount promissory notes of the I. Company to the amount of 200,000*l.*; that the I. Company should pay the sum so received back into the N. Bank to the account of the L. Company; that in return for such payment, 40,000 shares in the L. Company should be allotted to the nominees of the I. Company, and that the money so paid in should be retained by the bank, and employed in meeting the promissory notes when arrived at maturity. This scheme was carried out. Subsequently a bill was filed by a shareholder in the L. Company, on behalf of himself and all other shareholders in the company for a declaration that the application of these moneys to meet the debts of the I. Company had been a breach of trust, and for the recovery of the amount from the directors of the L. Company and the N. Bank:—Held, that such a suit came within the above-stated rule, and was not sustainable. *Ibid.*

Held also, that the whole scheme was a sham, with regard to which no liability could arise, either at law or in equity, between the three companies who were parties to it.

2.—Under an agreement sanctioned by Act of Parliament a railway company was sold and transferred to another railway company, who were to issue 155,000*l.* rent-charge stock at the selling company's request (the dividends to be paid out of a perpetual rent-charge of 7,000*l.*, payable by the purchasing company), and the proceeds of the stock and of the sale of certain surplus lands and other reserved assets were to be applied by the selling company in payment of certain vendors' debts, charges and costs, and the surplus to be divided between the preferential shareholders and creditors of the selling company in proportion to the amount of their shares and debts. The agreement further provided for the issue by the purchasing company to the ordinary shareholders of the selling company of ordinary stock in the purchasing company. The agreement provided

that when the company's affairs had been wound up as above, notice was to be advertised in the "London Gazette," and thereupon the selling company was to be dissolved. The agreement was sanctioned in 1866. In 1874 a creditor and ordinary shareholder of the company filed a bill on behalf of himself and all other the creditors and shareholders of the selling company against that company, alleging (amongst other things) wilful delay in winding up the company, default in payment of debts, and refusal or neglect to deliver to the plaintiff the ordinary stock to which he was entitled, and praying a winding-up and other consequential relief. On demurrer to the bill for want of equity:—Held (affirming the decision of Malins, V.C.), that on the allegations plaintiff was entitled to some relief as a creditor, and the demurrer was not sustainable for want of equity; but held also, that plaintiff's claim as an ordinary shareholder made the bill demurrable for multifariousness and misjoinder, and on this ground the demurrer was allowed, but with liberty to amend. *Ward v. The Sittingbourne Railway Company*, 43 Law J. Rep. (n.s.) Chanc. 533; Law Rep. 9 Chanc. 488.

The demurrer being sustained only on the grounds alleged *ore tenus*, the plaintiff was allowed his costs under Consol. Ord. xiv. rule 1. *Ibid.*

3.—A bill by one shareholder on behalf of himself and others which in substance seeks the interference of the Court in the internal management of a company cannot be sustained. The company should be the plaintiffs. Where such a bill against the directors of the company contained allegations to the effect that the chairman at a meeting refused a poll when properly demanded and thereby set up his own decision as conclusive, which by the constitution of the company it was not:—Held, that the bill was demurrable. The rule in *Moseley v. Alston* (1 Ph. 790) and *Foss v. Harbottle* (2 Hare, 461) will be strictly adhered to. Decision of Malins, V.C. (Law Rep. 20 Eq. 383) reversed. *Mac Dougall v. Gardiner*, 45 Law J. Rep. (n.s.) Chanc. 27; Law Rep. 1 Chanc. Div. 13.

[And see supra D 24, 66.]

(b) *Plaintiff company ordered to give security for costs.*

4.—Where a limited company being wound up was the plaintiff, an order for security for costs to a limited amount to cover costs up to answer with liberty to apply for further security after answer was held proper and convenient. Such orders are matters for the discretion of the Judge. *The Western of Canada Oil Lands and Works Company v. Walker*, Law Rep. 10 Chanc. 628.

5.—A bill was filed by a limited company in liquidation to set aside a mortgage which the defendants were foreclosing, or to have the accounts taken on a footing totally different from that suggested in the foreclosure suit, and was expressed to be a cross bill to the foreclosure suit:—Held, that the bill was not a mere cross bill, and that the plaintiff company must give security for costs.

Semble—that even if it had been a mere cross bill, the plaintiff company being in liquidation must give security for costs.

Order of the Master of the Rolls (41 Law J. Rep. (n.s.) Chanc. 151) affirmed. *The City of Moscow Gas Company v. The International Financial Society*, 41 Law J. Rep. (n.s.) Chanc. 350; Law Rep. 7 Chanc. 225.

(c) *Debtor's summons by secretary of company.*

6.—A debtor's summons taken out in the name of the secretary of a company for a debt due to the company is irregular. *Ex parte Leathley; In re Hodges*, 42 Law J. Rep. (n.s.) Bankr. 56; Law Rep. 8 Chanc. 204.

(G) SHAREHOLDERS.

(a) *Allottees.*

(1) *Persons who have signed the memorandum of association.*

1.—L. signed the memorandum of association of a company for fifty shares in January, 1866. The company was registered on the 18th of January, 1866. Directors were appointed on the 24th of February, 1866. The company was wound up on the 23rd of September, 1867. L.'s name had not, up to that time, been placed on the list of shareholders:—Held, that, notwithstanding the lapse of time, L. must be made a contributory. *In re the Imperial Land Company of Marseilles (Lim.)*; *Levick's case*, 40 Law J. Rep. (n.s.) Chanc. 180.

2.—When a person signs a memorandum of association for any number of shares, he becomes absolutely bound to take those shares and no delay in placing his name on the register will relieve him from that liability. *In re Robinson and Preston's Brewery Company*; *Sidney's case*, Law Rep. 13 Eq. 228.

3.—D. signed the memorandum of association for 100 shares. The articles of association registered on the same date as the memorandum, provided that the shares allotted under the memorandum should be fully paid-up shares:—Held, nevertheless (affirming *Dent's Case*, 42 Law J. Rep. (n.s.) Chanc. 474; Law Rep. 15 Eq. 407), that D. was liable as a contributory. *In re the Anglo-Moravian Hungarian Junction Railway Company (Lim.)*; *Dent's Case and Forbes' case*, 42 Law J. Rep. (n.s.) Chanc. 827; Law Rep. 8 Chanc. 760.

The concessionaire and contractor for the works of a company in course of formation (before the passing of the Companies Act, 1867), applied to F. to become a director, and offered to provide his qualification as a director (fifty shares) out of the fully paid-up shares to be issued to himself. F. never signed the articles of association, nor made any application for shares nor received any certificate of shares, but he took his seat at the board as a director. Upon the winding-up of the company,—Held, that F. was not liable as a contributory. *Ibid.*

[And see infra G 23, 26.]

(2) *Persons who have applied for shares.*(i) *Scrip holders.*

4.—A private Act of Parliament, under which the defendant company was constituted, provided that it should not be lawful for the company to issue any share, nor should any share vest in the person accepting the same, unless and until one-fifth part of the amount of the share should be paid up:—Held, that a person who applied for shares and had them allotted to him before the one-fifth was paid, was a shareholder in the company to all intents and purposes, except that he could not transfer his shares until one-fifth was paid up. *McEwen v. The West London Wharves and Warehouses Company*, 40 Law J. Rep. (n.s.) Chanc. 471; Law Rep. 6 Chanc. 655.

*The East Gloucestershire Railway Company v. Bartholomew* (Law Rep. 3 Exch. 15) followed. *Ibid.*

With the same Act of Parliament was incorporated the 14th section of the Companies Clauses Consolidation Act, 1845, which enacts that the shares of a company can be transferred by deed only. M., a shareholder in the company, received, in respect of the shares which had been allotted to him, scrip certificates, which stated that the allottee or bearer was entitled to exchange the scrip for share certificates. M. sold his right to the shares, and delivered the scrip certificates to the purchaser who paid the first call upon them; but no deed of transfer was executed. M. was subsequently placed on the share register, and on the company being wound up the liquidators commenced an action at law against him to recover calls due on the shares:—Held, that notwithstanding the terms of the scrip certificates, and that the company had treated the purchaser from M. as the virtual shareholder, M. had not ceased to be the legal shareholder, as the right to the shares had not been transferred by deed, and therefore that the Court would not restrain the action for calls, whatever rights M. might have against his purchaser. *Ibid.*

5.—The plaintiff applied for and received an allotment of scrip certificates to bearer under a prospectus, which stated that on registration of the scrip, of which due notice would be given, the certificates would be divided into five shares of 10l. each. He never applied to have his scrip registered:—Held, affirming the decision of the Master of the Rolls (40 Law J. Rep. (n.s.) Chanc. 652), that he could not be registered as a shareholder without his consent. *MacIlwraith v. The Dublin Trunk Connecting Railway Company*, 41 Law J. Rep. (n.s.) Chanc. 262; Law Rep. 7 Chanc. 134.

(ii) *Application in name of married woman.*

6.—A person who applies for shares in a fictitious name, or in the name of a person incapable of contracting, is liable to be himself placed on the list of contributories in respect of the shares so applied for. *In re the Hercules Insurance Company (Lim.)*; *Pugh's case and Shorman's case*, 41 Law J. Rep. (n.s.) Chanc. 580; Law Rep. 13 Eq. 566.

S., with the concurrence of an agent of the company, induced his married daughter to sign an application for shares, she being in ignorance of the nature of the document she signed. S. paid the deposit on the shares, and received a dividend upon them. Both the married daughter and her husband were in total ignorance that any shares were standing in her name:—Held, that the name of S. must be placed on the list of contributories in respect of the shares. *Ibid.*

Evidence taken under the Companies Act, 1862, s. 115, may be used on the hearing of a summons against the person giving the evidence. *Ibid.*

(iii) *Conditional application for shares.*(1) *Officer of company.*

7.—The fact that W. was an auditor of the company was held to be sufficient to give him notice who were the shareholders on the register, and that he himself was one of them. And Held, that having allowed his name to remain there till after the winding-up order was made, he must be fixed on the list of contributories. *In re the Matlock Old Bath Hydropathic Company (Lim.)*; *Wheatcroft's case*, 42 Law J. Rep. (n.s.) Chanc. 853.

8.—A. having applied for the secretaryship of a company, was informed by B., the then secretary, that he would have to take 120 shares in the company, for which he accordingly signed a written application, on the understanding that it was not to be acted upon until he had finally decided upon accepting the appointment. The next day B. sent A. a formal notice of allotment of the shares, but seven days afterwards A., having decided not to accept the appointment, wrote to B. repudiating them. The company subsequently passed resolutions for a voluntary winding-up, and A.'s name was settled on the list for 120 shares. An application by A. to strike his name off was granted, with costs as between solicitor and client, by way of damages. *In re the National Equitable Provident Society (Lim.)*; *Ex parte Wood*, 42 Law J. Rep. (n.s.) Chanc. 403; Law Rep. 15 Eq. 236.

*Liability of director in respect of qualifying shares.* [See supra D 31-40.]

(2) *Condition as to liability of applicant.*

9.—Directors having power to compromise claims made against, or owing to, their company, or to settle disputes arising between the company and any other body or person, have power to compromise a *bonâ fide* claim by a shareholder to be removed from the list of contributories, and to annul the allotment to him, provided the claim is fairly a matter of dispute and no ulterior purpose is sought to be accomplished by the compromise. *Dixon v. Evans* (H.L.) 42 Law J. Rep. (n.s.) Chanc. 139; Law Rep. 5 E. & I. App. 606.

In 1846 D. became a shareholder in an unlimited company, upon the faith of a promise by W., the local manager, that he should not become responsible as a shareholder until or unless an Act of Parliament should be passed incorpo-

rating the company with limited liability. D. never paid any calls upon his shares, but he acted as a shareholder in some particulars. In 1848, the company having failed to obtain an Act limiting the liability of its members, D. applied to have his shares cancelled, and the directors on learning the facts, and considering that the company might be injured if they discredited their agent and local manager, resolved, in consideration of the payment of the amount then due for a call, to cancel the shares. This resolution was not communicated to the shareholders generally, but they were made aware that money had been received on account of cancelled shares; and during upwards of twenty years the name of D. never appeared as a shareholder. The deed of settlement contained a clause empowering the directors to compromise any claims made against, or owing to, the company, and either to refer to arbitration or to settle as they should think proper any dispute which might arise between the company and any other person or corporation. *Ibid.*

In 1869, the company being in course of winding up, it was sought to make D. liable as a contributory:—Held, that the compromise was *intra vires* of the directors, and that D.'s name must be removed from the list of contributories. *Ibid.*

10.—P. applied for shares in an unlimited company (if limited). Shares were allotted to him and his name placed on the register of members. Six months after the company was ordered to be wound up. P. was placed on the list of contributories. *In re the United Fords and General Insurance Company*; *Perrett's case*, 42 Law J. Rep. (N.S.) Chanc. 305; Law Rep. 15 Eq. 250.

(iv) *Allotment of shares to directors for distribution.*

11.—Agreement in 1864 between two limited banking companies, A. and B., that 10,000 new shares in Company B. should be "allotted at par to the directors" of Company A. "for distribution amongst their shareholders." Company A. had no power of holding shares in another bank. Two hundred and sixty out of the 10,000 shares were never allotted to shareholders of Company A.:—Held, that the agreement was from the beginning conditional on the circumstance of the shareholders in the A. Company accepting the shares, and could not in the year 1869 be specifically enforced as to the 260 shares by the liquidators of the A. Company against the B. Company. *In re the Mercantile and Exchange Bank*; *Ex parte the London Bank of Scotland*, Law Rep. 12 Eq. 268.

(3) *Notice of allotment.*

(i) *What notice sufficient.*

12.—A joint stock company agreed to appoint R. their district manager on condition that he took twenty-five shares in the company. R. accordingly applied for twenty-five shares in the usual printed form addressed to the directors, and paid at the same time the required deposit thereon. Afterwards twenty-five shares were

allotted to him, and his name was entered on the register of shareholders, and on the same day he was duly appointed district manager. Notice of this appointment was given him, and he accepted the same, but he never received any formal notice of the shares having been allotted to him. He shortly afterwards desired that the shares might not be allotted to him, and after a few weeks he resigned his appointment:—Held, that under the circumstances sufficient notification had been given to R. that the shares had been allotted to him, and that therefore his name was rightly on the register of shareholders. *In re the Home Assurance Association*; *Ex parte Richards*, 40 Law J. Rep. (N.S.) C. P. 290; Law Rep. 6 C. P. 591, *nom. Richards v. The Home Assurance Society*.

13.—The B. Company with limited liability, carrying on the business of marine insurance only, and having no power to sell its business, entered into an agreement with the P. Company, being an unlimited company and carrying on the business of life, fire and marine insurance, for the transfer of its business to that company, in consideration of a sum of money, and of so many shares in the P. Company, to be issued to members of the B. Company. In order to carry out this agreement, the B. Company was wound up voluntarily under an order of the Court, and the sanction of the Court was obtained to the agreement. Letters were sent by the manager of the P. Company to the shareholders of the B. Company, asking them to exchange their shares in the B. Company for shares in the P. Company, in pursuance of the agreement, and enclosing forms of application for shares in the P. Company:—Held, that shareholders of the B. Company, who signed and returned such forms of application to the manager of the P. Company, had entered into a binding contract to take shares in that company, notwithstanding they had received no notice of allotment of the shares. Held, also, that the agreement for the amalgamation between the two companies having been sanctioned by the Court under the winding-up of the B. Company, was not *ultra vires*, and therefore not invalid. *In re the United Ports and General Insurance Company*; *Brown's case and Tucker's case*, 41 Law J. Rep. (N.S.) Chanc. 157.

[And see *supra* E 17.]

(ii) *Notice through post.*

14.—Proof of the posting of several letters at successive dates is not conclusive evidence of any of them having been received at the address to which they were directed. *In re the Constantinople and Alexandria Hotels Company*; *Reidpath's case*, 40 Law J. Rep. (N.S.) Chanc. 39; Law Rep. 11 Eq. 86.

An applicant for shares in a company, the articles of association of which declare that an application followed by an allotment shall be treated as an acceptance of shares, is not bound after a lapse of years as a contributory, unless it is conclusively proved that he received notice of the allotment. *Ibid.*

15.—A company being in course of formation, T., in March, 1866, sent a written application for



shares, giving an imperfect address. Shares were allotted to him, and notice of the allotment posted on the 16th of March to the address given on his application. This should have reached him on the 17th, but owing to this address being imperfect, it did not reach him at all. Another letter was posted on the 20th, which reached him on the 21st. On the 20th he posted a letter to revoke his application for shares:—Held, that as the notice of the 16th would have reached him but for his giving a wrong address, its being posted must be taken as good notice to him, and that his revocation was too late. *In re the Imperial Land Company of Marseilles, Townsend's case*, 41 Law J. Rep. (n.s.) Chanc. 198; Law Rep. 13 Eq. 148.

Held, also, that when a person has applied for shares, and they have been allotted to him, and notice of the allotment has been posted to and received by the allottee, the date at which the contract to take the shares is completed is the time of the posting the notice; and that if the allottee sets up a revocation, he must prove that the letter of revocation was posted before the notice of allotment. *Ibid.*

16.—Where an application for shares in a company has been sent by post, the contract to take shares is complete and binding from the moment that the letter announcing the allotment is put into the post, whether such letter subsequently reaches the allottee or not. *Townsend's case* (41 Law J. Rep. (n.s.) Chanc. 198; Law Rep. 13 Eq. 148) observed upon. *The British and American Telegraph Company v. Colson* (40 Law J. Rep. (n.s.) Chanc. 97; Law Rep. 6 Exch. 108) disapproved. *In re the Imperial Land Company of Marseilles (Lim.)*; *Wall's case*, 42 Law J. Rep. (n.s.) Chanc. 372; Law Rep. 15 Eq. 18.

(4) *Rescission of ultra vires allotment.*

17.—An *ultra vires* allotment of shares, even to a director, not completed by registration, may be rescinded; and if rescinded, the director is not a contributory. *In re the Essex Brewery Company, Barnett's case*, Law Rep. 18 Eq. 507.

(b) *Agreement to take shares.*

(1) *What amounts to.*

18.—D., for good consideration, entered into an arrangement with a company, part of which was that he and his partner should take 250 shares. He applied for fifty shares, and paid the deposit thereon. No allotment of shares in the company was ever made, and his name was never entered upon any register of members. The company afterwards being wound up,—Held, that D. was rightly placed upon the list of contributories. *In re the Valparaiso Waterworks Company*; *Davies' case*, 41 Law J. Rep. (n.s.) Chanc. 659.

19.—An agreement to "place" shares does not render the contractor liable as a contributory, but only to an action for damages. *In re the Monarch Insurance Company*; *Gorissen's case*, 42 Law J. Rep. (n.s.) Chanc. 864; Law Rep. 8 Chanc. 507.

G. being desirous of being appointed agent of a

company offered to place 1,000 shares upon being promised the appointment. The offer was accepted and 1,000 shares were allotted to him, and his name was entered on the register as the holder thereof, but it did not appear that any notice of the allotment was sent to him. The shares could not be placed owing to a want of confidence on the part of the public, and G. then proposed to establish a branch office in Germany with a second issue of shares before placing those of the first issue, and in reply to a letter from the secretary of the company requesting him to complete his agreement as to the placing of the 1,000 shares, and stating that they stood in the register in blank with merely G.'s name as reference, G. wrote authorising his name to be left where it was placed, and engaging to keep that amount himself out of the commission on the second issue. No second issue was ever made. On the winding-up of the company:—Held, reversing the decision of one of the Vice-Chancellors, that G. was not liable as a contributory. *Ibid.*

20.—A special railway Act, passed in 1865, incorporated certain persons mentioned by name therein, "and all other persons who shall have already subscribed or shall hereafter subscribe to the undertaking." The Companies Clauses Consolidation Act, 1845, was in part incorporated in the Act. Before the passing of the Act the defendants, with several other persons, signed a list headed with the name of the proposed railway, and with the words, "We, the undersigned, hereby agree, on the passing of the Act for the construction of the railway, to subscribe for the number of 101 shares set opposite our respective names." The number opposite the name of the defendant's firm was fifty. Subsequently an agent, alleging himself to have authority from the defendants, but not in fact having any, sent in a fresh list to the promoters, in which list the defendants were set down for 100 shares. The company, after the passing of the Act, allotted the larger number of shares, but at a later period inserted the names of the defendants in the register book of the company in respect of fifty shares. The defendants had no notice of the allotment or the entry in the register, and in 1868 had a call made upon them in respect of their shares under the Companies Clauses Consolidation Act, 1845, ss. 7, 8, 9:—Held, that the defendants were liable as shareholders in the undertaking for the amount of the calls. *Burke v. Lechmere*, 40 Law J. Rep. (n.s.) Q. B. 98; Law Rep. 6 Q. B. 297.

*Liability of directors in respect of qualifying shares.* [See supra D 31—40.]

(2) *Right of repudiation.*

21.—Shares in a company having been purchased by C. from H., he in October, 1865, obtained the consent of B., then an infant of nineteen years, to allow them to be placed in his name, which was done. The company was ordered to be wound up, and in December, 1867, B.'s name was placed upon the list of contributories. B., who attained the age of twenty-one years in September, 1867, wrote a letter in February, 1868,

repudiating the shares. The official liquidator in March, 1868, took out a summons to remove B.'s name from the list and place that of H. in its place. This summons, apparently with B.'s consent, was not proceeded with. B., at the request of the liquidator, in April, 1871, gave liberty to file a bill in his name against C. Afterwards B. applied to have his name removed:—Held, affirming the Master of the Rolls, that he was entitled to an order. *In re the Contract Corporation; Baker's case*, 41 Law J. Rep. (N.S.) Chanc. 275; Law Rep. 7 Chanc. 115.

**22.**—The repudiation of a contract upon insufficient grounds will be good, if at the time there existed sufficient grounds of which the party repudiating was not aware. *In re the London and Mediterranean Bank (Lim.)*; *Wright's case*, 41 Law J. Rep. (N.S.) Chanc. 1; Law Rep. 7 Chanc. 55.

Upon the faith of a false representation in the prospectus of a joint-stock company, W. applied for shares and obtained an allotment, paying a deposit. The committee of the Stock Exchange having refused an application by the directors for a settling day, W., who had at that time no knowledge of the misrepresentation in the prospectus, wrote to the secretary demanding his money back, and subsequently, resolutions having been passed at a general meeting giving to the allottees the option of having their allotments cancelled and the money returned without interest, W. availed himself of that option, returned the share certificates, and received back his money, and the register of shareholders was altered by setting opposite to the shares entered in his name the words, "Money returned and allotment cancelled." The company was afterwards wound up, and the A. list of contributories having become exhausted, W.'s name was placed on the B. list of contributories as a past member of the company; but upon appeal, Held, reversing the decision of Wickens, V.C. (Law Rep. 12 Eq. 331), that the shares had been repudiated and the allotment cancelled, *ab initio*, and that the repudiation by W. of the shares was not the less effectual, because he was not aware at the time, of the misrepresentation in the prospectus, which alone entitled him to repudiate them. *Ibid.*

*Agreement to take shares: acquiescence.*  
[See *supra* E 1.]

(c) *Fully paid-up shares.*

(1) *Subscription of memorandum.*

**23.**—J. F. sold a "take-note" or mining license to F. and others, under an agreement that a portion of the purchase-money, viz., 2,000*l.*, should be taken in paid-up shares of a company about to be promoted by F. and others for working the mine. J. F., on the company's being formed, signed the memorandum of association for 1,000 2*l.* shares, and 1,000 shares were afterwards allotted to him. In the share-ledger of the company was an entry debiting J. F. with 2,000*l.* for the shares and crediting him with 2,000*l.* described as paid by F. and the others. J. F. afterwards sold the 1,000 shares. On the company's

being wound up,—Held, that J. F. had done nothing to exempt him from the liability he had incurred by signing the memorandum to pay for the 1,000 shares in cash, and that he was a contributory in respect of 1,000 shares. Observations of Mellish, L.J., in *Fothergill's case* (21 W.R. 301, and *Spargo's case*, *Ibid.* 307) commented on. *In re the Pen' Allt Silver Lead Mining Company (Lim.)*; *Fraser's case*, 42 Law J. Rep. (N.S.) Chanc. 358.

**24.**—M. in November, 1865, signed the memorandum of association for one hundred 10*l.* shares, and alleged that at the time he did so there was a verbal understanding that the shares were to be paid for by the conveyance of certain land to the company. No allotment was made, but M. acted as a director, for which a qualification of twenty shares was required. Six months after the memorandum was signed M. agreed to sell and afterwards conveyed the land to the company, and the consideration was stated to be 1,000*l.*; 100 shares were afterwards allotted to M. in pursuance of the purchase as fully paid-up shares. M. afterwards purchased ten other fully paid-up shares, and his name was on the register for 110 shares only:—Held, by one of the Vice-Chancellors, that in the absence of any written evidence of the understanding or agreement, the 100 fully paid-up shares allotted for the land could not be taken as being the 100 shares for which M. signed the memorandum of association, but that he must be considered liable for 100 shares. But upon appeal this decision was reversed, and it was held that M.'s name ought not to be on the list for any other than fully paid-up shares. *In re the Matlock Old Bath Hydropathic Company (Lim.)*; *Maynard's case*, 43 Law J. Rep. (N.S.) Chanc. 146; Law Rep. 9 Chanc. 60.

**25.**—Two owners of certain mines subscribed the memorandum of association of a limited company incorporated in 1866, whose object was to work the mines, each for 250 shares. The articles sanctioned the adoption of an agreement by which the owners sold the mines for a price, part of which was to be 500 paid-up shares. The mines were taken by the company, and the former owners were entered on the register of members as holders of 250 fully paid-up shares each:—Held, in the absence of any evidence further than as to these facts, that the shares for which they were so registered must be taken as paid-up shares, and that the liability arising from their subscription of the memorandum was satisfied. *In re the Bosworthen and Penzance Mining Company; Jones's and Taylor's case*, 40 Law J. Rep. (N.S.) Chanc. 133; Law Rep. 6 Chanc. 48.

**26.**—D. signed the memorandum of association of a company registered under the Companies Act, 1862, for 100 shares. He also signed the articles of association of the company, and became a director of it. The memorandum and articles were both dated and registered together. The former said nothing as to the quality of the shares to be subscribed for under it; but the latter provided, *inter alia*, that the shares allotted to the subscribers of the memorandum should be "fully

paid-up shares." The company was ordered to be wound up, and D.'s name was placed on the list of contributories:—Held, that D. having signed the memorandum, had thereby agreed to take "and pay for" the 100 shares; that having regard to the Companies Act, 1862, s. 12, the substitution by the articles of fully paid-up shares, for shares agreed to be paid for, was a substantial alteration in the memorandum, which was not warranted by the Act; and that D. was a contributory. *In re the Anglo-Moravian Hungarian Junction Railway Company (Lim.)*; *Dent's case*, 42 Law J. Rep. (n.s.) Chanc. 474; Law Rep. 15 Eq. 407.

(2) *Payment in bonds.*

27.—Directors of a company formed for running a blockade accepted payment for shares in bonds of the blockaded country, which ultimately became valueless:—Held, that the directors were justified in receiving payment in these bonds, and that the shareholder who had thus paid for his shares was not a contributory. *In re the Mercantile Trading Company*; *Schroeder's case*, 40 Law J. Rep. (n.s.) Chanc. 130; Law Rep. 11 Eq. 131.

(3) *Payment "in cash" within section 25 of the Companies Act, 1867.*

28.—An allottee of "fully paid-up shares" will now be a contributory in respect of them unless he discharges himself from his liability by complying with the provisions of the Companies Act, 1867, s. 25. *In re The Metropolitan Public Carriage and Repository Company (Lim.)*; *Cleland's case*, 41 Law J. Rep. (n.s.) Chanc. 652; Law Rep. 14 Eq. 387.

29.—Section 25 of the Companies Act, 1867, requiring the registration of contracts for payment of shares otherwise than in cash, is not satisfied by the registration of articles of association providing for the execution of a contract of purchase by the company for fully paid-up shares, and signed by the vendor as a subscriber. *In re the Tavarone Mining Company (Lim.)*; *Pritchard's case*, 42 Law J. Rep. (n.s.) Chanc. 768; Law Rep. 8 Chanc. 956.

Semble, per Mellish, L.J., even the proper registration of such a contract, for the issue of fully paid-up shares to the vendor or his nominees, would not protect nominees, unless there were something on the register to identify them as such. *Ibid.*

Articles of association provided that the company, immediately after incorporation, should enter into an agreement for purchase of a mine, the consideration to the vendor being cash and fully paid-up shares, such agreement to be conditional on a certain sum being actually paid up in cash within three months on the shares other than the fully paid-up shares. Such condition was not fulfilled, but some of the shares were allotted as fully paid up:—Held, affirming the decision of Wickens, V.C., that the articles did not constitute a duly-registered agreement under the Companies Act, 1867, and that the allottee was therefore liable as a contributory; but Held also, that even

if there had been a duly-registered agreement the shares were not properly issued under it, and on that ground also could not be considered fully paid up. *Ibid.*

30.—F. was the holder of fifty shares in the company, which had been issued before the Companies Act, 1867, came into operation, and on each of which 14*l.* was unpaid. In 1868 W. brought an action against the company, which was compromised upon the terms that the company should pay to W. 3,200*l.* and should credit F. with 700*l.* in respect of his shares so as to make them fully paid-up shares. The arrangement was carried out, and certificates for fully paid-up shares were issued to F. The company was afterwards wound up:—Held (affirming the decision below, 43 Law J. Rep. (n.s.) Chanc. 264), that there had been payment in full of the amount due upon F.'s shares, and therefore he was not a contributory. *In re the Paraguassu Steam Tramroad Company (Lim.)*; *Ferrao's case*, 43 Law J. Rep. (n.s.) Chanc. 482; Law Rep. 9 Chanc. 355.

Semble—the 25th section of the Companies Act, 1867, is not retrospective so as to apply to shares taken before the commencement of the Act. *Ibid.*

31.—By the articles of association of a limited company it was provided that immediately after its registration the company should raise a loan of 20,000*l.*, to be secured by the issue of first mortgage debenture bonds, bearing 15 per cent. interest; and that with each of the bonds so issued the company should allot fully paid-up shares of equal value to the amount of such bond, by way of bonus to the lenders. A shareholder of the company took debenture bonds, and bonus shares of equal value were registered in his name as fully paid-up shares. The company being ordered to be wound up:—Held, that the articles of association did not constitute a contract in writing between the shareholder and the company within the 25th section of the Companies Act, 1867, and that the bonus shares were payable in cash. *In re the Malaga Lead Company*; *Firmstone's case*, 44 Law J. Rep. (n.s.) Chanc. 617; Law Rep. 20 Eq. 524.

32.—A company at its first meeting resolved "that the sum of 2,716*l.* be credited to S. for the lease of a mine, and that the same be paid out of the share capital of the company," and at the same time that certificates should be issued to S. for the shares agreed to be taken by him as fully paid up. At the date of these resolutions S. had only a verbal agreement with the parties equitably entitled to a lease of the mine, which was afterwards put into writing; the company was cognisant of that agreement, and subsequently made arrangements with S. and the other parties on the footing of that agreement; but in consequence of some difficulties as to the form of the lease, it was never executed. Upon the winding up of the company:—Held, that the transaction between the company and S. was equivalent to an exchange of cheques, and was therefore a cash payment by him, and might be pleaded as such at law; and, consequently, that it was not a contract requiring to be made valid by registration under section 26 of the Companies Act, 1867 (30 & 31 Vict. c. 131). Fur-

ther, that the company having had full knowledge of the nature of the title of S., and having acted upon it, could not now allege that the consideration proceeding from S. had failed. And that even if the consideration had failed, the original payment was none the less a cash payment, though the failure of consideration might be the subject of an action or bill for the recovery of the money or damages. Semble, that it might also be matter for an order under section 101 of the Companies Act, 1862 (25 & 26 Vict. c. 89). *In re the Harmony and Montague Tin and Copper Mining Company (Lim.)*; *Spargo's case*, 42 Law J. Rep. (N.S.) Chanc. 488; Law Rep. 8 Chanc. 407.

The costs of an appeal from the Stannaries Court being ordered to be paid out of the assets of the company, of which the taxing officer of the Stannaries was also official liquidator, directed to be taxed by the officer in Chancery. *Ibid.*

**33.**—F. and others contracted with H., as a trustee for the P. Company then about to be formed, for the sale to the company of their interest in the P. mine in consideration of 5,000 fully paid-up shares. This agreement was filed with the Registrar of Joint Stock Companies together with the memorandum and articles of association of the company, the memorandum of association being signed by F. for 1,000 shares. 1,575 fully paid-up shares were afterwards allotted to F. as part of the consideration to be paid to him for the purchase of the mine, and no other shares were ever allotted to him, nor was he ever registered as the owner of any other shares. Upon the winding-up of the company,—Held, affirming the decision of the Master of the Rolls, that the contract was a separate transaction from the signing of the memorandum of association and the filing of it did not take the case out of the 25th section of the Companies Act, 1867, 30 & 31 Vict. c. 131; and F.'s name must therefore be placed on the list of contributories for 1,000 shares. *In re the Pen' Allt Silver Lead Mining Company (Lim.)*; *Fothergill's case*, 42 Law J. Rep. (N.S.) Chanc. 481; Law Rep. 8 Chanc. 270.

**34.**—A company was formed with a capital of 7,500 l. shares for the purpose, as stated in the memorandum of association, of purchasing the business of C. C. subscribed the memorandum for 2,500 shares, and other persons subscribed it for 3,625 shares, making the total number of shares subscribed for 6,125. The articles, which bore the same date as the memorandum, stated that an agreement had been prepared for the purchase of C.'s business, and that the purchase-money was to be 5,000l., half to be paid in cash and half in fully paid-up shares. The articles also authorised the company by special resolution to create new shares. Two days afterwards the agreement between C. and the company was executed, and it contained the same provisions as to the payment of the purchase-money, but did not in terms state that the 2,500 shares for which C. had subscribed were the 2,500 fully paid-up shares he was to receive in part payment. This agreement was duly registered as a compliance with the 25th section of the Companies Act of 1867, and

2,500 shares were subsequently allotted to C. as the shares for which he had subscribed the memorandum and articles of association, and C. was treated by the company and appeared on the register as the holder of 2,500 fully paid-up shares only:—Held, in the winding-up of the company, that the 2,500 shares for which C. had subscribed were the 2,500 fully paid-up shares which he was to receive in part payment, and that having given money's worth for them, he had in fact paid for them in "cash" within the meaning of the 25th section, and was not liable to be placed on the list of contributories. *In re the Limehouse Works Company (Lim.)*; *Coates' case*, 43 Law J. Rep. (N.S.) Chanc. 538; Law Rep. 17 Eq. 169.

Observations upon *Dent's case* (42 Law J. Rep. (N.S.) Chanc. 857; Law Rep. 8 Chanc. 270), *Spargo's case* (42 Law J. Rep. (N.S.) Chanc. 488; Law Rep. 8 Chanc. 407), and other authorities. *Ibid.*

**35.**—The owners of certain works and patents agreed with T., the promoter of a company, to sell the same for a sum in cash and a number of fully paid-up shares in the company. A contract was subsequently entered into between the vendors and the company by which the company agreed to purchase the property for a much higher consideration, including a larger number of fully paid-up shares, but it was arranged between the parties that the vendors should receive only the consideration mentioned in the original agreement, and that the excess should be received by T. Accordingly the vendors received only the original consideration, and the directors passed a resolution that the additional shares should be allotted to T. The contract was afterwards registered at the office of Joint Stock Companies. Subsequently T. transferred twenty of his shares to B. for value. It did not appear when these shares were actually allotted to T., but the certificates of them were dated after the registration of the contract:—Held, that the contract registered was sufficient to satisfy the 25th section of the Companies Act, 1867. Held also, that there was no evidence that these shares became the property of T. until the certificates were issued, and that accordingly they must be taken to be fully paid-up shares, and that the purchaser was not liable as a contributory in respect of them. *In re the Imperial Rubber Company (Lim.)*; *Bush's case*, 43 Law J. Rep. (N.S.) Chanc. 772; Law Rep. 9 Chanc. 555.

**36.**—The persons engaged in working a mine as shareholders in an unlimited company formed themselves into a limited company, for the purpose of acquiring the interests and property of the shareholders in the old company and working the mine, and they subscribed for the whole number of the shares in the new company. By a clause in the articles of association of the new company, it was agreed that each of the shares of the new company (which were of the nominal value of 10l. per share) should be credited with 7l. per share as paid up thereon; and that in consideration thereof, the interest of the parties engaged in working the mine should by the articles be transferred to the new company. No other contract as

to the transfer of the property was entered into. The articles were signed by all the shareholders and duly registered, and the new company took possession of the property of the old company. The shares were duly allotted in accordance with the agreement, and in the register of shareholders and books of the company, each share was credited with the sum of 7*l.* as paid up thereon:—Held, in the winding-up of the new company, that this clause in the articles of association constituted a sufficient contract in writing within the meaning of the 25th section of the Companies Act, 1870, to exonerate the shareholders in the new company from any further payment in respect of the 7*l.* per share credited as paid up on each share. *In re the Appletreewick Lead Mining Company (Lim.)*, 43 Law J. Rep. (n.s.) Chanc. 793; Law Rep. 18 Eq. 95.

[And see supra D 41, 44.]

(4) *Transferee of bonus shares, with notice.*

**37.**—A second transferee of fully paid-up bonus shares for which no consideration has been given or paid, with notice, stands in no better position than the original allottee of them, and will, in the absence of any contract in writing under the 26th section of the Companies Act, 1867, be liable in the winding-up of the company for any calls that may be made on the shares. *In re the Carribean Company (Lim.)*; *Crickmer's case*, 44 Law J. Rep. (n.s.) Chanc. 595; Law Rep. 10 Chanc. 614.

(5) *Rectification of register where contract not registered.*

**38.**—Where fully paid-up shares had been issued in pursuance of a contract which had through inadvertence not been registered, the Court, with the consent of the company, made an order for rectification of the register, and re-issue of the shares after registration of the contract. *In re the Denton Colliery Company*; *Ex parte Shaw*, and *In re the New Zealand Kapanga Gold Company*; *Ex parte Thomas*, Law Rep. 18 Eq. 16.

[And see D 62.]

(d) *Contributories entitled to set-off.*

**39.**—The Companies Act, 1862, does not give the Court of Chancery jurisdiction to decide what defence may or may not be set up to an action at law brought by the official liquidator with the leave of the Court against a debtor to the company, who is himself a creditor of the company on a separate claim, and has been admitted to prove as such in the winding-up. *In re the Albert Insurance Company*; *Paribyl's case*, 40 Law J. Rep. (n.s.) Chanc. 340.

**40.**—In a compulsory winding-up a shareholder cannot set off against calls debts due to him upon a contract with the company, notwithstanding his right to do so may have been specially stipulated for by the contract, and notwithstanding his application for shares may have been in consideration and in pursuance of such contract. Whether, under a voluntary winding up, such a

set-off can be allowed, quære. *In re the Paraguanu Steam Tramroad Company*; *Ex parte Black, Hawthorn & Company*, 42 Law J. Rep. (n.s.) Chanc. 404; Law Rep. 8 Chanc. 254.

*The Brighton Arcade Company v. Dowling* (37 Law J. Rep. (n.s.) C. P. 125; Law Rep. 3 C. P. 175) doubted. *Ibid.*

**41.**—A shareholder in a limited liability company cannot set off a debt due from the company to him against calls due on his shares previously to the winding-up, and the true reason for this is to be found in the language of section 38 of the Companies Act, 1862, and not in any implication to be drawn from the words of section 101 of the Act. Remarks on *Calisher's case* (37 Law J. Rep. (n.s.) Chanc. 208; Law Rep. 5 Eq. 214). *In re the Stranton Iron and Steel Company (Lim.)*; *Ex parte Barnett*, 44 Law J. Rep. (n.s.) Chanc. 233; Law Rep. 19 Eq. 449.

**42.**—A limited company—which was being wound up for insolvency under the Companies Act, 1862, at first by a resolution to wind up voluntarily, and afterwards by an order of the Court of Chancery that the winding-up should continue subject to its supervision—sued a shareholder for a debt contracted after the order was made. The defendant pleaded as a set-off a debt from the company due before the resolution was passed:—Held, that the plea was bad: first, because the debts are not “mutual” within the meaning of the statutes of set-off, 2 Geo. 2. c. 22, s. 13, and 8 Geo. 4. c. 24, ss. 4, 5; secondly, because (on the authority of the dicta in *The Brighton Arcade Company (Lim.) v. Dowling* (37 Law J. Rep. (n.s.) C. P. 125; s. c. Law Rep. 3 C. P. 175), such a set-off is excluded by the Companies Act, 1862; thirdly (per Bramwell, B.), because no debt can be set off, unless it can be sued for in a cross-action, and by the effect of the Companies Act, 1862, after such an order has been made, no action can be brought against the company without the leave of the Court of Chancery. *The Sankey Brook Coal Company (Lim.) v. Marsh*, 40 Law J. Rep. (n.s.) Exch. 125; Law Rep. 6 Exch. 185.

[And see supra G 30.]

(e) *Transfer of shares.*

(1) *Liability of person taking transfer in name of infant.*

**43.**—A father bought shares and took transfers executed by himself, in the name of his infant son:—Held, that these were transfers to the father in a wrong name, and his name was placed on the list of contributors. *The Imperial Mercantile Credit Association*; *Richardson's case*, 44 Law J. Rep. (n.s.) Chanc. 252; Law Rep. 19 Eq. 588.

(2) *Right of transferee to indemnity.*

(i) *Implied contract by transferee.*

**44.**—On the 13th of April, 1856, the defendant, through his brokers, C. & Co., purchased 100 shares in a company, registered under the Companies Act, 1862, of a jobber, for the account or

settling-day, the 26th of April. Before the day arrived, he requested his brokers to carry over the contract to the next account-day, the 15th of May. On the 14th of May, the brokers passed a ticket with the defendant's name as purchaser of the shares. This ticket was split or divided according to the practice of the Stock Exchange, and a part or split for fifteen shares was handed to the brokers of the plaintiff, who was the ultimate seller of that number of shares. The plaintiff thereupon, on the 15th of May, executed a deed of transfer to the defendant in the proper form, and delivered the transfer and the share certificates to the defendant's brokers, who accepted them on behalf of the defendant, paid the plaintiff's brokers the price of the shares, and forwarded the transfer and the certificates to the defendant. The defendant refused to accept the shares, and the company having stopped payment the plaintiff was made a contributory and compelled to pay calls:—Held, that the transactions above stated were evidence of a contract by which the defendant, as the acceptor of a transfer of the fifteen shares, was bound to indemnify the plaintiff against the calls made in respect of them. *Bouring v. Shepherd* (Exch. Ch.), 40 Law J. Rep. (n.s.) Q. B. 129; Law Rep. 6 Q. B. 309.

45.—On the 4th of September, 1865, the plaintiff sold to the defendant twenty shares in a joint-stock company. On the 8th he executed a transfer to the defendant, who paid the purchase-money and caused the transfer to be registered by the company on the 4th of December. On the 20th of March, 1866, the defendant transferred the shares to M. On the 18th of April, 1866, the company stopped payment, and on the 8th of May, 1866, was ordered to be wound up. On the 24th of July, 1866, M. was placed on the A list of contributories, being the list of existing members. On the 30th of October, 1866, M. executed a deed of inspectorship. An order was made upon M. to pay a call of 40% a share, but he did not pay, and the liquidators failed to get any payment out of his estate. On the 6th of December, 1867, the plaintiff and the defendant were placed, in respect of the same shares, on the B list of contributories, being the list of past members. On the 27th of December, 1866, the defendant executed a deed of inspectorship under section 192 of the Bankruptcy Act, 1861, which was registered on the 29th of December, 1867. On the 20th of March, 1869, the Court ordered the defendant to pay a call of 40% a share, which he did not do, and on the 10th of May the plaintiff in pursuance of an agreement of compromise made between himself and the official liquidator, paid the sum of 15% per share in respect of the twenty shares sold by him to the defendant. The official liquidator proved under both deeds of inspectorship:—Held, affirming the judgment of the Court below (42 Law J. Rep. (n.s.) Q. B. 174; Law Rep. 8 Q. B. 458), that the plaintiff was entitled to sue the defendant for the amount which he had paid to the official liquidator, and that the deed which the defendant had executed formed no defence to the action. *Kellock v. Enthoven* (Exch.

Ch.), 43 Law J. Rep. (n.s.) Q. B. 90; Law Rep. 9 Q. B. 241.

(ii) *Right against real purchaser where transferee an infant.*

46.—R. through his brokers sold shares on the Stock Exchange to a jobber, who passed a name into which R. executed a transfer and the sale was settled. The transfer was never registered, the company was wound up, and the name proved to be that of a minor. The jobber gave R. all the information in his power, informing him to whom he resold the shares, and by what brokers the name was originally passed. On bill by R. against the jobber for indemnity against past and future calls,—Held, that the defendant was exonerated from all liability. *Rennie v. Morris*, 41 Law J. Rep. (n.s.) Chanc. 321; Law Rep. 13 Eq. 203.

Semble—the proper course for a vendor to pursue is, to make inquiries of all intermediate purchasers and brokers, and to sue the last principal or any intermediate person who refuses information. *Ibid*.

47.—M. sold fifty shares in a company (upon which there remained a liability of 900*l.*), through his broker, a member of the Stock Exchange, to N., a stock jobber, also a member. On the settling-day N. passed the name of L., which he had received from some other broker, to M.'s broker, who prepared a transfer to L., which M. executed. The price was paid, and the transfer handed over in the usual way. The transfer was never registered. Two years later the company being ordered to be wound up, M.'s name was put upon the list of contributories, and calls upon him were made. He then, for the first time, discovered that L. was an infant:—Held, that the jobber had not performed his contract, and that he was bound to indemnify M. against the calls. *Merry v. Nickalls* 41 Law J. Rep. (n.s.) Chanc. 767; Law Rep. 7 Chanc. 733; affirmed, on appeal, to the House of Lords, *sub nom. Nickalls v. Merry*, Law Rep. 7 E. & I. App. 530.

*Rennie v. Morris* (41 Law J. Rep. (n.s.) Chanc. 321) overruled. *Ibid*.

48.—Fifteen shares in a limited company partly paid up, belonging to the plaintiff, were, with 115 other like shares, sold on the London Stock Exchange, and were purchased by a London broker for B. & S., country brokers, who had been instructed by D., J., S., and E., to buy several lots of shares. B. & S. gave the name of K., an infant, and a clerk in their office, as the purchaser of the shares, which were accordingly transferred to K. Forty of these shares belonging to E. were subsequently sold; the other ninety, including those sold by the plaintiff, and of which three lots of thirty each had been really purchased on behalf of D., J. & S. respectively, remained in K.'s name, unappropriated to the real purchasers, until the company was wound up. The plaintiff was settled upon the list of contributories in respect of the fifteen shares sold by him:—Held, varying the decision of the Court below (42 Law J. Rep. (n.s.) Chanc. 397; Law Rep. 15 Eq. 363), that the plaintiff was entitled to be indemnified

by D., J. & S. rateably, in respect of these fifteen shares. *Brown v. Black*, 42 Law J. Rep. (N.S.) Chanc. 814; Law Rep. 8 Chanc. 939.

49.—E. E. instructed his brokers to purchase 100 shares in a joint-stock company to be transferred into the name of his son G. E. The shares were accordingly purchased from M., and transferred by E. E.'s direction into the name of his son, G. E., who was an infant, but not known by M. or his brokers to be so. The company was shortly afterwards wound up, and G. E., who had been placed on the list of contributories, commenced an action at law against M., who was an auditor of the company, for repayment of the purchase-money, charging fraud and failure of consideration. The action was compromised by M. repaying the purchase-money and taking back the shares, the charge of fraud being withdrawn, and M.'s name was substituted for that of G. E. as a contributory. Two and a half years afterwards M., who had paid several calls under the winding-up, filed his bill against E. E. for repayment and indemnity, alleging that E. E. was the real purchaser for his own benefit, and had passed the name of G. E. as the purchaser in order to evade liability, and also stating that the plaintiff did not know at the time of the compromise of the action that E. E. was the real purchaser:—Held, reversing the decision of one of the Vice-Chancellors, that the compromise of the action was a bar to the suit. *Maynard v. Eaton*, 43 Law J. Rep. (N.S.) Chanc. 641; Law Rep. 9 Chanc. 414.

(3) *Effect of guarantie by transferor.*

50.—H. transferred by deed to J. for a nominal consideration 650 shares in a company of 100l. each, on which 25l. per share had been paid up, and which were at the time quoted in the market at from 1l. to 3l. The transfer was *bonâ fide*, and H. retained no interest in the shares. The directors of the company at first refused to register the transfer, but ultimately accepted it on H. entering into a verbal agreement with them with regard to guaranteeing the payment of future calls. Under this agreement H. paid one call of 3l. per share which was then pending. The company was then wound up, and J. was unable to pay the calls:—Held, reversing the decision of Stuart, V.C., that whatever remedy the liquidator might have against H. by virtue of the guarantie, J. was the only proper person to remain on the list as contributory in class A, in respect of the 640 shares. *In re the Bank of Hindustan, China and Japan (Lim.)*; *Harrison's case*, 40 Law J. Rep. (N.S.) Chanc. 333; Law Rep. 6 Chanc. 286.

(4) *Purchase of shares in name of trustee.*

51.—K. and C., officers of an unregistered company, purchased shares, and caused them to be registered in the name of V., agreeing to indemnify him from calls, the object of using the name of the trustee being stated to be the concealment of the fact that K. and C. were dealing in the company's shares. The beneficial interest in the shares afterwards became K.'s alone. Three

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years after the purchase the company was ordered to be wound up:—Held, that K. could not be placed upon the list of contributories. *In re the Great Wheal Busy Mining Company*; *King's case*, 40 Law J. Rep. (N.S.) Chanc. 361; Law Rep. 6 Chanc. 196.

52.—H. & P., who were directors of the defendants' railway company, were the registered holders of shares. They held the shares as trustees for the company. After the death of P., H. became the registered holder of stock into which the shares had been converted, and which he held as trustee. The coupons or certificates for the stock were obtained by H., and he deposited them in a bank as a security for an advance of money. The money was advanced by R. at the request of H., who asserted that he was the real proprietor. R. received the certificates from the bank. No deed of transfer was executed in the lifetime of R., but after his death his widow required H. to execute a transfer, which he did. Neither the bank nor R. had given any notice to the defendants that they had any claim on the stock, and the defendants had regularly received the dividends. As soon as the defendants discovered the fraud committed by H., they gave notice to the widow of R. that H. had no right to mortgage the stock, as it stood in his name merely as trustee, and they refused to enter her name upon the register as proprietor of the stock:—Held, that H., as a trustee, had no right to hold the certificates; that the defendants by allowing him to hold them had enabled him to hold himself out as the proprietor of the stock; and that the prosecutrix was entitled to a mandamus commanding the defendants to enter her name as proprietor of the stock. *Robson v. The Shropshire Union Railways and Canal Company*, 42 Law J. Rep. (N.S.) Q.B. 193; Law Rep. 8 Q.B. 420, *nom. The Queen v. Shropshire, &c.*

53.—Shares in a company were, to escape liability, transferred by the direction of a mortgagee into the name of the mortgagee's servant. The servant afterwards claimed the shares, and contended that as the transaction was fraudulent as against the company, the Court would not assist the mortgagee by declaring that she was a trustee of the shares for him:—Held, that the mortgagee, not being under any liability to the company, or to the creditors of the company, had a right to direct this transfer to be made, and was entitled to a declaration that the servant held the shares in trust for him. *Colquhoun v. Courtenay*, 43 Law J. Rep. (N.S.) Chanc. 338.

[And see supra D 15.]

(5) *Shares held in joint names.*

54.—Shares registered in the joint names of two persons are their joint property, and on the death of one of them the whole liability in respect of the shares accrues to the survivor, and the executors of the deceased joint tenant are discharged. *In re the Maria Anna and Steinbank Coal and Coke Company (Lim.)*, 44 Law J. Rep. (N.S.) Chanc. 423; Law Rep. 20 Eq. 585.

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(6) *Registration and validity of transfers.*(i) *Transfer or registration after winding up or calls being due.*

**55.**—A winding up petition, after several adjournments, was dismissed on payment of costs, but a small balance of the costs was left unpaid. Some months afterwards another petition was presented, and an order was made on both petitions, that the company should be wound up and dissolved as from the day on which the order was made. These proceedings took place before the Winding-up Act of 1862:—Held, that a shareholder who had transferred his shares after the presentation of the first petition and before that of the second, was liable as a contributory. *In re the Consols Insurance Company; Glanville's case*, 40 Law J. Rep. (n.s.) Chanc. 35; Law Rep. 10 Eq. 479.

**56.**—A transfer of shares in a company subject to the provisions of the Companies Act, 1845, which is made whilst calls are due and is duly registered, is not invalid under the 16th section of the Act, and the transferor is not liable as a contributory. The restriction placed by the 16th section upon the transfer of shares on which calls are due was enacted for the protection of the company, and may be waived by them. *In re the Hoyalake Railway Company; Littledale's case*, 43 Law J. Rep. (n.s.) Chanc. 529; Law Rep. 9 Chanc. 257.

*Transfer of shares after amalgamation of company.* [See *supra* E 20, 21.]

(ii) *Misdescription and mistake.*

**57.**—A transfer of shares when the transferor has shares of the same number as, or a greater number than those expressed to be transferred, is not necessarily void because in the transfer the distinguishing numbers do not correspond with those of any of the transferor's shares. *The International Contract Company; In's case*, 41 Law J. Rep. (n.s.) Chanc. 564; Law Rep. 7 Chanc. 485.

I. agreed to accept as trustee fifty shares, to be transferred by K. A transfer in blank was executed, which was afterwards filled up with numbers not corresponding to any of K.'s shares. K. had, however, fifty shares whose numbers differed only as to one digit from those described in the transfer. The transfer was, with I.'s consent, registered before the mistake was discovered. Upon the company being subsequently ordered to be wound up,—Held, that I. was properly placed on the list of contributories for fifty shares. *Ibid.*

**58.**—The holder of shares in a banking company, not fully paid up, made a transfer of them (by way of absolute gift, according to the evidence of himself and the transferee) to his son-in-law, a journeyman butcher. The transfer was prepared by a stockbroker in the ordinary way, the transferee was described as a gentleman, and the consideration stated to be 5s. At the date of the transfer the shares were saleable in the market at a substantial price. The company had, by its articles, the power of declining to register transfers.

The transfer was registered. Twelve days later the company stopped payment. Five years afterwards the official liquidator sought to place the transferor on the list of contributories, upon the grounds, first, that the transfer was not a *bond fide* out-and-out transfer, and, secondly, that the misdescription of the transferee rendered it invalid:—Held, reversing the decision of one of the Vice-Chancellors, that the transfer must be held valid. *In re the European Bank; Masters' case*, 41 Law J. Rep. (n.s.) Chanc. 501; Law Rep. 7 Chanc. 292. And see *In re the Financial Insurance Company; Bishop's case* (Law Rep. 7 Chanc. 296n); and *In re Smith, Knight & Company; Hockin's case* (*Ibid.*).

(iii) *Irregularity: directors interested.*

**59.**—In 1859, B, who was a director of a company formed under 7 & 8 Vict. c. 110, sold all his shares to M., the purchase-money not to be paid if the company was wound up within two years. The company's deed of settlement provided, that if eighty per cent. of the subscribed capital should be lost, the company should *ipso facto* be dissolved, and it required, on a transfer of shares, a previous notice to the directors; a certificate of approval by them of the transfer; also that the transferee should execute within a month, at the office of the company or at such other place as the directors should reasonably require, a deed of covenant to abide by the rules of the company. The shares could be transferred only by deed of transfer executed by the transferor. Shortly before the sale of B.'s shares the directors had received an accountant's report of the state of the company's affairs, from which it appeared that eighty per cent. of the gross capital had been lost, but it appeared also that the goodwill and connection of the company was of considerable value, either as a basis for further operations or on a transfer to another company. This report was not communicated to the shareholders. But there was a change of directors, B. and his co-directors transferring their shares to and retiring in favour of M. and others, who were also directors of a banking company. No formal notice of the intended transfer by B. was ever given, nor was any deed of covenant ever executed by or demanded of M. But B. executed a deed of transfer, and the transfer was subsequently approved by the new board of directors, M. himself being present, and notice of the transfer was sent to the registrar of joint stock companies:—Held (by the House of Lords, affirming the decision of the Court of Appeal in Chancery, 40 Law J. Rep. (n.s.) Chanc. 205; Law Rep. 6 Chanc. 246, *nom. Agriculturists' Cattle Insurance Company, Bush's case*), that the transfer was valid, though irregular, that as M. and the other new directors had taken upon themselves to act, and were at various meetings recognised by the company as directors, their consent to the transfer was, by 7 & 8 Vict. c. 110. s. 30, rendered a valid consent, although their qualification had been irregularly obtained, and that it was a matter for the directors and no concern of B.'s



whether the deed of covenant was or was not demanded of M. *Murray v. Bush* (H.L.), 42 Law J. Rep. (N.S.) Chanc. 586; Law Rep. 6 E. & I. App. 37.

Held, also, that the transaction was not affected by the loss of capital, as the value of the goodwill might have turned the balance, if a proper estimate had been put upon it, and the goodwill was an asset of the company. And whether the directors ought or not to have wound up the company at that time, the transfer was not invalidated, since the company was carried on for nearly two years afterwards. *Ibid.*

Lords Chelmsford and Colonsay dissented from this decision, and the appeal was dismissed without costs, though fraud had been imputed and not sustained. *Ibid.*

(iv) *Enforcement of equitable right to be registered as shareholder.*

60.—The Court has no jurisdiction under the 35th section of the Companies Act of 1862, to grant specific performance of an agreement to transfer shares or to enforce against the company an equitable claim to be registered as a shareholder, but where an applicant has a legal title, the Court will compel the company to enter his name on the register, although his title is disputed by the person registered as holder. In such case the Court has no jurisdiction to make such person disputing the title pay the costs of the summons rendered necessary by his opposition. *In re the Tahiti Cotton and Coffee Plantation Company (Lim.)*; *Ex parte Sargent*, 43 Law J. Rep. (N.S.) Chanc. 425; Law Rep. 17 Eq. 273.

The pledgee of shares with transfers executed by the pledgor with the date and name of the transferee in blank has, and also his transferee has, implied power to fill up the blanks. Such transfers, although executed as deeds by the original pledgor, will not operate as deeds, and if the regulations of the company require a deed will only confer an equitable interest and operate as contracts to transfer, but when the articles of association did not require a deed and the blanks had been filled up by the transferee of the pledgor:—Held, that they operated as valid transfers and conferred on him a right to be registered as a shareholder, which the Court would enforce on summons under the 35th section. *Ibid.*

(v) *Rules of Stock Exchange.*

[And see STOCK EXCHANGE.]

61.—The plaintiffs, brokers on the Stock Exchange, who had at the request of the defendant contracted for the purchase of shares for him, were, on the 13th of July, the “carrying over day” for the 15th, instructed by him to carry over the contract from the 15th till the 29th of July, the next account day. On the 15th they paid for him the difference on the shares at the price of the 13th, amounting to 1,688*l.* To have closed the account on the 15th he would have had to pay 4,037*l.* On the 18th of July the plaintiffs became defaulters on the Stock Exchange, where-

upon, in accordance with the rules of the house, all their bargains were closed and made up by the official assignees at the prices of that day. The price of the shares purchased for the defendant having fallen, the amount due from him in respect thereof was 6,013*l.*, which the plaintiffs became liable to pay to the official assignees. The defendant might have had the shares at any time before the 29th by paying the price he contracted for, but he did not pay:—Held, that the rules of the Stock Exchange with regard to defaulting brokers are imported into a contract for the purchase of shares made through a broker, it being reasonable that the principal should be identified with the broker, and liable as the broker is to all the incidents of the contract; and that the defendant not having completed his purchase by paying the agreed price for the shares on or before the 29th, the plaintiffs were entitled to recover the 6,013*l.* from him. *Duncan v. Hill*, 40 Law J. Rep. (N.S.) Exch. 137; Law Rep. 6 Exch. 255.

Held, also, that if he had paid the plaintiffs the 1,688*l.* difference at the time of carrying over, they would have been none the less entitled to recover the sum they were liable to pay under the rules of the Stock Exchange in respect of the contract they had entered into for him. *Ibid.*

(f) *Bankrupt contributory.*

62.—Whenever any shareholder, who is liable to be put on the list as a contributory in class B, becomes a bankrupt after the commencement of the winding-up, the liquidator is entitled to prove the amount of his liability against his estate, and the assignees or trustees of the estate are to be placed on the list of contributories in lieu of the bankrupt, notwithstanding that the shareholder has obtained his order of discharge before the B list is made out. *In re the Land Credit Company of Ireland*; *McEwen's case*, 40 Law J. Rep. (N.S.) Chanc. 341; Law Rep. 6 Chanc. 582; affirming the decision of the Master of the Rolls, 40 Law J. Rep. (N.S.) Chanc. 184.

63.—A contributory in a mining company having become bankrupt and obtained his discharge:—Held, that he was not liable in respect of a call subsequently made in the winding-up of the company. *Ex parte Marshall*; *In re Waddington*, Law Rep. 7 Chanc. 324.

64.—Where a contributory in the winding-up of an unregistered company becomes bankrupt, the official liquidator may prove against his estate for the estimated amount of calls as for a separate debt, in the same way as in the case of a registered company. *Ex parte Ball*; *In re Adams*, Law Rep. 10 Chanc. 48.

(g) *Forfeiture of shares.*

65.—The directors of a company were empowered by the articles to forfeit shares of any member whose calls were in arrear, and also to remit forfeiture within six months on such terms as they thought fit. On November 11th, 1870, the directors declared the shares of C. forfeited. They subsequently sent to him notice that the for-

feiture would be remitted if the amount of call, with 10% per cent. interest, were paid before the evening of May 10th. The notice contained a postscript to the effect that the directors had not power to remit forfeitures after the 11th. The agent of a mortgagee of C. tendered a cheque for the amount of call and interest at the company's office on the afternoon of the 10th, and was directed by a clerk to pay it to the company's account at the bank. He arrived at the bank five minutes after closing hours, and was told to pay in the money next morning, which he did:—Held, on application by V., the trustee in bankruptcy of C., and by the trustee of C.'s mortgagee, that the tender at the company's office was good, that it might have been made at any time before sunset of the 10th, and that if it had not been made on the 10th, the payment on the 11th was in time; and that the register must be rectified by the insertion of V.'s name as holder of the seventy-five shares. *In re the Quebrada Company (Lim.)*; *Clarke's case*, 42 Law J. Rep. (N.S.) Chanc. 277.

(h) *Liability limited by contract.*

66.—Wherever under a policy of assurance there is a contract that the assured are to look to the assets and property of the company only, each shareholder is (except as to the expenses of a winding-up) liable only to the extent of the amount unpaid upon his shares. *Lethbridge v. Adams*; *Ex parte the National Life Assurance Society*, 41 Law J. Rep. (N.S.) Chanc. 710; Law Rep. 13 Eq. 547.

An unregistered company, the deed of settlement whereof provided for a dissolution when a fourth of the capital was lost, granted policies under which the property of the company alone was liable. The company continued business after a fourth of the capital was lost, became insolvent, was registered as an unlimited company, and was ordered to be wound up. Upon a claim carried in by the liquidator in a suit to administer the estate of a deceased shareholder, it being admitted that the shareholders were liable to contribute beyond the amount unpaid on their shares towards the expenses of the winding-up,—Held, that as regarded the policy holders the liability of each shareholder was nevertheless limited to the amount unpaid upon his shares.

(i) *Shares subject to lien by company.*

67.—The articles of a bank provided that the bank should have a permanent lien upon shares of members for money due from them to the company. The bank being in liquidation, an agreement was entered into with another company for the sale and transfer to it of the business and assets of the bank. The agreement provided that the purchasing company should pay to each shareholder of the bank who did not wish to take shares in the new company, 2% for each share he held in the bank. L., who held 605 shares in the bank, and was at the time largely indebted to it, did not subscribe for shares in the new company,

having shortly before executed an inspectorship deed under the Bankruptcy Act of 1861:—Held, that the lien given by the articles on L.'s shares extended to the money which the new company was to pay him for them under the agreement. *In re the General Exchange Bank*; *Claim of the London, Hamburg, and Continental Exchange Bank*, 40 Law J. Rep. (N.S.) Chanc. 429; Law Rep. 6 Chanc. 618.

(k) *Preference shares.*

68.—In order that a company may have power to issue preference shares, it is not indispensable that the power should be stated in the memorandum of association; it is sufficient if it is given by the articles of association, according to their true construction. *Harrison v. The Mexican Railway Company*, 44 Law J. Rep. (N.S.) Chanc. 403; Law Rep. 19 Eq. 358.

69.—A company, registered under the Companies Act, 1862, duly authorised the issue of 25,000 first preference shares on the following terms:—"The preference capital authorised is 250,000%, carrying dividend at 10% per cent. per annum, payable half yearly, and entitled to a *pro rata* participation in surplus dividends, after 10% per cent. has been paid on the ordinary share capital of 650,000%."—Held, that the owners of these preference shares were entitled to have the arrears of such preferential dividend made good out of the profits of subsequent years. *Webb v. Earle*, 44 Law J. Rep. (N.S.) Chanc. 608; Law Rep. 20 Eq. 556.

(l) *Past members.*

(1) *Extent of their liability.*

70.—A past member of a company, limited by shares under the Companies Act, 1862, who has transferred his shares within a year of the winding up, is liable (if his transferee has not paid the unpaid capital on his shares, and if the present members' contributions are insufficient) to contribute, together with other past members, to the assets of the company to the full amount of the debts which were due at the date of the transfer, and which were still unpaid at the date of the winding-up; but from that amount must be deducted the dividends already received in respect thereof from the present members. *In re the Oriental Commercial Bank (Lim.)*; *Morris's case*, 41 Law J. Rep. (N.S.) Chanc. 11; Law Rep. 7 Chanc. 200 (reported in Court below 40 Law J. Rep. (N.S.) Chanc. 520).

Each past shareholder is liable to contribute to such unpaid debts, to the extent of the amount unpaid on the shares by his transferee, *pari passu*, with all the other past shareholders who are liable for the same debts, and cannot require that the past members who transferred their shares after his transfer was registered should be exhausted before any call is made on him. *Ibid.*

71.—A past member of a company in course of winding-up is only liable to contribute in respect of debts contracted before he ceased to be a member to the extent to which those debts remain

unsatisfied after the application, *pari passu*, of the contributions of the present members to the payment of the general liabilities of the company; and he is at liberty to make any arrangement with the creditors in respect of those debts; and if the result of such arrangement be that the company is released from those debts, he will escape all liability as a contributory. *In re the Blakeley Ordnance Company (Lim.)*; *Brett's case*; *In re the Oriental Commercial Bank (Lim.)*, *Morris's case*, 43 Law J. Rep. (n.s.) Chanc. 47; Law Rep. 8 Chanc. 800.

But the contributions of past members are part of the general assets of the company, and are not applicable exclusively to the discharge of those debts in respect of which they are paid. *Webb v. Whiffin*, 42 Law J. Rep. (n.s.) Chanc. 161; Law Rep. 5 E. & I. App. 751. No. 76 *infra* examined and explained. *Ibid*.

**72.**—A past member of a company having been fixed upon the list of contributories in respect of debts contracted before he ceased to be a member, is at liberty to make any arrangement with the creditors in respect of those debts; and if the result of such arrangement be that the company is released from those debts, he will escape all liability as a contributory: affirming the judgment of the Master of the Rolls, 40 Law J. Rep. (n.s.) Chanc. 222, and dissenting from *In re the Accidental and Marine Insurance Corporation*, 39 Law J. Rep. (n.s.) Chanc. 585; Law Rep. 5 Chanc. 428. *In re the Blakeley Ordnance Company (Lim.)*; *Brett's case*, 40 Law J. Rep. (n.s.) Chanc. 497; Law Rep. 6 Chanc. 800.

(2) *Debt to bank: appropriation of payments.*

**73.**—The principle of appropriation of payments laid down in *Clayton's Case* (1 Mer. 572) applies to dealings between a company and its bankers, so that a former shareholder who has transferred his shares is exonerated from contributing to the company's debt to its bankers if before the winding-up sufficient money had been paid to the bank to cancel what was due to the bank when such shareholder ceased to be a member. *In re the Devonport, &c., Mill Company*; *Bateman's case*, 42 Law J. Rep. (n.s.) Chanc. 577.

(3) *Transfer to infant.*

**74.**—More than twelve months before the winding-up of a company, G. transferred shares to an infant, who within the twelve months transferred them to an adult. Both transfers were duly registered:—Held, reversing the decision of the Master of the Rolls, that G. was not liable as a past shareholder. *In re the Contract Corporation*; *Gooch's case*, 42 Law J. Rep. (n.s.) Chanc. 381; Law Rep. 8 Chanc. 266.

(4) *Shares transferred more than a year before winding-up.*

**75.**—An Act of Parliament incorporating a company enacted that no share should vest in any person until he should have paid one-fifth the

amount of it. In the winding-up of the company, the liquidator placed on the list of contributories the name of one who had had shares allotted to him, but had parted with them by a transfer registered more than a year before the winding-up, on the ground that he had never paid one-fifth of the amount of them, and that he consequently could not transfer them:—Held, that in such a case the pretended transfer would operate as a new agreement, whereby the company released the transferor from his engagement to take shares, and accepted the transferee in his place. *In re the Towns Drainage and Sewage Utilization Company*; *Morton's case*, 42 Law J. Rep. (n.s.) Chanc. 786; Law Rep. 16 Eq. 104.

(5) *Application of contributions of past members.*

[See *supra*, Nos. 70, 71.]

**76.**—Although past members of a company in liquidation are only liable to contribute in respect of debts existing at the time of their retirement their contributions when made become part of the general assets of the company and must be applied in discharge of the general liabilities of the company. Creditors in respect of debts contracted before the retirement of such members are not entitled to have such contributions applied or appropriated exclusively, or in priority, to the payment of their debts. *Morris's case* (41 Law J. Rep. (n.s.) Chanc. 11; Law Rep. 7 Chanc. 200; No. 70 *supra*) discussed, and not approved. *Webb v. Whiffin* (H.L.), 42 Law J. Rep. (n.s.) Chanc. 161; Law Rep. 5 E. & I. App. 711.

(6) *Relative rights of past and present members.*

**77.**—A past member of a company does not stand in the relation of a surety for his transferee who is fixed on the list of contributories as a present member, and if the liquidator release or compromise his claim against the latter, the former will not be thereby discharged. *In re the Contract Corporation*; *Hudson's case*, 40 Law J. Rep. (n.s.) Chanc. 444; Law Rep. 12 Eq. 1.

**78.**—The plaintiff sold partly paid-up shares in a limited company to the defendant, subject to the conditions on which he held them; within a year the company became insolvent and was wound up; the defendant was put in Class A and the plaintiff in Class B with respect to these shares: and the liquidators, under 25 & 26 Vict. c. 89, s. 160, entered into a compromise with the defendant, and afterwards into one with the plaintiff. The plaintiff having paid under the compromise made with him,—Held, that he could recover what he had paid from the defendant. *Roberts v. Crowe*, 41 Law J. Rep. (n.s.) C. P. 198; Law Rep. 7 C. P. 629.

**79.**—A liquidator of a company entered into a compromise with a contributory on the A list (which was afterwards sanctioned by the Court), whereby in consideration of 100% and a surrender of his shares to the company, the liquidator gave the contributory a full discharge from all calls and liabilities in respect of them. The agreement

further contained a proviso reserving the rights of the company against all other contributories whether past or present. It was not communicated to X., who had sold the shares within a year from the commencement of the winding-up:—Held (affirming the decision of the Master of the Rolls), that X. was properly placed on the Blist of contributories in respect of the same shares. *In re the Natal Investment Company (Lim.)*; *Nevill's case*, 40 Law J. Rep. (N.S.) Chanc. 1; Law Rep. 6 Chanc. 43.

Semble—X. being in the position of a surety, would have his remedy over against his principal either in the winding-up or at law. *Ibid.*

[And see next case.]

(7) *Affidavit by official liquidator: compromises.*

**80.**—By the Companies Act, 1862, 25 & 26 Vict. c. 89, sec. 38, sub-secs. 3 and 4, it is provided that no past member shall be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them in pursuance of the Act—nor for an amount exceeding the amount, if any, unpaid on the shares in respect of which he is liable. The official liquidators of a company being wound up, after stating in their affidavit the estimated unpaid debts of the company at about 1,600,000l., set forth the assets of the company as consisting of “first, real estate which we estimate will produce 60,000l.; secondly, of amounts due from debtors and upon guaranteed bills, from which we estimate that we shall recover 33,000l.; thirdly, calls unpaid by present members, from which we estimate that we shall recover 85,000l.” In consequence of this affidavit a call of 35l. per share was made upon a past member. There was at that time due from existing members in respect of unpaid calls upwards of 1,225,000l. The past member had not cross-examined the official liquidator before the Court of first instance by which the call was directed:—Held, on appeal, that the affidavit of the official liquidator was reasonable evidence, from which it might appear to the Court of first instance that the existing shareholders were unable to satisfy the contributions to be made by them under the above section, and that, as the past member had abstained from soliciting in that Court any more satisfactory testimony as to the assets of the company, including therein the liability of existing shareholders, or as to the fact of his, the past member, being a contributory, he was precluded from raising objections on either of those points before the Court of Appeal. *Helbert v. Banner (H.L.)*, 40 Law J. Rep. (N.S.) Chanc. 410; Law Rep. 5 E. & I. App. 28.

Compromises effected, under the 160th section, by the liquidator with existing shareholders do not operate to release or discharge past members from their liability to contribute, and it is not necessary that on such compromises the rights of past members against other members past or present should be reserved. The past and present members are not to be regarded with respect to one another as sureties and principals. *Ibid.*

(m) *Shareholder in foreign company.*

**81.**—Should the law of a foreign country be that shareholders of a company there established are subject to the provisions in the articles of association, then, by taking shares in such a company, the articles of association of which provide that all disputes shall be submitted to the jurisdiction of a tribunal in such country, and that a shareholder shall, in certain events, elect a domicile within the jurisdiction whereat process shall be served, or, in default, that such election shall be made for him, an English subject, neither resident, nor domiciled in the foreign country, becomes bound by legal proceedings there in a suit against him for calls, if process has been duly served at a domicile elected for him under the provision aforesaid, although he may have had no notice or knowledge of such proceedings; for he has contracted to be bound thereby, and an action may be maintained in this country upon a judgment recovered against him in such suit. *Copin v. Adamson*, *Copin v. Strahan*, 43 Law J. Rep. (N.S.) Exch. 161; Law Rep. 9 Exch. 345: (affirmed on appeal, 45 Law J. Rep. (N.S.) Exch. 15; s. c. Law Rep. 1 Exch. 17.

But (Kelly, C.B., *dissentiente*) his mere membership in such company does not render him subject to the general law of the foreign country so as to be bound by similar provisions for the election of a domicile upon his default which are contained in that law, and thereby liable to an action here upon a foreign judgment recovered under the above-mentioned circumstances.

(n) *Distribution of surplus.*

**82.**—A company having spent its capital, raised additional capital by the issue of new shares, providing that if the company were wound up before the new shares should be fully paid up no call should be made on them, except for payment of debts remaining after realization of all the assets, and no call should be made on them for repayment to the old shareholders. In the winding-up of the company more was called up from and paid by the new shareholders than was necessary to pay the debts, but the new shares were still not fully paid up:—Held, first, that though the surplus had arisen from the payments of the new shareholders, yet that, in the absence of any contract to that effect, they were not entitled to have it returned to them, but that it must be divided rateably among all the shareholders, old as well as new. Secondly, that the old shareholders were not, under the circumstances, entitled to have the amount which they had paid up on their shares equalised with the amount paid by the new shareholders on theirs by the return of the excess before division of the surplus, but that the surplus was divisible according to the amounts paid on each set of shares. *In re the Eclipse Gold Mining Company*, 43 Law J. Rep. (N.S.) Chanc. 637; Law Rep. 17 Eq. 490.

**83.**—In winding up a company limited by shares under the Companies Act, 1862, losses are to be borne by the shares equally. And a com-

pany forms no exception to this rule, in which some of the shareholders have by special agreement taken shares fully paid up, and have, in accordance with the articles, received dividends in proportion to the amount paid up by them on their shares. *In re Hodges' Distillery Company (Lim.)*; *Maude's case*, 40 Law J. Rep. (N.S.) Chanc. 21; Law Rep. 6 Chanc. 51.

Where, therefore, in such a company, M. took 20 fully paid-up shares of 25*l.* each, and received two dividends thereon at the rate of 7 per cent. on the whole amount, and the company was then wound up at a time when the other shareholders had paid 20*l.* on their shares, and in the winding-up, after payment of all debts, there was a surplus to be divided amongst the shareholders:—Held, that M. was entitled to be paid 5*l.* per share in full before a distribution of the surplus was made to the shareholders. *Ibid.*

(o) *Scire facias against shareholder.*

84.—The discretion which the Court exercises in granting a writ of *scire facias*, under section 36 of the Companies Clauses Consolidation Act, 1845, to a judgment creditor of a company against any of its shareholders, is only a judicial discretion, and therefore, if such creditor makes out a *prima facie* legal claim to such writ, and it cannot be shewn that there is a sufficient answer to it in equity, or that the creditor is himself indebted as a shareholder to the company, or that the writ is applied for vexatiously or oppressively, the Court is bound, in the exercise of its discretion, to allow the writ to issue. And it is no answer to the application for such writ that the judgment was obtained fraudulently or collusively, as this may be pleaded in defence. Neither is it any reason for refusing the writ that the creditor induced Parliament, by false representations, to pass the Act by which the company was constituted, and to enact that his claim should be a debt payable by the company. *Lee v. the Bude and Torrington Junction Railway Company*; *In re Stevens*, 40 Law J. Rep. (N.S.) C.P. 285; Law Rep. 6 C. P. 576.

(H) CREDITORS.

(a) *Proof of debts.*

(1) *Secured creditors.*

(i) *Right of proof.*

1.—The articles of association of an assurance company provided that all securities made on behalf of the company should be sealed with the company's seal, signed by two of the directors and countersigned by the secretary, and when so sealed, signed and countersigned, should be valid and enforceable against the company. The company requiring accommodation from their bankers, the directors passed a resolution, that certain title deeds should be deposited with the bankers as collateral security for bills under discount, and the deeds were deposited accordingly. The bankers then discounted bills directly for the company, and also bills for third persons on which

the company were liable, and the company being afterwards wound up, the bankers sold the property comprised in the title deeds for a sum greater than would cover the amount due on the bills directly discounted, but less than their general debt:—Held, first, that the deposit was only intended as a security for bills discounted directly for the company; Secondly, that the bankers not being officers of the company, had not imposed upon them the duty of seeing that the formalities required by the articles of association were complied with; and that the equitable mortgage by deposit was valid although these formalities were not complied with, and although it was not registered under section 43 of the Companies Act, 1862; Thirdly, that by analogy to *Hazelfoot's case* (41 Law J. Rep. (N.S.) Chanc. 286; Law Rep. 13 Eq. 327), the bankers had, as mortgagees, a right to retain as against the liquidators of the company the balance which would remain in their hands after paying the amount due on the bills directly discounted for the company, in satisfaction of their general debt. *In re the General Provident Assurance Company*; *Ex parte the National Bank*, 41 Law J. Rep. (N.S.) Chanc. 823; Law Rep. 14 Eq. 507.

2.—The certified rules of a permanent benefit building society stated that the society's objects were "to raise a fund for the purpose of enabling its members to purchase land; to erect buildings thereon; to provide means for the profitable investment of small savings; and in cases of accidental death to relieve the widows and families of deceased shareholders by adding the interest and estimated profits of the current year on the withdrawal of their shares at the time of death." The original rules contained no powers of borrowing. Subsequently the rules were altered, so as to empower the directors, "from time to time to borrow for the purposes of the society such sums, and at such rates of interest, and under such terms and conditions, as they might think proper and expedient." This rule was duly certified by the barrister:—Held, that under this power the directors could only borrow for the purposes expressly mentioned in the original rules of the society, and that money lent to the society by way of deposit at interest, and used for an unauthorised purpose, could not be recovered by the depositor.

But where the loan had been secured by a deposit of mortgage deeds executed in usual course by the members to the society to secure the advances made to them,—Held, that the official liquidator of the society was not entitled without payment of the loan to deprive the lender of his securities. *In re the Durham County Permanent Benefit Building Society*; *Davis's case*; *Wilson's case*, 41 Law J. Rep. (N.S.) Chanc. 124; Law Rep. 12 Eq. 516.

(ii) *Amount of proof: deductions.*

3.—A banking company at the request of A., a speculator in cotton, issued a letter of credit, authorising J., a merchant at Pernambuco, to draw upon them to the amount of 10,000*l.*, the

drafts to be covered by bills of lading of cotton, to be addressed to the company by the same mail which should bring the acceptances; on receipt of which bills the company engaged to honour the draft. A similar letter of credit for 17,000*l.* was issued to J. at the request of B, another speculator in cotton. J. accordingly drew drafts under the first letter of credit to the amount of 9,690*l.* 0*s.* 9*d.*, and under the second letter of credit to the amount of 13,062*l.* 15*s.* 1*d.* The first set were accepted by the banking company, which received the corresponding bills of lading. The second set were not presented till after the banking company had stopped payment, and were therefore not accepted. The first set were dishonoured:—Held, affirming *Coupland's case* (39 Law J. Rep. (N.S.) Chanc. 287), that the cotton represented by the bills of lading was the property of the banking company, and that J. could only prove against the company for the amount of the several bills after deducting the value of the cotton which was sold, and the proceeds received by J. *Banner v. Johnston*; *In re Barned's Banking Company*, 40 Law J. Rep. (N.S.) Chanc. 730; Law Rep. 5 E. & I. App. 157.

4.—A bank at Liverpool, at the request of L., authorised H. in New Orleans, to draw upon them at sixty days' sight against cotton, the bills of exchange to be accompanied by the corresponding bills of lading, which were to be delivered to the bank on their accepting the bills of exchange. A bill of exchange for 7,798*l.* was accordingly drawn and accepted by the bank, and the bills of lading handed to them. Subsequently, with the consent of the bank, L. obtained 6,000*l.* from his brokers on deposit of the bills of lading, which sum was paid into his account at the bank. Before the bill of exchange became payable, the bank was wound up. The cotton was sold by the brokers, who, after repaying themselves the 6,000*l.*, paid the balance of 574*l.* to the holders of the bill of exchange. The Master of the Rolls allowed the holders of the bill to prove for the whole amount, but directed that the 574*l.* should be deducted from the dividends payable to them on that amount:—Held (reversing the decision of the Master of the Rolls), that the 574*l.* must not be deducted from the dividends. But, semble, the proof ought to be reduced by 574*l.* *In re Barned's Banking Company*; *Leesh's claim*, 40 Law J. Rep. (N.S.) Chanc. 590; Law Rep. 6 Chanc. 388.

5.—A bank, carrying on business in Bombay and London, sold to "C. & Sons," of Bombay, their acceptances for 25,000*l.*, payable in London three and four months after sight. In payment, "C. & Sons" gave the bank bills for 20,000*l.*, drawn on C. & Co., payable six months after sight, and 5,000*l.* in cash, together with a further sum, by way of discount, in respect of the difference of times when the bills became due. "C. & Co." accepted the bills drawn on them, and "C. & Sons" indorsed to "C. & Co." the bank's acceptances for 25,000*l.* The bank being unable to meet some of their acceptances, gave "C. & Co." a security for payment thereof. Subsequently the bank became insolvent, and was ordered to be

wound up. Both "C. & Co." and "C. & Sons" executed assignments for benefit of their creditors. All the acceptances of "C. & Co." had been dealt with by the bank, and were in the hands of third parties, but "C. & Co." were the holders of the bank's acceptances to the extent of 19,000*l.* The representatives of "C. & Co.," acting on the erroneous assumption that the bank held their acceptances for 20,000*l.*, sent in a claim in the winding-up of the bank for 5,000*l.* only. Subsequently, upon discovering the fact that the bank had parted with all their acceptances, they claimed to be admitted to prove to the full amount of 19,000*l.* They had in the meantime realised their security:—Held, that the representatives of "C. & Co.," as indorsees for value, were entitled to prove against the bank in respect of the acceptances held by them; and that since the claim for 5,000*l.* had been made on an assumption of facts shewn to be erroneous by the affidavit made in support of it, the case should be treated as if the claim for the whole 19,000*l.* had been made at the time when the original claim for 5,000*l.* was carried in, and that being before "C. & Co." had realised their security, they were entitled to retain the amount so realised as well as to prove for the whole amount in the winding-up. *In re the London, Bombay and Mediterranean Bank*, 43 Law J. Rep. (N.S.) Chanc. 683; Law Rep. 9 Chanc. 686 *nom.*, *Ex parte Cama*.

6.—A company which had indorsed certain bills was ordered to be wound up, and all the other parties to the bills became bankrupt. In the winding-up the billholders were admitted to prove the amounts due upon the bills in full, without reference to the value of certain securities for the payment thereof. These securities were subsequently realised, and the proceeds distributed among the billholders, upon the principle of the doctrine in *Ex parte Waring* (19 Ves. 345):—Held (affirming the decision of the Master of the Rolls, 43 Law J. Rep. (N.S.) Chanc. 97; Law Rep. 19 Eq. 1), that notwithstanding the securities were not realised until after proof of the debts, the value of them was applicable, *ab initio*, to the reduction of the debts, and the proof must be reduced accordingly, and any dividends paid on the original proof, in excess of the dividends payable on the reduced proof, must be refunded by the billholders. *In re Barned's Banking Company (Lim.)*; *Ex parte Joint Stock Discount Company (Lim.)*, 44 Law J. Rep. (N.S.) Chanc. 494; Law Rep. 10 Chanc. 198.

7.—A railway company, in order to enable a hotel company to complete a hotel at the terminus of the railway, lent the hotel company money upon the security of unissued shares, which were placed in the name of trustees with power to sell the shares and reduce the debt. The hotel having been afterwards sold to the railway company, and the hotel company wound up,—Held, that the railway company were not shareholders in the hotel company, but creditors, and entitled to deduct from the purchase-money the sums advanced upon the security of the shares. *In re the City Terminus Hotel Company*;

*South-Eastern Railway Company's Claim*, Law Rep. 14 Eq. 10.

(2) *Bill holders.*

(i) *Acceptance by director pending winding-up.*

8.—A resolution to wind up a banking company voluntarily was confirmed on the 22nd, and advertised in the *London Gazette* on the 26th of November. On the 24th of the same month one of the directors, who had been appointed one of the liquidators, accepted, as director, a bill of exchange on the bank. This bill was afterwards indorsed for value to a person who had no notice that the bank was in liquidation:—Held, affirming the decision of Stuart, V.C., that the bill was not a bill of the company, and therefore that the holder could not prove against the company for the amount. *In re the London and Mediterranean Bank; Bolognesi's case*, 40 Law J. Rep. (N.S.) Chanc. 26; Law Rep. 6 Chanc. 206, *nom. Ex parte Agra and Masterman's Bank*.

(ii) *Double proof.*

[And see supra H 6.]

9.—The O. Company indorsed bills of exchange which they had induced the E. Company to accept for their accommodation, upon an agreement to provide funds to meet the bills when due. Both companies were in liquidation when the bills matured, and no funds being provided they were dishonoured. The holders of the bills proved against both companies, and received dividends from both. The E. Company then sought to prove against the O. Company for the amount of the dividend paid by them as damages, in respect of the breach of the agreement to provide funds:—Held, overruling the decision of Vice-Chancellor Bacon (Law Rep. 12 Eq. 501), that the proof could not be allowed, as it would constitute a double proof against the estate for the same debt, as to which the rule in bankruptcy ought to be adopted in winding-up cases. *In re the Oriental Commercial Bank; Ex parte the European Bank*, 41 Law J. Rep. (N.S.) Chanc. 217; Law Rep. 7 Chanc. 99.

(iii) *Authority to accept bills.*

10.—Four mercantile firms, each of whom carried on a separate trading business of its own, agreed to carry on jointly a particular trade which had been theretofore carried on by F., one of the four firms, alone. The agreement between the four firms provided that the business should be carried on under the style of F., who were to keep separate books for the purpose, and that each party to the agreement should be liable in respect of the business in proportion to his share in the undertaking, and in the event of being under cash advance he should receive interest for the same; but it was "understood and agreed, that the finance of the business be carried on by acceptances of the several parties interested as may, from time to time, be arranged." *In re the Adanson Fibre Company; Miles's Claim*, 43 Law J. Rep. (N.S.) Chanc. 732; Law Rep. 9 Chanc. 635.

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The association was known to the members as the A. Company, but its name and existence were kept secret. *Ibid*.

In order to raise money for the purposes of the business a number of bills of exchange were drawn by M., one of the firms, upon each of the other three, were accepted by them respectively, and were discounted by bankers, the money thus obtained being applied to the purposes of the joint business. The bankers were ignorant of the existence of the association. An order was afterwards made to wind up the association, as an unregistered partnership consisting of more than seven members:—

Held, reversing a decision of Malins, V.C., that only those of the firms whose names appeared upon the bills of exchange were liable in respect of them, and that consequently the holders of the bills could not prove upon them in the winding-up. *Ibid*.

(3) *Bond holders: notice: equities.*

11.—Bonds of a company which are void in the hands of the person to whom they were originally given may be valid in the hands of an innocent holder for value. *In re the South Essex Estuary and Reclamation Company; Ex parte Chorley*, 40 Law J. Rep. (N.S.) Chanc. 153; Law Rep. 11 Eq. 157.

A company gave bonds to H., who transferred to an innocent purchaser for value, the transfer being registered in the books of the company. The purchaser brought an action against the company upon the bonds. It was arranged between the plaintiff and the company that judgment should be signed, but not until the expiration of three months. In the meantime a petition was presented to wind up the company, upon which an order was subsequently made. The bonds were alleged to be *ultra vires*, and void as between the company and H.:—Held, that without entering into the question of the validity of the bonds as between the company and H., they were, under the circumstances, good in the hands of the purchaser. *Ibid*.

12.—A bond issued by an insurance company to S., the condition of which was that it should be void on payment to S., his executors, administrators, and assigns, of a sum of money on a future day, was assigned for value by S. to B. B. made no enquiry as to the validity of the bond before taking the assignment, but gave notice of the assignment to the company. The company accepted notice of the assignment but did not register it. Before the money secured by the bond became payable, the company was ordered to be wound up:—Held, upon the application of the representatives of B. for leave to prove in the winding-up against the company, that the company, and not persons dealing with it, were answerable for the neglect of its officers to register the assignment of the bond, and that whatever equities might have existed between the company and the original obligee of the bond, the company, by accepting notice of the assignment, had precluded themselves from setting up those equities as against the assignee for value. *The Athenæum*

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*Assurance Company v. Pooley* (1 Giff. 102; s. c. 28 Law J. Rep. (n.s.) Chanc. 119) commented on. *In re the Hercules Insurance Company; Brunton's Claim*, 44 Law J. Rep. (n.s.) Chanc. 450; Law Rep. 19 Eq. 302.

(4) *Debenture holders.*

13.—Instruments were issued by a company (whose directors were empowered to draw, accept or endorse negotiable instruments) which were in the form of debenture bonds, but which bound the company to "pay to the bearer":—Held, that such instruments were promissory notes which passed to the bearer free from any equities which might have attached to them as between the company and the original holders. *In re the Imperial Land Company of Marseilles; Ex parte Debenture Holders*, 40 Law J. Rep. (n.s.) Chanc. 93; Law Rep. 11 Eq. 479, *nom.* *Ex parte Colborne and Strawbridge*.

(5) *Policy holders.*

14.—An assurance company having been ordered to be wound up,—Held, that a policy-holder was entitled to prove for the sum which a solvent assurance office, having the same rate of premiums and the same extent of proprietary capital as the company in liquidation would require him to pay, in order to obtain a policy of the same amount and under the same conditions at the same premium. *Bell's case* (Law Rep. 9 Eq. 706) followed. *Lancaster's case* (Albert Arbitration, *Solicitors' Journal*, December 9, 1871, vol. xvi. p. 103) disapproved of. *In re the English Assurance Company, Holdich's case*, 42 Law J. Rep. (n.s.) Chanc. 612; Law Rep. 14 Eq. 72.

15.—A ship was insured in 1863 by M. in a Mutual Marine Insurance Association. The policy, which was unstamped, was renewed up to 1868, when the ship, with M. on board, was lost at sea. The money due in respect of the insurance was collected by the order of the association, according to their usual practice, from the members liable to contribute the same, but was retained by the secretary until a personal representative to M. should have been appointed. Before any such appointment was made the association was ordered to be wound up. Subsequently M.'s widow took out administration to him, and brought in a claim in the winding-up under the policy. A portion of the amount due under the policy had already been paid to persons having a lien thereon:—Held, that the relation of debtor and creditor had been sufficiently established between the parties, and the widow was entitled to recover the amount, notwithstanding the want of a stamp on the policy. *In re the Teignmouth and General Mutual Shipping Association*, 41 Law J. Rep. (n.s.) Chanc. 679; Law Rep. 14 Eq. 148.

(6) *Judgment creditors.*

16.—A company registered in England under the Companies Act, 1862, with an office in London, but carrying on business and having property in India, was ordered to be wound up compulsorily

by an order of the Court in England. Another English company, also carrying on business in India, had, prior to the winding-up order, obtained in India a judgment against the first-mentioned company in respect of a debt, and subsequently to the winding-up order issued execution upon the judgment against the property in India of the debtor company. The property was subsequently sold under an order of the Court here, and a portion of the proceeds was paid to the creditor company on account of their debt, on their undertaking to refund the same if they were not entitled thereto:—Held, that the creditor company were not entitled to retain the proceeds, but must hand over the same to the official liquidator of the debtor company, for equal distribution among the creditors. *In re the Oriental Inland Steam Company (Lim.)*, 43 Law J. Rep. (n.s.) Chanc. 699; Law Rep. 9 Chanc. 557.

17.—Where a judgment creditor of a company is told by the company's solicitor that they have no assets on which he can levy, that is evidence of their inability to pay, and relieves him from the necessity of actually levying. *In re the Flagstaff Silver Mining Company of Utah*, Law Rep. 20 Eq. 268.

(7) *Improper loan.*

[And see *supra* H. 1.]

18.—The M. Company being in want of money for a particular purpose, and having large borrowing powers, applied to the C. Company for a loan. The negotiations for the loan were conducted by a director of the M. Company, who was also director of the C. Company. The object for which the loan was required by the M. Company was not fully disclosed by the negotiating director to the board of the C. Company. It was alleged that this object was an illegal one:—Held, reversing the decision of Malins, V.C., that even if the object of the loan was an improper one (as to which their Lordships were not satisfied by the evidence), still the C. Company were not affected by notice of the impropriety, and a claim by the C. Company in the winding-up of the M. Company founded upon the loan, was allowed. *In re the Marseilles Extension Railway Company; Ex parte the Credit Foncier and Mobilier of England*, 41 Law J. Rep. (n.s.) Chanc. 345; Law Rep. 7 Chanc. 161.

(8) *Prospective claims and claims for damages.*

19.—An agreement was executed between L., a banker at Paris, and the directors of a company formed to take over his business. No day was fixed for the completion of the transfer of the business and offices. In fact, the transfer was never carried out; but the company was started, and it transacted business, and L. admitted a committee of its directors to his offices, which he vacated, removing his clerks to a higher storey in the same building, where he continued to transact his business pending the completion of the contract, which he was always anxious and willing to effect by handing over books and executing legal transfers. The contract never was completed by



the default of the company. The company came to a winding-up. L. claimed the full amount of the purchase money for which he had contracted:—Held, that the contract was *in fieri*, and, as it was owing to the fault of the company that it never became fully executed, an inquiry was directed before the chief clerk as to the damages sustained by L. through the breach of the contract,—L. to be allowed to prove for the amount of the damages so ascertained. *Charles Laffitte & Co. (Lim.) v. Laffitte* (H.L.), 42 Law J. Rep. (N.S.) Chanc. 716.

20.—A company engaged D. & G. to act as their commercial travellers for three years in a certain district, at a commission upon goods ordered. The company was wound up before the termination of the three years:—Held, that D. & G. were entitled to compensation in respect of commission for the unexpired portion of the term, the amount to be ascertained by the chief clerk in chambers. *In re the Patent Floor Cloth Company; Dean and Gilbert's Claim*, 41 Law J. Rep. (N.S.) Chanc. 476.

*Claim for commission.* [See *supra* D 18.]

*Claim for estimated value of indemnity.*

[See *infra* H 22.]

#### (9) Proof by officer of company.

21.—S. agreed with the promoters to take certain shares in a proposed company on condition that he should be appointed manager at a salary, and that in case of his dismissal from the office he should be repaid the amount paid on his shares. The agreement was confirmed by the articles of association. The company was subsequently wound up, and S. was appointed liquidator at a salary:—Held, that the winding-up was *ipso facto* a dismissal of S. from the office of manager, and that he was entitled to prove in the winding-up for the amount paid up by him on the shares taken under the agreement, less any sums received by him as liquidator since the winding-up. *In re the Imperial Wine Company (Lim.)*; *Shirreff's Claim*, 42 Law J. Rep. (N.S.) Chanc. 5; Law Rep. 14 Eq. 417.

#### (10) Claim for professional services.

22.—Certain persons signed the subscription contract of a railway company, and agreed to act as provisional directors on the representation of S., a solicitor, that they would not incur any responsibility or be called upon in respect of their shares for expenses or otherwise if the undertaking were not carried out. The company obtained their Act of Parliament, but the works were never commenced, the undertaking was abandoned and the company was ordered to be wound up. S. carried in a claim for professional services performed by him in respect of the passing of the Act, and it was held, affirming the decision of one of the Vice-Chancellors, that the claim must be allowed, the representations made amounting at most to a contract of indemnity with the persons to whom they were made, and not enuring for the benefit of the company. *In re the Brompton and Longtown*

*Railway Company; Shaw's Claim*, 44 Law J. Rep. (N.S.) Chanc. 670; Law Rep. 10 Chanc. 177.

#### (11) Statute of Limitations.

23.—After an order to wind up a company has been made the Statute of Limitations does not run so as to bar a creditor's claim, but he will be allowed to prove his debt at any time not disturbing former dividends. *In re the General Rolling Stock Company; Ex parte the Joint Stock Discount Company's Claim*, 41 Law J. Rep. (N.S.) Chanc. 732; Law Rep. 7 Chanc. 646.

#### (12) Interest.

24.—H. held twenty shares in the W. Company, as a nominee for the C. Company. In June, 1866, a call of 2*l.* 10*s.* per share was made on the twenty shares by the W. Company. In July, 1866, the C. Company was ordered to be wound up. In November, 1866, a further call of 2*l.* 10*s.* per share was made by the liquidator of the W. Company on the twenty shares. Interest was payable on the calls in case of default. In May, 1871, the liquidator of the W. Company sued H. at law for the unpaid call on the twenty shares, and recovered judgment for them, viz., 100*l.* principal, 23*l.* 7*s.* 6*d.* interest, and 6*l.* 4*s.* 2*d.* costs. H. paid the 129*l.* 11*s.* 8*d.*, and then carried a proof into chambers in the winding-up of the C. Company for that amount. An order was made in January, 1872, allowing him to prove for the principal and interest, but not for the costs. The liquidator of the C. Company moved to vary that order by disallowing the interest as well as the costs:—Held, that the rights of creditors (*inter se*) of a company in liquidation are definitely fixed when the winding-up order is made; that the order nullifies as between them all contracts for interest; that the interest which had accrued after the order to wind up the C. Company could not be allowed, but that if H. had claimed to prove for it against the surplus assets only of the company, such a proof might have been allowed; that he might carry in a claim for the estimated value of his indemnity by the C. Company when the order was made to wind it up; and that the order of January, 1872, must be varied, as asked. *In re the International Contract Company (Lim.)*; *Hughes's Claim*, 41 Law J. Rep. (N.S.) Chanc. 373; Law Rep. 13 Eq. 623.

25.—A trustee for a company, who advanced money on behalf of the company, which he had bound himself by contract to pay:—Held, entitled in the winding-up, to interest at 5*l.* per cent. *In re the Beulah Park Estate; Sargood's Claim*, Law Rep. 15 Eq. 43.

26.—Where a voluntary winding-up had been ordered to be continued under supervision, debenture holders were held entitled to prove for interest only up to the date of the confirmatory resolution to wind up the company voluntarily, without prejudice to their right to prove for further interest, if there should be found to be surplus assets. Payments of interest made since the above date to be brought into account by the

debenture holders. *In re the Imperial Land Company of Marseilles; Ex parte the Debenture Holders*, 40 Law J. Rep. (n.s.) Chanc. 343; Law Rep. 11 Eq. 478, *nom. Ex parte Colborne and Strawbridge*.

(13) *Proof by nominee of company.*

27.—Calls were made upon M, in respect of shares in the W. Company which M. held as the nominee of, and as *quasi* trustee for the I. Company. Both companies came to a winding-up under the supervision of the Court. Thereupon the W. Company executed a deed with M., whereby M. consented that the W. Company should use his name in suing the I. Company for the calls then due upon the shares, and the W. Company agreed not to sue M. in respect of these calls. Upon the joint application of M. and of the W. Company:—Held, first, that the deed executed between M. and the W. Company was a nullity, the sanction of the Court not having been obtained for it, and that the claim of M. was in no way affected by it; secondly, that M. was entitled to be indemnified by the I. Company against any liability in respect of the shares in the W. Company so held by him, and to rank as creditor of the I. Company for the amount of calls made or to be made on the shares, with interest to the date of the order to wind up the I. Company, and the liquidator of the I. Company was ordered to pay to the liquidator of the W. Company the dividends which in the course of the winding-up should become payable in respect of their liability, thus declared, on the amount of such calls and interest. *James v. May* (H.L.), 42 Law J. Rep. (n.s.) Chanc. 802; Law Rep. 6 E. & I. App. 328.

(b) *Effect of winding-up order or amalgamation on rights of creditors.*

*Effect of winding up order.* [See *supra* H 23.]

*Effect of amalgamation.* [See *supra* E 5.]

(I) WINDING UP.

(a) *On petition.*

(1) *Right to order ex debito justitiæ.*

(i) *Creditors.*

1.—The Court will not make an order to wind up a benefit building society compulsorily, on the petition of advanced members, contrary to the wishes of the majority of the creditors and contributories, unless a plain injustice will be done to the petitioners by refusing the order. A contributory is not entitled to a winding-up order against an insolvent company *ex debito justitiæ*. *In re the Professional, Commercial and Industrial Benefit Building Society*, Law Rep. 6 Chanc. 856.

2.—The Court is not necessarily bound *ex debito justitiæ* to make an order to wind up a company upon the petition of an unpaid creditor. In considering the advisability of making such an order, regard will be had to the wishes of the majority of the creditors and shareholders, as well as to the amount of the debt due to the petitioner. *In*

*re the Langley Mills Steel and Ironworks Company (Lim.)*, 40 Law J. Rep. (n.s.) Chanc. 313; Law Rep. 12 Eq. 26.

A winding-up petition was presented by an unpaid creditor whose debt was 80*l*. Meetings both of creditors and shareholders had been held, which had pronounced against liquidation through the medium of the Court and in favour of a voluntary winding-up. It was believed that the assets recoverable under a compulsory winding-up would not pay the expenses:—Held, that no order should be made on the petition. *Ibid*.

Shortly after the presentation of the petition the company offered to call meetings of creditors and shareholders, to proceed to a voluntary winding-up, and to pay the petitioner's cost; up to that day, if he would stop proceedings. This offer having been declined,—Held, that the company would not be ordered to pay the costs incurred after the date of the offer. *Ibid*.

3.—A creditor of a company who cannot get paid without a winding-up, is entitled *ex debito justitiæ* to an order for winding-up. *In re the Western of Canada Oil, Lands and Works Company*, 43 Law J. Rep. (n.s.) Chanc. 184; Law Rep. 17 Eq. 1.

The 91st section of the Companies Act, 1862, is applicable when a petition for winding-up is before the Court, and does not necessarily presuppose a winding-up order. *Ibid*.

Where it appears that there is a reasonable chance of a creditor getting paid without a winding-up order sooner than if an order was made, the Court may order a creditor's petition to stand over, although the creditor has, under section 80 of the Companies Act, served on the company a formal demand for payment, and not been paid within the three weeks. *Ibid*.

4.—A creditor of an insolvent company is not entitled to a compulsory winding-up order *ex debito justitiæ*, where resolutions have been passed for a voluntary winding-up. *In re the West Hartlepool Iron Company* (No. 2), 44 Law J. Rep. (n.s.) Chanc. 668; Law Rep. 10 Chanc. 618.

The wishes of creditors as to the mode of winding up an insolvent company may be sufficiently shewn under sections 91 and 149 of the Companies Act, 1862, by the appearance of a majority of them by counsel at the bar, although no general meeting of creditors has been held. *Ibid*.

[And see *infra* I 12.]

(ii) *Shareholders.*

5.—The Court has, under the 79th section of the Companies Act, 1862, power to refuse an order for a compulsory winding-up of a limited company where the petition is presented by a shareholder, and founded on an allegation that the company is unable to pay its debts, and the Court will exercise such power where it appears that the liability of the shareholder is of very small amount, and the result of making the order will be to swallow up in costs the assets of the company. *In re the London Suburban Bank*, 40 Law J. Rep. (n.s.) Chanc. 174; Law Rep. 6 Chanc. 641.

(2) *Liability to winding-up order.*(i) *Number of members.*

6.—A company registered under the Act of 1862, consisting of only seven members, was ordered to be wound up on a petition. *In re Sander-son's Patents Association (Lim.)*, 40 Law J. Rep. (n.s.) Chanc. 519; Law Rep. 12 Eq. 188.

*In re the Sea and River Marine Insurance Company* (35 Law J. Rep. (n.s.) Chanc. 820; Law Rep. 2 Eq. 545, and *In re the Natal Company*, 1 Hem. & M. 639) not followed. *Ibid.*

7.—A company which had been registered as a limited company carried on business for a short time with more than seven shareholders. On its being wound up under a supervision order it was discovered that one of the subscribers of the memorandum was an infant, thereupon a petition for winding up the company under the 199th section was presented by a creditor and an order made. *In re the Hertfordshire Brewery Company*, 43 Law J. Rep. (n.s.) Chanc. 358.

(ii) *Company unable to pay debts.*

8.—The dishonour of a bill of exchange, accepted by a limited company in part payment of goods sold and delivered to the company, held, on a winding-up petition by the creditors, to be proof to the satisfaction of the Court, under section 80, sub-section 4, of the Companies Act, 1862, of the company being unable to pay its debts, although no demand of payment had been made under sub-section 1. *In re the Globe New Patent Iron and Steel Company*, 44 Law J. Rep. (n.s.) Chanc. 580; Law Rep. 20 Eq. 337.

(iii) *Disputed debt.*

9.—Where the debt of a creditor petitioning for a winding-up order is disputed by the company, the Court will not order the petition to stand over with leave to bring an action unless it sees that the debt is disputed on some substantial ground. *In re the King's Cross Industrial Dwellings Company*, Law Rep. 11 Eq. 149.

10.—B. contracted with a company to complete certain works for the sum of 290,000*l.*, of which 200,000*l.* was to be paid in cash, and the remainder in fully paid up shares of the company. B. having received 250,000*l.* in cash and shares, and being unable to complete the works, the company took possession. B. claimed 30,000*l.* more to be due to him under the contract. The company disputed the claim, alleging that B. had been, if anything, overpaid, whereupon B. threatened to present a petition to wind up the company, and served upon them particulars of demand under the 80th section of the Companies Act, 1862.—Held, that there being a *bonâ fide* dispute as to the debt and no proof that the company was insolvent, B. must be restrained from presenting any petition to wind up the company, and an injunction was accordingly granted. *The Cadiz Waterworks Company v. Barnett*, 44 Law J. Rep. (n.s.) Chanc. 529; Law Rep. 19 Eq. 182.

11.—The mere omission (unless without reasonable cause) to comply with a statutory notice for

payment of a debt is not "neglect" to pay. Where, therefore, such a debt is *bonâ fide* disputed, and there is no evidence of the company's insolvency, the creditor is not entitled to a winding-up order. In such a case where it appeared that a creditor's petition was presented solely with the view of putting pressure on the company, the petition was dismissed with costs. *In re the London and Paris Banking Corporation*, Law Rep. 19 Eq. 444.

(3) *Benefit building society.*

12.—By one of the rules of a building society, members who held investment shares were entitled, on giving one month's notice, to withdraw their investments; it being provided that if several members should give notice to withdraw at one time they should be paid in rotation according to the priority of notice. Another rule provided for the reference of disputes to arbitration. On the 26th of April the petitioner, a holder of five investing shares, gave notice to withdraw her investment. Sixteen hundred investing members had previously given notice to withdraw investments to the amount of 350,000*l.* On the 28th of May the altered rules were duly certified, and it was thereby provided that dividends should be paid to all the members in part repayment of the principal of their investments, and that any member holding investment shares might give one month's notice of his desire to withdraw, and that at the expiration of such notice he should cease to be a member of the society, but should be entitled to receive the same dividends as continuing members, and to be paid the balance of the principal of his investment shares, when the funds of the society would admit of it, in such instalments as the directors might determine. The petitioner not being paid at the expiration of the month gave the statutory notice under the 199th section of the Companies Act, 1862, and subsequently filed a petition for winding up the society. It appeared that the society had sufficient assets to meet all claims, but that these would take a long time to realise, and that it had not money in hand to pay all members who had given notice of withdrawal previously to the petitioner.—Held, that the 199th section did not entitle the petitioner to a winding-up order. *In re the Planet Benefit Building and Investment Society*, 41 Law J. Rep. (n.s.) Chanc. 738; Law Rep. 14 Eq. 441.

Held, also, that the petitioner as an investing member stood on a different footing from outside creditors, and was not entitled *ex debito justitiæ* to an order for winding-up under the 199th clause of the Companies Act, and that the Court had a discretion to order or refuse a winding-up. *Ibid.*

Semble—the rules as altered were not illegal. *Ibid.*

[And see *supra* I 1.]

(4) *Unregistered company.*

13.—A petition was granted to wind up an unincorporated company, upon which an order was subsequently made. Between the presentation of the petition and the date of the order, the company was registered with the registrar of joint

stock companies. During the winding-up an arrangement was concluded for the transfer of the business and the assets of the company to another company, and in order to carry out this transaction a petition was presented on the footing that the company in liquidation was an unregistered company, praying for an order vesting in the liquidator certain securities held by trustees for the company in liquidation, in order that they might be assigned by him to the purchasing company. The Court being of opinion that the company in liquidation was to be considered as an unregistered company, made the order. *In re the Hercules Insurance Company (Lim.)*, and *In re the International Life Assurance Society*, 40 Law J. Rep. (N.S.) Chanc. 379; Law Rep. 11 Eq. 321.

[And see *supra* C 1, 3, 4.]

(5) *Railway company.*

14.—A “dock company” incorporated by a special Act, with power to construct a short subsidiary “branch railway,” is not a “railway company” within the exception in section 199 of the Companies Act, 1862. *In re the Exmouth Docks Company*, 43 Law J. Rep. (N.S.) Chanc. 110; Law Rep. 17 Eq. 181.

(6) *Question of advantage.*

15.—A company had been in existence for four years without carrying on any business; all its shares were registered as fully paid up, and there were no creditors. An agreement having been entered into for the sale of its property, a shareholder presented a petition for winding up the company with a view to the property being sold under the direction of the Court, other shareholders, however, opposing the petition on the ground that the sale could be better effected without the intervention of the Court, and that there being no creditors or contributories a winding-up order would be useless. Winding-up order granted on two grounds. First, that the company being registered under the Companies Act, 1862, the liability to a winding-up order existed, independently of the question whether any advantage might result from such an order. Secondly, that as the property appeared to be of some value, and the shareholders were unable to agree as to the mode of sale, the sale could be more advantageously effected under the direction of the Court. *In re the Tumacacori Mining and Land Company*, 43 Law J. Rep. (N.S.) Chanc. 417; Law Rep. 17 Eq. 534.

The Court will not direct meetings of creditors or contributories to be called under section 91 of the Companies Act, 1862, except where the company is a going concern. *Ibid.*

(7) *Demurrable petition: petitioner in arrear of calls.*

16.—A contributory who is in arrear for calls will not be allowed to petition to wind up a company. *In re the European Life Assurance Society; Ex parte Crowe*, 40 Law J. Rep. (N.S.) Chanc. 87; Law Rep. 10 Eq. 403.

17.—A petition for the winding-up of a company must allege such a case as will justify the making of a winding-up order, otherwise it is demurrable, and must be dismissed. The petitioner will not be permitted to prove a case which he has not alleged. *In re the Wear Engine Works Company (Lim.)*, 44 Law J. Rep. (N.S.) Chanc. 256; Law Rep. 10 Chanc. 188.

18.—A petition for winding-up by a shareholder in arrear of calls alleged the calls were in danger of waste by the company, and offered payment into Court. The petition was dismissed as demurrable. Costs of evidence were not allowed the respondents. *In re the Steam Stoker Company*, 44 Law J. Rep. (N.S.) Chanc. 386; Law Rep. 19 Eq. 416.

[And see *infra* I 22.]

(8) *Petition of debenture holder.*

19.—A company cannot, on a winding-up petition presented by a debenture-holder, plead informality on the part of their directors in issuing the debentures as a valid objection to a winding-up order. *In re the Exmouth Docks Company*, 43 Law J. Rep. (N.S.) Chanc. 110; Law Rep. 17 Eq. 781.

Where a company is empowered by its special Act to raise money by debentures, and the Act provides that the debenture-holders may enforce payment of their debts by the appointment of a receiver, the Court will not make a winding-up order on a petition by a debenture-holder who has not first tried the remedy provided by the special Act. *Ibid.*

Observations as to costs of opposing winding-up petitions. *Ibid.*

(9) *Right to have petition dismissed.*

20.—A creditor who has presented a petition to wind up a company is entitled to have it dismissed with costs at the hearing. *In re the Home Assurance Association*, 40 Law J. Rep. (N.S.) Chanc. 110; Law Rep. 12 Eq. 59.

21.—In a winding-up petition the petitioning creditor is *dominus litis*, and may dismiss his petition at the hearing on being paid his debt, but creditors who have appeared are entitled to their costs. *In re the Hereford and South Wales Engineering Company*, Law Rep. 17 Eq. 423.

(b) *Jurisdiction.*

(1) *In voluntary winding-up.*

22.—A contributory of a company in voluntary liquidation presented a petition for a compulsory winding-up or supervision order, and for the removal of the liquidators, on the ground (chiefly) that the liquidators, who had been directors, had immediately before the winding-up taken a vote, allowing the solicitors of the company, who were also directors, but not liquidators, 1,500*l.* for their bill of 1,650*l.*, 960*l.* being payable only by the promoters of the company, and that the vote was improperly carried. The petition also contained various allegations tending to shew that

the solicitors had a preponderating influence in the company. Affidavits were filed opposing the petition, and denying the charges of improper conduct. The debts of the company had been all paid, and nothing remained but to divide a small balance amongst the contributories, who were less than twenty in number:—Held, that any powers the Court had in a compulsory winding-up could be exercised under section 138 of the Companies Act, 1862, in the voluntary winding-up, and that the petition must therefore be dismissed with costs. Held, also, that as the petition was in effect demurrable, evidence to oppose it was unnecessary, and the respondents were disallowed the costs of such evidence. *In re the Star and Garter Company (Lim.)*, 42 Law J. Rep. (N.S.) Chanc. 374.

**23.**—An order may be made under section 165 of the Companies Act, 1862, in a pure voluntary winding-up. That section applies to a case where all the shareholders were parties to the transaction under which the directors obtained the money, the refunding of which is in question. *In re the County Marine Insurance Company; Ramoel's case*, 40 Law J. Rep. (N.S.) Chanc. 277; Law Rep. 6 Chanc. 104.

Where a dividend was declared by a general meeting of an insurance company upon a mere statement of receipts and payments, without any statement of the amount of the liabilities of the company, or estimation of the risks, or of any profit and loss account, and where the statement of receipts included items which were mere debts and had not been actually received, it was held that the dividend was improperly made, and one of the directors was ordered to pay to the liquidator the amount of the dividend on his shares. *Ibid.*

## (2) Winding up under supervision: rights of single shareholder.

**24.**—The opposition of a single shareholder, who had a large stake in a company, was not allowed to prevent the Court from sanctioning a scheme for reconstruction. *In re the Imperial Mercantile Credit Association*, 41 Law J. Rep. (N.S.) Chanc. 116; Law Rep. 12 Eq. 504.

Section 161 of the Companies Act, 1861, applies to a voluntary winding-up under supervision. *Ibid.*

A meeting of contributories had passed resolutions for a reconstruction. The Court refused to make the liquidator pass his accounts on motion of a dissentient shareholder. *Ibid.*

## (c) Practice.

### (1) Branch of Court: concurrent proceedings.

**25.**—Where a winding-up petition has been presented in any one branch of the Court, any other petition for the same purpose should be presented in the same branch of the Court. *In re the West Hartlepool Iron Company*, 44 Law J. Rep. (N.S.) Chanc. 529; Law Rep. 10 Chanc. 629.

**26.**—Where on the petition of W. for the winding-up of a company, whose directors had

power to accept surrenders of shares, a consent order was made rectifying the register by removing the names of W. and others, and on the same day other petitions were presented for a winding-up in another branch of the Court, upon which a winding-up order was subsequently made; a summons by the liquidator to settle the name of W. on the list of contributories was dismissed in consequence of the consent order in the first-mentioned branch of the Court. *In re the London Suburban Bank*, Law Rep. 15 Eq. 274.

### (2) Advertisement of petition.

**27.**—The advertisements of a winding-up petition must be strictly in accordance with the first rule of the General Orders of 21st of March, 1868. *In re the Marezzo Marble Company (Lim.)*, 43 Law J. Rep. (N.S.) Chanc. 544.

**28.**—It is no objection to a shareholder's petition for winding-up that the petition does not on the face of it state that the petitioner has held his shares for the period required by the 40th section of the Companies Act, 1867. *In re the City and County Bank (Lim.)*, 44 Law J. Rep. (N.S.) Chanc. 716; Law Rep. 10 Chanc. 470.

The advertisement of a winding-up petition is absolutely void if any error occurs in the name of the company. *Ibid.*

Where all classes interested are represented at the hearing of a petition, the Court has a discretion to hear it, notwithstanding the seven clear days required by rule 2 of the 11th of February, 1862, have not elapsed since the appearance of the advertisement in the "Gazette." *Ibid.*

### (3) Service.

**29.**—Where all the petitioners presenting a petition for winding up a company were abroad, the Court, notwithstanding the 4th rule of the General Order of the 11th of November, 1862, made the winding-up order upon the petition being verified by the affidavit of the petitioners' solicitor. *In re the Fortune Copper Mining Company of Western Australia*, 40 Law J. Rep. (N.S.) Chanc. 43; Law Rep. 10 Eq. 390.

Where there was no registered place of business service at an unregistered office was held sufficient. *Ibid.*

**30.**—A clause in the articles of association of a joint-stock company providing that notices may be served on members by leaving the same at their registered place of abode will not extend to legal proceedings, and an order for substituted service of a debtor summons at such address, that not being his last known place of abode, is bad. *Ex parte Chatteris; In re Studer*, 44 Law J. Rep. (N.S.) Bankr. 77; Law Rep. 10 Chanc. 458.

### (4) Production of documents.

**31.**—Where an official liquidator sought to place a person on the list of contributories as a past member, upon the application of the latter that the official liquidator should make the usual affidavit as to documents,—Held (reversing the decision of the Master of the Rolls, 41 Law J.

Rep. (n.s.) Chanc. 21), that the proper affidavit to be made was an affidavit of documents relating to the particular shares as to which it was sought to make the alleged contributory liable. *In re the Contract Corporation (Lim.)*; *Gooch's case*, 41 Law J. Rep. (n.s.) Chanc. 338; Law Rep. 7 Chanc. 207.

**32.**—A banker with whom a contributory has formerly kept an account, may be summoned under s. 115 of the Companies Act, 1862, and compelled to produce his books relating to the contributory's account, and to give all information in his power touching his affairs. *In re the Contract Corporation*; *Forbes' case*, 41 Law J. Rep. (n.s.) Chanc. 467; Law Rep. 14 Eq. 6, *nom. Druitt's case*.

**33.**—Where the secretary of a company has made an affidavit on behalf of the company in opposition to a petition for winding it up, the company must, for the purposes of his cross-examination on his affidavit, produce the books of the company at the instance of the petitioner. *In re the Emma Silver Mining Company*, 44 Law J. Rep. (n.s.) Chanc. 456; Law Rep. 10 Chanc. 194.

The power of the Court of Chancery to make an order for the production of documents, for the purpose of their being put into the hands of a witness who is being cross-examined in order to test his evidence, is the same as that of a Common Law Court at a trial at Nisi Prius. *Ibid.*

#### (5) Examination of witnesses.

**34.**—A stockbroker, who was the attesting witness to transfers of shares to an infant, and suspected of having an interest in the shares, was held liable to be summoned as a witness under section 115 of the Companies Act, 1862. *In re the Contract Corporation*; *Ex parte Carter*, 40 Law J. Rep. (n.s.) Chanc. 15.

**35.**—Parties attending the proceedings in the winding-up of a company under the 60th rule of the General Orders of the 11th of November, 1862, under the Companies Act, 1862, are entitled to cross-examine witnesses attending before the examiner at the instance of the official liquidator for the purpose of being cross-examined by him. But the cross-examination by such parties must be strictly confined to the matter in the affidavits upon which the cross-examination is founded. *In re the Brompton and Longtown Railway Company*, 40 Law J. Rep. (n.s.) Chanc. 234; Law Rep. 11 Eq. 428.

**36.**—The C. Company in course of being wound up by the Court, was a judgment creditor of the T. Railway Company. The shares in the T. Company were largely held by the G. & M. Railway Companies, which companies were working the line of the T. Company, but as alleged without profit to the T. Company. The official liquidator of the C. Company, who was promoting a bill in Parliament to compel the G. & M. Companies to take over the T. Railway and pay the debts of the T. Company, having reason to suspect that the shareholders of the T. Company were mere nominees of the G. & M. Companies, which fact he considered material for his bill, desired to examine them. The Court allowed a summons under

s. 115 of the Companies Act, 1862, to issue, but without prejudice to the right of the shareholders to object to the examination. *In re the Contract Corporation*, 40 Law J. Rep. (n.s.) Chanc. 351; Law Rep. 6 Chanc. 145.

**37.**—The mother-in-law of a contributory was ordered to be summoned, under this Act, to give evidence with respect to her son-in-law. *Swan's case* (Law Rep. 10 Eq. 675) followed. *In re the Bank of Hindustan, China and Japan*; *Fricker's case*, 41 Law J. Rep. (n.s.) Chanc. 278; Law Rep. 13 Eq. 178.

**38.**—A contributory, on being examined under section 115 of the Companies Act, 1862, objected to answer some questions aimed at impeaching a composition deed executed by him, on the ground that the Court of Bankruptcy was the proper forum in which proceedings of that nature should be taken:—Held, that he must answer the questions, one of the objects of section 115 being to enable a liquidator to ascertain whether he ought or ought not to take proceedings elsewhere. *In re the London Gas Meter Company*; *Ex parte Webber*, 41 Law J. Rep. (n.s.) Chanc. 145.

**39.**—Any person indebted to a contributory in a company may be summoned under section 115 of the Companies Act, 1862, and compelled to produce his books relating to his dealings with the contributory, and give information respecting the means of the contributory. *In re the Land Credit Company of Ireland*; *Trower and Lawson's case*, 41 Law J. Rep. (n.s.) Chanc. 468; Law Rep. 14 Eq. 8.

**40.**—When a witness in Scotland, summoned under section 127 of the Companies Act, 1862, objects to be examined, the proper course is to move the Court of Chancery in England that he be ordered to attend for examination before the sheriff of his county, at his own expense. *In re the Tyne Chemical Company (Lim.)*, 43 Law J. Rep. (n.s.) Chanc. 354.

A creditor of a company may be summoned to ascertain whether the company has an alleged counter-claim against him. *Ibid.*

#### (6) Evidence on hearing of summons.

**41.**—Evidence taken under the Companies Act, 1862, may be used on the hearing of a summons against the person giving the evidence. *In re the Hercules Insurance Company (Lim.)*; *Pugh's case and Sharmar's case*, 41 Law J. Rep. (n.s.) Chanc. 580; Law Rep. 13 Eq. 566.

#### (7) Enrolment of order.

**42.**—On an application for the enrolment of an order to place B. on the list of contributories of the above-named company, which was made by B.'s mother after his decease, and not by his personal representative, and which was made more than six months but less than five years from the date of the order, —Held, that the matter was in the discretion of the Court, and that having regard to the Winding-up Acts, to the time when the application was made, and the position of the applicant, it was not one which the Court could

accede to. *In re the United Ports and General Insurance Company*; *Brown's case*, 44 Law J. Rep. (N.S.) Chanc. 745; Law Rep. 20 Eq. 639.

*Time for application to vary chief clerk's certificate.* [See *supra* C 3.]

#### (d) Liquidator.

##### (1) Appointment and removal.

**43.**—A notice of the intention to wind up a company voluntarily is sufficient notice of an intention to appoint liquidators. *In re the Welsh Flannel and Tweed Company (Lim.)*, 44 Law J. Rep. (N.S.) Chanc. 391; Law Rep. 20 Eq. 360.

A company's articles of association provided that calls should be made at the discretion of the directors, and should not exceed 2*l.* per share, and that unpaid calls should bear interest at ten per cent. A notice having been issued to the shareholders of the intention to wind up the company, a meeting was held at which a resolution was passed for a voluntary winding up, and at a subsequent meeting, without any express notice, liquidators were appointed. The liquidators then made a call of 3*l.* per share, without providing for interest on unpaid calls. An order having been made sometime afterwards continuing the winding-up under supervision, the liquidators took out a summons to enforce payment of the unpaid calls with interest at ten per cent.:—Held, that the appointment of liquidators was valid; that they had power to make the call of 3*l.* per share, the articles referring to calls by directors only; and that the unpaid calls were chargeable with interest at five per cent. only, under 3 & 4 Will. 4. c. 42, s. 28. *Ibid.*

**44.**—"Due cause" for the removal of a liquidator under the above section is shewn when it appears to the Court desirable that the removal should take place. The Court has jurisdiction to remove a liquidator at the instance of one shareholder, but will be cautious in doing so against the wishes of the great majority of the shareholders. *In re the British Nation Life Assurance Association*, Law Rep. 14 Eq. 492.

##### (2) Powers.

[See *infra* Nos. 49–55, and *supra* E 9.]

##### (3) Liability to action by creditor.

**45.**—A company passed a resolution to wind up voluntarily, and appointed the plaintiff liquidator. In pursuance of the resolution a sum of money was paid to the directors out of the assets, to be applied as they might think proper, in compensation to officers of the company. The directors accordingly awarded the defendant, who had been their secretary, 500*l.*; and the plaintiff, as "liquidator," then wrote a letter to the defendant informing him of the award, but stating that the 500*l.* would be retained by the company as a set-off against a larger sum due from the defendant to the company, and requesting him to arrange for payment of the balance. No part of the balance was paid, and on the day before the expiration of six

years from the date of the letter the defendant commenced an action against the plaintiff personally, and not as liquidator, to recover the 500*l.* Subsequently the company presented a petition to continue the winding-up under supervision, which petition was still pending. A demurrer by the defendant, for want of equity, to a bill filed by the liquidator to restrain the action was over-ruled with costs. *Kemp v. Tucker*, 42 Law J. Rep. (N.S.) Chanc. 222; Law Rep. 8 Chanc. 372 n.: reversed, on appeal, 42 Law J. Rep. (N.S.) Chanc. 532; Law Rep. 8 Chanc. 369.

##### (4) Costs of liquidator.

**46.**—The respondent's costs of an unsuccessful appeal by the official liquidator ordered to be paid by the liquidator. *In re the Hoylake Railway Company*; *Littledale's case*, 43 Law J. Rep. (N.S.) Chanc. 529; Law Rep. 9 Chanc. 257.

**47.**—When a liquidator is brought before the Court of Appeal as a neutral party, his costs should as a rule be allowed out of the estate, but the Court of Appeal will make no order on the subject, but will leave the matter to the discretion of the Court below. *In re the Wheal Vryyan Mining Company*, 43 Law J. Rep. (N.S.) Chanc. 599; Law Rep. 9 Chanc. 553.

**48.**—The appeal of an official liquidator of a company seeking to settle a respondent upon the list of contributories being dismissed with costs, the respondent's costs will, as a rule, be ordered to be paid by the official liquidator and not out of the estate. *In re the United Ports Company*; *Beck's case*, 43 Law J. Rep. (N.S.) Chanc. 531; Law Rep. 9 Chanc. 392.

##### (e) Compromises and arrangements.

##### (1) Deed purporting to release debts.

**49.**—A deed purporting to release debts, if executed on behalf of a company in course of winding up under the supervision of the Court, and without the sanction of the Court, is *ultra vires*, and may be treated as a nullity. *James v. May* (H. L.), 42 Law J. Rep. (N.S.) Chanc. 802; Law Rep. 6 E. & I. App. 328.

Calls were made upon M. in respect of shares in the W. Company which M. held as the nominee of, and as *quasi* trustee for the I. Company. Both companies came to a winding-up under the supervision of the Court. Thereupon the W. Company executed a deed with M., whereby M. consented that the W. Company should use his name in suing the I. Company for the calls then due upon the shares, and the W. Company agreed not to sue M. in respect of these calls. Upon the joint application of M., and of the W. Company,—Held, firstly, that the deed executed between M. and the W. Company was a nullity, the sanction of the Court not having been obtained for it, and that the claim of M. was in no way affected by it; secondly, that M. was entitled to be indemnified by the I. Company against any liability in respect of the shares in the W. Company so held by him, and to rank as creditor of the I. Company for the amount of calls made or to be made on the shares,

A A

with interest to the date of the order to wind up the I. Company, and the liquidator of the I. Company was ordered to pay to the liquidator of the W. Company the dividends which in the course of the winding-up should become payable in respect of their liability, thus declared, on the amount of such calls and interest. *Ibid.*

(2) *Compromises under sections 160-163.*

**50.**—An arrangement under section 161 of the Companies Act, 1862, that leaves no assets or uncalled capital out of which dissentients can be paid the value of their shares, cannot be carried out against their wishes. *In re Hester & Co. (Lim.)*, 44 Law J. Rep. (N.S.) Chanc. 747.

In such a case the Court would find means to protect the dissentients by some order on a winding-up petition, without driving them to file a bill, *Semble. Ibid.*

Upon an undertaking by the liquidator in such a case, not to part with the assets until the dissentients were paid, a winding-up order made by Bacon, V.C., was discharged. *Ibid.*

*Bird v. Bird's Patent Sewage Company* (43 Law J. Rep. (N.S.) Chanc. 399; Law Rep. 9 Chanc. 358) explained. *Ibid.*

**51.**—A compromise with a contributory under section 160 must be initiated by the liquidator and cannot be made by the Court without his consent. *In re the East of England Banking Company; Pearson's case*, 41 Law J. Rep. (N.S.) Chanc. 524; Law Rep. 7 Chanc. 302.

**52.**—The Court will not compel a liquidator against his judgment to sanction a compromise of debts. *In re the International Contract Company; Hankey's case*, 41 Law J. Rep. (N.S.) Chanc. 385.

**53.**—The M. Company was wound up and reconstructed by the formation of the M. Corporation, the shareholders taking shares in the corporation in exchange for their shares in the company, and the corporation taking over the company's assets and liabilities. The corporation failed to indemnify the company, and was itself wound up. Its capital was fully called up in the liquidation, and it still owed large debts, besides the claim of the company against it for indemnity. The company's capital had not been fully called up. It owed no debts, and had a balance of cash in hand. Under these circumstances an agreement was entered into between the liquidators, that the company should take the assets of the corporation, paying the creditors of the corporation 4s. in the pound, and retaining what else they might make of them. There was evidence that the assets, if realised carefully, might more than pay the company's claim in full. If sold immediately, the assets would probably pay about 3s. in the pound to all. Malins, V.C., having sanctioned this arrangement, giving dissentients the option of taking the present estimated value of their shares, certain executors holding shares in the company appealed from the order. Their appeal was dismissed with costs. *In re the Marine Investment Company; Ex parte Poole's executors*, 42 Law J. Rep. (N.S.) Chanc. 620; Law Rep. 8 Chanc. 702.

Though a transfer of shares to the liquidator in a voluntary winding-up, under an arrangement whereby the shareholder retires from the company, will not absolve him from liability to existing creditors, it will relieve him from any liabilities incurred under an arrangement of which his retirement forms part, and from the costs of the liquidation. *Ibid.*

(3) *Sale of assets abroad and release of a class of contributories.*

**54.**—In the compulsory winding-up of a limited company formed to construct a railway in Brazil, the Court sanctioned the sale by the official liquidator of all the company's assets in Brazil, and the release of all rights against contributories there, in consideration of the payment of a lump sum, it being shewn that there would be great difficulty in releasing the property, and that it would be practically impossible to recover any calls. *In re the Paraguassu Steam Tramroad Company (Lim.)*, 42 Law J. Rep. (N.S.) Chanc. 442.

(4) *Lien on shares.*

**55.**—A bank, under its articles of association, had a lien on the shares of a shareholder, for all moneys due by him to the bank. In the winding-up of the bank, on sale of the assets, an arrangement was made that certain shareholders should be paid 2l. a share:—Held, that the lien extended to the moneys so paid. Order of the Master of the Rolls reversed. *In re the General Exchange Bank; Ex parte Lewis*, 40 Law J. Rep. (N.S.) Chanc. 429; Law Rep. 6 Chanc. 818.

(f) *Costs.*

(1) *Priorities.*

**56.**—A second equitable mortgagee of, and a debenture holder in, a company which was being wound up voluntarily under supervision, filed a bill against the company to realise his securities, and obtained an order under which the liquidator of the company was appointed the receiver in the cause. The liquidator was ordered to carry on the business of the company; and a sale by him of a portion of his property was confirmed by the Court with costs. The plaintiff obtained an order for the payment or satisfaction of his claims out of the purchase-money in the hands of the receiver. The liquidator, however, insisted that his costs of preserving and selling the property, and his general costs of the liquidation, ought to be paid or provided for in priority to all other charges on the balance of the purchase-money:—Held, that the liquidator's costs of realising the property were payable in priority to any claim of the plaintiff, or the debenture holders of the company; that the plaintiff's claims as mortgagee and the debenture holder's claims had priority over the general costs of the liquidation; that as between the plaintiff and the company, the costs of preserving the property were payable by the latter, but that the liquidator must be indemnified out of the purchase-money against such of those costs as he might not be paid out of the



company's assets; that the costs of realisation must be taxed; and that the balance of the purchase-money, after making the deductions ordered, must be duly paid into Court, and not dealt with, without notice to the plaintiff. *Perry v. the Oriental Hotels Company (Lim.)*, and *In re the Oriental Hotels Company (Lim.)*, 40 Law J. Rep. (n.s.) Chanc. 420; Law Rep. 12 Eq. 126.

## (2) How payable.

**57.**—Past members were settled on the list of contributories, and a call made on them, partly to pay the costs of winding-up; the past members subsequently satisfied the debts in respect of which they were liable:—Held, that the past members were liable to pay the costs of settling them on the list, but nothing further. *In re Greening & Co.; Ex parte Marsh*, 41 Law J. Rep. (n.s.) Chanc. 111; Law Rep. 13 Eq. 388.

**58.**—An insurance company incorporated under 7 & 8 Vict. c. 110, with unlimited liability, stipulated with each of their policy holders that the funds, securities and property of the company at the time of enforcing any claim under his policy remaining unapplied and undisposed of, and inapplicable to prior claims, should alone be liable to answer and make good all claims and demands upon the company. The company was ordered to be wound up, and the amounts unpaid upon the shares had to be enforced by calls, the fund so formed being the only fund applicable to the payment of the claims of the policy holders:—Held (affirming the decision of the Master of the Rolls), that no part of the costs of realising the fund or of the winding-up ought to be paid out of the fund so realised, but must be raised entirely by further calls upon the shareholders. *In re the Agricultural Cattle Insurance Company*, 44 Law J. Rep. (n.s.) Chanc. 108; Law Rep. 10 Chanc. 1.

*Offer to pay petitioner's costs.* [See supra I 3.]

*Costs of opposing winding-up petitions.* [See supra I 19.]

*Costs of evidence in opposition to demurrable petition disallowed.* [See supra I 22.]

## (3) Security for costs.

**59.**—Where a creditor out of the jurisdiction presented a petition to wind up a company, and the company, having filed affidavits in answer to the petition, asked at the hearing that the petitioner might be ordered to give security for costs to the amount of 100*l.*:—Held, that filing the affidavits was no waiver of the company's rights, and that they were entitled to the order. *In re the Home Assurance Association* (No. 2), Law Rep. 12 Eq. 113.

## (g) Effect of winding-up order.

### (1) Staying execution or other proceedings.

**60.**—A petition for the winding-up of a company was presented at one o'clock in the day. At four o'clock in the same day execution was levied on part of the company's property, in pursuance

of a writ issued before the time when the petition was presented:—Held, that the execution was void. *In re the London and Devon Biscuit Company (Lim.)*, 40 Law J. Rep. (n.s.) Chanc. 574; Law Rep. 12 Eq. 190.

**61.**—A creditor made a claim in a voluntary winding-up, but the liquidator refused to take out a summons to consider it. The creditor then brought an action, and the company not appearing, he recovered judgment for the full amount. On motion by the company, —Held, that the Court would restrain execution on the terms of the creditor being allowed to prove for his judgment, costs at law, and costs of motion. *In re the Poole Fire Brick and Blue Clay Company*, 43 Law J. Rep. (n.s.) Chanc. 447; Law Rep. 17 Eq. 268.

**62.**—The local manager of a company accepted its drafts in order to pay for goods supplied to the company. Being unable to obtain payment from the company of the debt so incurred by him, he brought an action which the company defended. In consequence of its being defended he was unable to obtain judgment for four months. Three months after the action was commenced a winding-up petition was presented, and an order was made on the petition the day after execution was issued on the judgment. On an application for leave to enforce execution, —Held, that, although the applicant had been unfairly treated by the company, there was not such a combination of circumstances as rendered it right that he should proceed with his execution. Costs of the application and of the action at law allowed to the applicant. *In re Dimson's Estate, Fire Clay Company*, Law Rep. 19 Eq. 202.

**63.**—On an application in a winding-up to stay a suit for specific performance by a vendor against the company, the bill having been filed six months, the Court gave the plaintiff leave to enforce an answer, but not to proceed further without the leave of the Court. *The Thames Plate Glass Company v. The Land and Water Telegraph Construction Company*, 40 Law J. Rep. (n.s.) Chanc. 165; Law Rep. 11 Eq. 248.

### (2) Leave to proceed.

**64.**—Where the Judge in whose Court a company is being wound up has given leave under the above section for the plaintiff to proceed with a suit against the company, the Court of Appeal will not interfere with the discretion of the Judge. *The Thames Plate Glass Company v. The Land and Sea Telegraph Construction Company*, Law Rep. 6 Chanc. 643.

**65.**—A limited company having obtained leave to defend an action on a dishonoured bill of exchange, after the action was set down for trial, gave judgment on terms of payment, which they did not fulfil, and eight days afterwards presented a winding-up petition. After the winding-up order the plaintiff moved for leave to issue execution, on the ground of the deceptive conduct of the company:—Held, that leave ought not to be given. *In re the Universal Disinfectant Company*, 44 Law J. Rep. (n.s.) Chanc. 478; Law Rep. 20 Eq. 162.

*Quære*—whether, under any circumstances, leave

ought to be given to a judgment creditor to issue execution after a winding-up order, having regard to the fact of winding-up being in the nature of a bankruptcy for the equitable distribution of the assets among the persons entitled. *Ibid.*

### (3) Distress for rent.

**66.**—Section 163 of the Companies Act, 1862, has no application where the distress is against a tenant other than the company, although the company's goods may be taken in distress. *In re the Lundy Granite Company; Ex parte Heaven*, 40 Law J. Rep. (n.s.) Chanc. 588; Law Rep. 6 Chanc. 462.

Semble—where the liquidator of a company continues, for the purposes of the winding-up, in occupation of land of which the company was lessee, the landlord ought to be permitted to enforce, by distress or otherwise, his right to the full amount of rent, in respect to the time during which the liquidator so continues in possession and enjoyment. *Ibid.*

**67.**—Section 163 of the Companies Act, 1862, does not apply to the case of a landlord distraining goods of a company on his tenant's land after the commencement of the winding-up; but does apply to the case of a distress on the goods of a company where the party distraining is a creditor of the company. The instances in which the Court has allowed distresses put in force after the commencement of the winding-up to proceed, whatever grounds the decisions may have gone upon, have been instances in which the landlord was a stranger to the company. *In re the Traders' North Staffordshire Carrying Company (Lim.); Ex parte the North Staffordshire Railway Company*, 44 Law J. Rep. (n.s.) Chanc. 172; Law Rep. 19 Eq. 60.

A railway company, being owners of a canal, with a special Act enabling them to take tolls on barges using the canal, and to recover such tolls by action or distress, distrained on the barges of a carrying company after a resolution had been passed for voluntarily winding up the latter company. The voluntary winding-up was continued under the supervision of the Court:—Held, that the proceeds of the distress belonged to the official liquidator of the carrying company. *Ibid.*

*In re the Exhall Mining Company (Lim.)*, (4 D. J. & S. 311; 38 Law J. Rep. (n.s.) Chanc. 595); and *In re the Lundy Granite Company; Ex parte Heaven* (40 Law J. Rep. (n.s.) Chanc. 588; Law Rep. 6 Chanc. 462, see last case), commented on. *Ibid.*

### (4) Protected transaction.

**68.**—A creditor filed a petition to wind up a limited company, but delayed his proceedings on payment of part of his debt with a promise of payment of the remainder. No further payment was made, and ultimately a winding-up was ordered on his and other petitions:—Held, that the payment to him was not a transaction that ought to be protected by the Court under section

153 of the Companies Act, 1862 (which avoids all payments after the petition, unless the Court otherwise directs), and that the money must be refunded. *In re the Liverpool Civil Service Association; Ex parte Greenwood*, 43 Law J. Rep. (n.s.) Chanc. 609; Law Rep. 9 Chanc. 511.

### (5) Sequestration.

**69.**—The arrest of a ship in a cause of wages, after the company to which the ship belonged was ordered to be wound up,—Held, a sequestration within the meaning of the 163rd section of the Companies Act, 1862, and consequently void. *In re the Australia Direct Steam Navigation Company; Ex parte Baker*, 44 Law J. Rep. (n.s.) Chanc. 676; Law Rep. 20 Eq. 525.

### (6) Lien under previous agreement.

**70.**—Where a joint-stock company has been wound up under the Companies Act, 1862 (25 & 26 Vict. c. 89), and the business is duly carried on by the official liquidator, a creditor who has continued his dealings with the company cannot exercise a general lien on its goods for the whole amount due to him by virtue of an agreement made between him and the company previous to the winding-up. *The Wiltshire Iron Company (Lim.) v. The Great Western Railway Company*, 40 Law J. Rep. (n.s.) Q. B. 43; Law Rep. 6 Q. B. 101: affirmed on error, 40 Law J. Rep. (n.s.) Q. B. 308; Law Rep. 6 Q. B. 776.

A joint-stock company was wound up under the Companies Act, 1862 (25 & 26 Vict. c. 89), and the business carried on by the official liquidator according to the Act. Previous to the winding-up the company had made an agreement with a railway company for the carriage of goods on a credit account, upon the terms that goods belonging to or sent by them should be subject to a general lien in favour of the railway company, to take effect, at their option, at any time after failure of any sum due on the credit account, or in case of bankruptcy, insolvency or stoppage of payment:—Held (affirming the judgment below), that the railway company could not enforce this lien upon goods which they had received after the winding up, to be carried on account of the new business. *Ibid.*

## COMPENSATION.

*To landowner for land taken, &c. under Lands Clauses Consolidation Act.* [See LANDS CLAUSES CONSOLIDATION ACT, 10-24.]

*Assessment of.* [Ibid. 18-29.]

*Application of.* [Ibid. 30-46.]

*To officer for deprivation of office.* [See POOR, 4, 5.]

*Bridge toll: injury to bridge by statutory powers.* [See TOLL, 1.]

## COMPOSITION DEED.

- (A) WHAT PROPERTY PASSES TO TRUSTEES.  
 (B) RIGHTS OF CREDITORS.  
     (a) *Rights against surety and against trustee as stakeholder.*  
     (b) *Proof.*  
         (1) *Creditor not executing.*  
         (2) *Time of proof.*  
 (C) JURISDICTION OF COURT OF EQUITY.  
 (D) PLEADING DEED.  
 (E) INSPECTORSHIP DEED.

## (A) WHAT PROPERTY PASSES TO TRUSTEES.

1.—A. (by deed executed after the repeal of the Bankruptcy Act, 1861) assigned to B. for the benefit of his creditors "all his goods and chattels, personal estate, substance and effects whatsoever, and all his right, title, property, benefit, claim and demand whatever therein":—Held, that these words were sufficient to pass a term of years in certain premises; and that B., having executed the deed of assignment and put a man in possession of the premises, and never having disclaimed the lease (though he had not expressly accepted it), was liable to the lessor as assignee of the term. *White v. Hunt*, 40 Law J. Rep. (n.s.) Exch. 23; Law Rep. 6 Exch. 32.

The ruling of Lord Tenterden, C.J., in *Carter v. Warne* (1 Moo. & M. 479) impugned.

2.—By a partition deed of real estate, of which a married woman was joint tenant, land was conveyed to such uses as she and her husband should appoint, and in default to her separate use during their joint lives, with remainder to the survivor for life, and ultimate remainder to her in fee. She joined in mortgages under the power to secure repayment of advances to her husband, and he afterwards executed a composition deed under the Bankruptcy Act of 1861, assigning all his property to trustees for the benefit of creditors. He afterwards sold the estate, and requested the trustees to release it on the ground that only his life estate passed to the trustees, and that his wife was entitled to throw on his life estate the debt, which far exceeded it in value:—Held, that she was so entitled, and that the trustees ought therefore to release the property. *Ex parte Trueman*; *In re Trueman*, 42 Law J. Rep. (n.s.) Bankr. 1.

## (B) RIGHTS OF CREDITORS.

- (a) *Rights against surety and against trustee as stakeholder.*

3.—Detinue does not lie against the maker of a promissory note after he has delivered it to a properly constituted stakeholder, though he may have forbidden the stakeholder to hand it over to the person claiming it, and in whose favour it was drawn. *Latter v. White*, (H. L.), 41 Law J. Rep. (n.s.) Q. B. 342; Law Rep. 5 E. & I. App. 578.

The trustee of a composition deed holding the bills or notes of the debtor or of his surety for the benefit of creditors is such a stakeholder. *Ibid.*

Semble, by Lord Cairns—a creditor who has

as between himself and the debtor, successfully contested in a Court of law the validity of a creditors' or composition deed executed by his debtor, is not thereby precluded from afterwards coming in under the deed, and obtaining the benefits he would only be entitled to on the footing that the deed was valid. *Ibid.*

The judgment of the Court of Exchequer Chamber (40 Law J. Rep. (n.s.) Q. B. 162; Law Rep. 6 Q. B. 474), reversing the previous judgment of the Court of Exchequer (40 Law J. Rep. (n.s.) Q. B. 9; Law Rep. 5 Q. B. 622), affirmed. *Ibid.*

(b) *Proof.*

- (1) *Creditor not executing.*

4.—A debtor executed a deed of assignment of property for the benefit of creditors, which provided that creditors not executing within a certain time were to be excluded:—Held, that a creditor who, in ignorance of this provision, had not executed the deed within the specified time, but had forborne to sue, was entitled to participate in dividends. *In re Baber's Trust*, 40 Law J. Rep. (n.s.) Chanc. 144; Law Rep. 10 Eq. 554.

(2) *Time of proof.*

5.—For the purpose of ascertaining the dividend to which creditors are entitled under a composition deed, they are not to be treated as having proved at the time of the registration of the deed, but at the time when they go in to make their claims against the estate. *Ex parte the Joint Stock Discount Company*; *In re Daunt*, Law Rep. 6 Chanc. 455.

## (C) JURISDICTION OF COURT OF EQUITY.

6.—A Court of Equity will, at the suit of the debtor, entertain a suit to open an account settled between a debtor and creditor, although the debtor has registered a composition deed under the Bankruptcy Act of 1861, and entered the creditor for the amount settled, and the composition has been paid, if it be shewn that the creditor was guilty of fraud. *Pike v. Dickinson*, 40 Law J. Rep. (n.s.) Chanc. 450; Law Rep. 12 Eq. 64.

Affirmed on appeal, 41 Law J. Rep. (n.s.) Chanc. 171; Law Rep. 7 Chanc. 61.

## (D) PLEADING DEED.

7.—An English composition and inspectorship deed, made under 24 & 25 Vict. c. 134, may be set up as an answer to an English action on a contract made and to be performed in Upper Canada; but it cannot be set up as an answer to an English action on a judgment given in Upper Canada in an action there on such a contract, if it could have been used as a defence in such Canadian action. *Ellis v. M'Henry*, 40 Law J. Rep. (n.s.) C. P. 109; Law Rep. 6 C. P. 228.

The effect of a provision in a composition and inspectorship deed that creditors shall not sue, &c., for their debts, and that if they do the deed may be pleaded as an accord and satisfaction, is

not that they are to forfeit their debts and dividends on action brought, but simply to prevent actions for the debts leaving the dividends untouched, and therefore such a provision does not make the deed void. *Ibid.*

*Deed of composition or arrangement: jurisdiction of Court of Chancery in questions as to.* [See JURISDICTION IN EQUITY, 10, 11.]

(E) INSPECTORSHIP DEED.

[See that title.]

COMPROMISE.

1.—The general principle is that where a person has had full notice, and has had the opportunity of taking part in the suit, he will be bound by its decision; but he will not be bound by a compromise into which the parties to the suit may enter. *Wytherley v. Andrews*, 40 Law J. Rep. (n.s.) P. & M. 57; Law Rep. 2 P. & D. 327.

A., one of the next-of-kin, was aware that the validity of the will was contested in a suit between the executor and her sister. The suit was compromised at the trial, and the will pronounced for.—Held, that A. was not precluded by the compromise from calling in the probate and putting the executor again on proof of the will. *Ibid.*

2.—Where a person complaining of injury has a choice of remedies by proceeding either civilly or criminally and elects to take criminal proceedings, it is not against public policy to compromise such proceedings. *Fisher v. the Apollinaris Company*, 44 Law J. Rep. (n.s.) Chanc. 500; Law Rep. 10 Chanc. 297.

3.—Parties to a suit in the Court of Probate entered into and signed an agreement drawn up by their counsel in these terms:—"In consideration of the defendant withdrawing from opposition to proof of the will and codicils, the plaintiffs undertake to pay to the defendant within fourteen days the sum of 5,850*l.*, and a further sum of 750*l.* for costs, and thereupon the defendant and the other residuary legatees will, if so required, release by deed all claim to the residue; probate not to issue till after payment of the above sums, and the case to be adjourned for that purpose. In default of payment of the above sums within the time specified, the defendant to be entitled to have the case called on for hearing, and to take a verdict by consent upon all the issues:—Held, that upon non-payment of the stipulated sums an action at law could be maintained to recover them, and that this remedy for breach of the agreement was not limited by the final proviso for taking a verdict in the probate suit. *Smith v. Shirley*, 44 Law J. Rep. (n.s.) Exch. 29.

*Effect of compromise with one of two joint tortfeasors.* [See NEGLIGENCE, 27.]

CONDITION.

- (A) CONDITION IN RESTRAINT OF ALIENATION.
- (B) CONDITION IN RESTRAINT OF TRADE.
- (C) IMPOSSIBLE CONDITION.
- (D) FORFEITURE: CONDITIONAL LIMITATION.
- (E) CONDITION PRECEDENT.

(A) CONDITION IN RESTRAINT OF ALIENATION.

1.—Devise in fee to a brother of the testatrix, "on the condition that he never sells it out of the family:—Held, that "the family" meant the blood relations of the devisee, and that the condition was valid in law as a partial restraint on alienation. *In re Macleay*, 44 Law J. Rep. (n.s.) Chanc. 441; Law Rep. 20 Eq. 186.

Observations on *Attwater v. Attwater* (18 Beav. 330; 23 Law J. Rep. (n.s.) Chanc. 692). *Ibid.*

2.—Conveyance on sale of land, with stipulation by the vendor, that an adjoining plot of land "should never be hereafter sold, but left for the common benefit of both parties:—Held, that this was merely an agreement that the plot should be left open in the state it then was in, and as such contravened no rule of law. Although not a covenant running with the land, such agreement was held to create an equity, binding all who came into possession with notice of it. *McLean v. McKay*, Law Rep. 5 P. C. 327.

(B) CONDITION IN RESTRAINT OF TRADE.

[See COVENANT, 1-4; BOND, 3; ATTORNEY, 9.]

(C) IMPOSSIBLE CONDITION.

3.—A testator directed that in the division of his property an estate belonging to one of his children should be brought into hotchpot. After the date of his will he acquiesced in the sale of this estate, and the settlement of the proceeds on the child for life, with remainder to her children:—Held, that the condition was not thereby waived, and that in the division of the testator's property the estate must be brought into hotchpot. *Middleton v. Windross*, 42 Law J. Rep. (n.s.) Chanc. 555; Law Rep. 16 Eq. 212.

[And see LEGACY, 24.]

*Conditional legacy: non-compliance with condition through ignorance.* [See LEGACY, 22, 23.]

(D) FORFEITURE: CONDITIONAL LIMITATION.

4.—Section 4 of 3 & 4 Will. 4. c. 27, extends to forfeitures which operate to accelerate an estate under a conditional limitation as well as to forfeitures, of which the heir-at-law only can take advantage. *Asley v. the Earl of Essex*, 43 Law J. Rep. (n.s.) Chanc. 817; Law Rep. 18 Eq. 290.

A devisee under a conditional limitation is not protected from forfeiture by ignorance of the condition. *Ibid.*

## (E) CONDITION PRECEDENT.

[See CONTRACT, 21, 22; SHIPPING LAW, E 5.]

*Condition in bond by defendant to pay sum recovered, if action "determined in favour" of plaintiff.* [See BOND, 2.]

*Condition founded on mistake.* [See WILL, CONSTRUCTION, O 1.]

*Condition as to residence.* [See WILL, CONSTRUCTION, O 5, 6.]

*Condition in restraint of alienation.* [See WILL, CONSTRUCTION, O 7, 8.]

*Condition in restraint of marriage.* [See WILL, CONSTRUCTION, O 9, 10.]

## CONFIRMATION OF SALES ACT.

1.—Mortgagees with power of sale may sell minerals and surface distinct. Subsequent mortgagees need not be served with the petition. *In re Beaumont's Trusts*, 40 Law J. Rep. (n.s.) Chanc. 400; Law Rep. 12 Eq. 86.

2.—Mortgagees of real property, except the minerals, were allowed upon petition to exercise their power of sale by selling apart from the minerals, although a bill for foreclosure had been filed by them, and subsequent incumbrancers and persons interested in the equity of redemption opposed the petition. *In re Wilkinson's Mortgaged Estates*, 41 Law J. Rep. (n.s.) Chanc. 392; Law Rep. 13 Eq. 634.

3.—When trustees petition for sale of land apart from minerals, the beneficiaries should either join in the petition or be sufficiently represented. *In re Palmer*, 41 Law J. Rep. (n.s.) Chanc. 511; Law Rep. 13 Eq. 408.

4.—The trustees of a will devising real estate in strict settlement had mere general powers of sale and exchange. Upon a petition presented by the trustees and the tenant for life under the Confirmation of Sales Act (25 & 26 Vict. c. 108), for authority to exercise the powers by selling the minerals and surface separately, the Court gave a general direction that the powers might be so exercised. *In re Wynn's Devised Estates*, 43 Law J. Rep. (n.s.) Chanc. 95; Law Rep. 16 Eq. 237.

## CONFLICT OF LAWS.

(A) SUCCESSION TO PROPERTY.

(B) ADMINISTRATION.

(C) EXECUTION OF TRUSTS OF SETTLEMENT.

(D) DEPOSIT OF TITLE DEEDS.

(E) BANKRUPTCY AND INSOLVENCY.

(F) PROBATE OF WILL.

## (A) SUCCESSION TO PROPERTY.

1.—The succession to personal property in England of a person domiciled abroad, is governed by the law of the domicile at the time of the death

of the deceased. A retrospective change in that law made after the death of the deceased by the legislative authority of the foreign country (e.g. a decree confiscating the property of the deceased), will not be recognised by the English Courts as affecting the distribution of personal property in England. *Lynch v. the Provisional Government of Paraguay*, 40 Law J. Rep. (n.s.) P. & M. 81; Law Rep. 2 P. & D. 268.

## (B) ADMINISTRATION.

2.—Real estate in Scotland of a testator domiciled in England must be administered according to Scotch law; and the personal estate being by the law of Scotland primarily liable for the personal debts, it follows that in respect of those debts pecuniary legatees are not entitled to a marshalling of assets against the heir-at-law. *Harrison v. Harrison*, 42 Law J. Rep. (n.s.) Chanc. 495; Law Rep. 8 Chanc. 342.

3.—The widow of a domiciled Scotchman filed a bill in this Court for the administration of her husband's estate, under an English will; and prayed (*inter alia*) that her infant children should elect and collate, in order to enable her to ascertain her rights and remedies according to the Scotch law; and insisted on a Scotch domicile. The residuary legatee under the English will filed a cross-bill, to establish an English domicile, and for the administration of the estate accordingly:—Held, that the questions raised by the widow were well raised, and could be disposed of by this Court. *Douglas v. Douglas*; *Douglas v. Webster*, 41 Law J. Rep. (n.s.) Chanc. 74; Law Rep. 12 Eq. 617.

## (C) EXECUTION OF TRUSTS OF SETTLEMENT.

4.—A woman domiciled in England married a man having a foreign domicile on the faith that he would adopt an English domicile. A settlement, void by the law of the foreign domicile, but valid by English law, was executed previously to the marriage; the husband did not adopt the English domicile, and obtained a decree in his own country for a divorce in a suit in which the wife was not represented:—Held, that the settlement was binding; and that the decree of the foreign country, though not shewn to be invalid by the foreign law, would not be taken notice of in the English Courts. The trusts of the settlement were therefore directed to be carried into execution. *Collis v. Hector*, 44 Law J. Rep. (n.s.) Chanc. 267; Law Rep. 19 Eq. 334.

## (D) DEPOSIT OF TITLE DEEDS.

5.—S. & Co., German merchants, carrying on business in London and Shanghai, being in Prussia, entered into verbal negotiations with H. & Co., merchants in Prussia, for opening a credit with H. & Co., against which S. & Co. were to draw bills to a certain amount. As a security S. & Co. proposed to deposit with H. & Co. the title deeds of real estate at Shanghai. These negotiations were subsequently carried on by letters, written by S. & Co. from London and

H. & Co. from Prussia. A final contract was completed by a letter written by S. & Co. from London, transmitting the title deeds to H. & Co., and undertaking to register the mortgage at Shanghai, as required by the law there. S. & Co. liquidated their affairs by arrangement in the London Bankruptcy Court. They were indebted in a large amount to H. & Co., under the above-mentioned contract. H. & Co. applied for an order that the trustee in liquidation should convey the real estate to them; the mortgage had not been registered in Shanghai, and without such registration was incomplete according to the law of Shanghai:—Held, that by whatever law the contract was governed it was personally binding on S. & Co., and the real estate was ordered to be sold, and the proceeds paid to H. & Co.:—Held, by Mellish, L.J., that looking to the nature of the security, and the letter by which the deposit was completed, and which was written and posted in London, the contract must be construed according to the law of England. *Ex parte Holthausen; In re Scheibler*, 44 Law J. Rep. (n.s.) Bankr. 26; Law Rep. 9 Chanc. 722.

#### (E) BANKRUPTCY AND INSOLVENCY.

6.—An Englishman, domiciled in Batavia, in contemplation of marriage, executed, according to the forms of the Dutch Indian Civil Law which prevails there, a notarial deed, whereby he in effect settled a sum of money on his wife to her separate use. The deed was not registered in Batavia; it was proved in the evidence that such a contract was valid by the law of Batavia as between the husband and wife, but that it would not have any effect with regard to third parties but from the day on which it was registered. The husband afterwards became bankrupt in England, and the wife claimed to prove against his estate:—Held, that the non-registration in Batavia did not affect the validity of the contract there, but only postponed any claim the wife might have against her husband's estate, to the claims of all other creditors; that the question of the priorities of creditors *inter se* was governed by the law of the country where the bankruptcy took place; and, therefore, that the wife was entitled to prove *pari passu* with the other creditors against her husband's estate. *Ex parte Melbourn; In re Melbourn*, 40 Law J. Rep. (n.s.) Bankr. 25; Law Rep. 6 Chanc. 64.

7.—A person died in England, having been adjudicated insolvent in Australia, and debts to a large amount having been proved in the insolvency and not satisfied,—Held, that even if the domicile of the deceased was English, a sum of money paid into the Court of Chancery in England to his credit must be applied towards payment of the debts proved in the insolvency in Australia, in priority to any claim by an English administrator. *In re Davidson's Settlement*, 42 Law J. Rep. (n.s.) Chanc. 347; Law Rep. 15 Eq. 383.

*Act of bankruptcy: a foreigner not domiciled or trading in England cannot be*

*made bankrupt upon an act of bankruptcy committed out of England.*  
[See BANKRUPTCY, A 2.]

8.—Where probate of the will of a testator who dies domiciled abroad has been granted by a competent Court of the domicile, the validity of the will cannot be disputed in this Court, although it was proved abroad in common form only. *Miller v. James*, 42 Law J. Rep. (n.s.) P. & M. 21; Law Rep. 3 P. & D. 4.

The executor propounded a will alleging that the deceased died domiciled in Jersey, and that probate had been granted by a competent Court of Jersey. The next-of-kin pleaded 1, undue execution; 2, incapacity; 3, undue influence. The Court ordered the 2nd and 3rd pleas to be struck out, on the ground that it was bound by the foreign probate.

#### (F) PROBATE OF WILL.

[See COLONIAL LAW, 1; LEGACY AND SUCCESSION DUTY, 2.]

#### CONSPIRACY.

[Amendment of the law relating to conspiracy and protection of property. Penalties for neglect by master, and for intimidation or annoyance of servants. 38 & 39 Vict. c. 86.]

A partnership consisting of the prisoner and L. carried on business abroad. The prisoner gave notice under the articles of partnership to dissolve the partnership. An account of the partnership property had to be taken on the dissolution, and upon such account after payment of partnership liabilities the partnership assets were to be divided between the prisoner and L. The prisoner agreed with W. and P. to forge documents and to make false entries in the partnership books and accounts, so as to make it appear that debts existed and were owing which did not exist, so as to reduce the amount divisible between the partners on the dissolution with intent to cheat and defraud L.:—Held, that the prisoner was rightly convicted of conspiring with W. and P. to defraud L. *The Queen v. Warburton*, 40 Law J. Rep. (n.s.) M. C. 22; Law Rep. 1 C. C. R. 274.

#### CONSTABLE.

*Supplying liquor to constable on duty.* [See ALBHOUSE, 17.]

#### CONSTRUCTIVE NOTICE.

[See VENDOR AND PURCHASER, 22, 23; MORTGAGE 19, 20; PARTNERSHIP, 6.]

## CONSTRUCTIVE TRUST.

[See TRUST, A 19, E.]

## CONTAGIOUS DISEASES ACT.

1.—The object of the Contagious Diseases Act is the prevention of disease, not the protection of owners of animals; and an action by an owner for damage arising from a breach of the statutory duty will not lie. *Gorris v. Scott*, 43 Law J. Rep. (n.s.) Exch. 92; Law Rep. 9 Exch. 125.

2.—By the 19th rule, part II. of the Animals' Order of 1871, made under the Contagious Diseases (Animals) Act, 1869, sec. 75, every person having in his possession, or under his charge, an animal affected with a contagious disease, is required, with all practicable speed, to give notice to a police constable of the fact of the animal being so affected; and by the 103rd section of the Act, if any person acts in contravention of any Order of Council, he shall be liable to a penalty not exceeding 20*l.*, or when such offence is committed in respect of more than four animals, a penalty not exceeding 5*l.* for each animal. A person was convicted of neglecting to give the notice, required by the above Order, that animals in his possession were affected with the foot and mouth disease, upon a complaint whereon no evidence was given to prove that the defendant knew the animals were so affected.—Held, that evidence was necessary to shew that the defendant knew that the animals were so affected, and that the conviction must be quashed. *Nicholls v. Hall*, 42 Law J. Rep. (n.s.) M. C. 195; Law Rep. 8 C. P. 322.

The complaint was preferred by the Inspector of Police against a cattle dealer.—Held, that the appellant having been convicted of an offence, and having shewn that he ought not to have been, the conviction should be quashed with costs to the appellant. *Ibid.*

3.—By the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 57, "If any person exposes in a market, or fair, or other public place where horses or animals are commonly exposed for sale . . . any horse or animal affected with a contagious or infectious disease, he shall be deemed guilty of an offence against this Act, unless he shews, to the satisfaction of the justices before whom he is charged, that he did not know of the same being so affected," &c. By section 103, "If any person is guilty of any offence against this Act . . . he shall be liable to a penalty not exceeding 20*l.*" By section 108, "If any party feels aggrieved by the dismissal of his complaint by justices, or by any determination or adjudication of justices with respect to any penalty under the Act, he may appeal therefrom to any quarter sessions for the county or place in which the cause of appeal has arisen. The appellant shall, within three days after the cause of appeal, give notice to the clerk of the petty sessional division for which the justices act whose decision is appealed from":—Held, that although there were

no express words making the penalties recoverable by summary procedure, yet that a jurisdiction was impliedly conferred upon justices to deal summarily with offences under the Act. *Cullen v. Trimble*, 41 Law J. Rep. (n.s.) M. C. 132; Law Rep. 7 Q. B. 416.

4.—By the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 57, the local authority constituted by the Act may exercise compulsory powers with regard to horses and other animals, "and the local authority may recover the expenses of the execution by them of this section from the owner of the horse or animal":—Held, that section 57 enabled the local authority to sue for the expenses under that description, although they were not a corporation. *Mills v. Scott*, 42 Law J. Rep. (n.s.) Q. B. 234; Law Rep. 8 Q. B. 496.

5.—The onus of shewing that the owner of diseased animals did not give notice to a police constable lies on the owner. The production of a copy of an Order in Council under the above Act, purporting to be printed by the Queen's printers, is *prima facie* evidence of the Order under the Documentary Evidence Act, 1868, whether publication in the *London Gazette* be or be not necessary to the validity of such order. *Huggins v. Ward*, Law Rep. 8 Q. B. 521.

## CONTEMPT OF COURT.

1.—If, on a motion by a pauper defendant for his discharge from prison, on purging his contempt, he does not ask for the plaintiff's costs of the contempt, the Court has no jurisdiction, under 32 & 33 Vict. c. 91, to make an order for their payment on the application of the plaintiff. *Hall v. Hall*, 40 Law J. Rep. (n.s.) Chanc. 236; Law Rep. 11 Eq. 290.

2.—In cases of defiant contempt a judge may commit the offender to prison instantly; and in such a case a process caption may issue without notice. *Watt v. Ligertwood*, Law Rep. 2 Sc. App. 361.

*Proceedings against person in contempt.*

[See PRACTICE AT LAW, 27, 28; PRACTICE IN EQUITY, 50, 51.]

*Authority of County Court Judge.* [See BANKRUPTCY, N 9; COUNTY COURT, 5.]  
*Authority of legislature of Victoria.* [See COLONIAL LAW, 38.]

## CONTRACT.

[See FRAUDS, STATUTE OF; DAMAGES; SALE OF GOODS; PRINCIPAL AND AGENT; PRINCIPAL AND SURETY.]

## (A) CONSIDERATION.

- (a) *Mutuality.*
- (b) *Forbearance to sue.*
- (c) *Public policy.*
- (d) *Representation by donor.*

- (B) WHEN COMPLETE.
  - (a) *Acceptance of offer by letter.*
  - (b) *Transmission by post.*
  - (c) *By telegram: mistake of telegraph clerk.*
- (C) RATIFICATION.
- (D) CONSTRUCTION.
  - (a) *Words ejusdem generis.*
  - (b) *Words of expectancy.*
  - (c) *Alternative contract.*
  - (d) *Description of subject-matter: penalty or liquidated damages.*
  - (e) *Condition precedent.*
  - (f) *Work and labour.*
  - (g) *Contract to teach apprentice.*
  - (h) *Implied warranty.*
  - (i) *Implied indemnity.*
  - (k) *Implied negative clause.*
  - (l) *Implied condition: personal skill.*
  - (m) *Interest, right to.*
  - (n) *Lex loci.*
- (E) EVIDENCE.
  - (a) *Parol evidence to vary.*
  - (b) *Evidence of custom of trade.*
  - (c) *Contemporaneous verbal promise.*
  - (d) *Partial spoliation of written contract.*
- (F) RESCISSION AND RECTIFICATION.
- (G) STATUTORY LIABILITY.
- (H) ASSIGNMENT OF CONTRACT.

#### (A) CONSIDERATION.

##### (a) *Mutuality.*

1.—The defendant, by tender, offered to supply the plaintiffs, at certain prices, with such quantities of iron as they might order from time to time during a limited period. The defendant's tender was accepted by the plaintiffs, but he failed to supply all the iron ordered by them during the period specified. An action having been brought for breach of the contract to supply iron,—Held, that the contract was not void for want of mutuality, and was founded upon a good consideration, and that the plaintiffs were entitled to the verdict. *The Great Northern Railway Company v. Witham*, 43 Law J. Rep. (N.S.) C. P. 1; Law Rep. 9 C. P. 16.

2.—The plaintiffs, a corporation empowered to maintain a market and take tolls in respect thereof, passed a resolution under their seal authorising certain auctioneers to let the premises by auction. The market and tolls were accordingly put up by the auctioneers on the 18th of July, under conditions stipulating that on the fall of the hammer one month's rent in advance should be paid by the lessee, to be forfeited on breach of the conditions, and he should produce two sureties who should forthwith sign the conditions and a draft lease. The defendant being the highest bidder, the premises were knocked down to him on lease for a year, with the option of extending the term for two years. He was then neither ready to pay the deposit of a month's rent nor to produce sureties, but, after half-an-hour allowed him to get the money, he brought a guarantee for payment, which was accepted by an officer of the corporation, who thereupon, without authority under seal from

the plaintiffs, signed the conditions, which were also signed by the defendant, but not by the auctioneers. The deposit was paid next day, and the keys of the market were handed to the defendant by the retiring collector of tolls, who was not, however, authorised to deliver them. Being unprepared with his sureties, the defendant was given a week to obtain them. At the end of that period he was still in default, and some further indulgence of a short time was granted. On the 7th of August the plaintiffs passed another resolution under seal adopting a report which stated that the premises had been let to the defendant. He never had actual possession of the market, nor did he receive any tolls. The plaintiffs pressed the defendant to produce the sureties; he finally failed to do so, and an action was brought against him for that breach of the conditions:—Held, that the action could not be maintained, for that as the agreement, being within section 4 of the Statute of Frauds, was, at the time of the breach, neither under seal nor signed by an agent "lawfully authorised by the plaintiffs," the defendant could not have sued upon it at law, and as there had not then been any part performance of it entitling him to a decree in equity for specific performance, the contract was void for want of mutuality. *The Mayor, &c., of Kidderminster v. Hardwicke*, 43 Law J. Rep. (N.S.) Exch. 9; Law Rep. 9 Exch. 13.

[And see BANKRUPTCY, E 6.]

##### (b) *Forbearance to sue.*

3.—The plaintiff, a widow, during her husband's lifetime lent the defendant 20*l.*, derived from funds belonging to her in her own right. Two days after her husband's death the defendant gave her an I O U for that amount, and subsequently promised that if she would let the matter remain over, he would pay the debt and interest; the plaintiff did not inform the defendant that his offer was accepted but waited more than three years and then brought the present action for the debt and interest:—Held, that the plaintiff was entitled to succeed; for though it might be doubtful whether in point of law the money lent was her's or her husband's, yet the giving of the I O U after his death by the defendant was evidence that she was entitled to sue in her own right, and that the forbearance to prosecute a doubtful claim was a good consideration for a promise, and that by not suing for more than three years the plaintiff had, in effect, communicated to the defendant her acceptance of his offer. *Wilby v. Elgee*, 44 Law J. Rep. (N.S.) C. P. 254; Law Rep. 10 C. P. 497.

*Consideration: guarantee: forbearance to sue.* [See PRINCIPAL AND SURETY, 1.]

##### (c) *Public policy.*

4.—An agreement to withdraw from a prosecution for felony, provided the person accused will promise to bring no action for trespass and false imprisonment or malicious prosecution, is void, and cannot be enforced; and if the person accused subsequently sues the prosecutor, the action will



not be stayed upon the ground that it is brought against good faith. *Rawlings v. The Coal Consumers' Association (Lim.)*, 43 Law J. Rep. (n.s.) M. C. 111.

5.—The plaintiff and the defendant were both subscribers to a charitable society, and were entitled to votes in proportion to the amount of their subscriptions. They agreed together that if the plaintiff would give the defendant twenty-eight votes, the defendant would at the next election return twenty-eight votes to the plaintiff for such child as the plaintiff should then favour. The plaintiff performed his part of the bargain, but the defendant made default. The plaintiff in consequence subscribed 7l. 7s. to purchase twenty-eight votes at the next election in lieu of those which the defendant failed to deliver:—Held, that he could recover the amount subscribed from the defendant. *Bolton v. Maddan*, 43 Law J. Rep. (n.s.) Q. B. 35; Law Rep. 9 Q. B. 55.

6.—An agreement between four quarry owners for three of them not to tender for the supply of stone to a corporation, with a view that the other should tender and buy part of the stone of the three at a fixed price:—Held, not void, and a party who tendered in defiance of the contract was restrained by injunction. The corporation need not be made parties. *Jones v. North*, 44 Law J. Rep. (n.s.) Chanc. 368; Law Rep. 19 Eq. 426.

7.—It is not against public policy for the vendor of a patent to agree to assign to the purchaser all future patent rights which he might afterwards acquire with respect to the inventions sold or any of a like nature. *The Printing and Numerical Registering Company v. Sampson*, 44 Law J. Rep. (n.s.) Chanc. 705; Law Rep. 19 Eq. 462.

[And see *infra* No. 17.]

(d) *Representation by donor.*

8.—A., the owner of a leasehold house, verbally agreed to allow B. to occupy the house during her life, that she might maintain herself by letting lodgings, B. paying the ground-rent and rates and taxes. B. accordingly broke off certain negotiations for a business she was then contemplating, and entered into possession of the house, and there remained until A.'s death, maintaining herself by letting lodgings, and duly paying the ground-rent and rates and taxes. A.'s residuary legatee having brought an action of ejectment against B., and pleaded the Statute of Frauds,—Held, that there was a good gift of the house to B. for life, she having on the faith of A.'s representations, not only altered her mode of life, but also entered into possession. *Loffus v. Maw* (3 Giff. 592; 32 Law J. Rep. (n.s.) Chanc. 49) approved of. *Coles v. Pilkington*, 44 Law J. Rep. (n.s.) Chanc. 381; Law Rep. 19 Eq. 175.

(B) WHEN COMPLETE.

(a) *Acceptance of offer by letter.*

9.—The owners of land in answer to a written offer to buy it, wrote saying they had received the offer, and added, "which offer we accept, and now

hand you two copies of conditions of sale which we have signed; we will thank you to sign same, and return one of the copies to us":—Held, that this was not an unqualified acceptance, and did not make a contract. *Crossley v. Maycock*, 43 Law J. Rep. (n.s.) Chanc. 379; Law Rep. 18 Eq. 180.

10.—Where an offer is made by letter sent through the post, and is accepted by letter, also sent through the post, the contract is made at the moment that the letter of acceptance is put into the post. *In re the Imperial Land Company of Marseilles; Harris's case*, 41 Law J. Rep. (n.s.) Chanc. 621; Law Rep. 7 Chanc. 587.

A letter allotting shares stated that the allotment money must be paid on the 21st of March, and punctual payment was requisite, and that the bankers were instructed not to receive payment after that day without interest at 10 per cent.:—Held, that this addition relative to interest was not an introduction of a new term. *Ibid.*

The provisions of articles of association under which directors were at liberty to delegate their authority to a committee considered. *Ibid.*

11.—Where a municipal company issued debentures which the holders were entitled to exchange for allotments to be selected by them out of the company's lands, and a certain holder gave notice that he had made his selection, but asked permission to retain his debentures for a time, setting the interest off against the rent, to which the company assented, at the same time stating that the land selected exceeded the amount of his debentures, and that he must pay the difference:—Held, that this last statement did not introduce a new term into the contract, but merely pointed out the mode of performance of it. A correspondence amounting to a contract for purchase of a future interest in land does not require registration under the Indian Registration Act, 1845. *The Port Canning Land Company v. Smith*, Law Rep. 5 P. C. 114.

12.—Where a contract is composed of an offer by letter and an acceptance of the offer also by letter, if the offer be clear and unambiguous, the party who answers it and who purports in his answer to accept it, if he wish to add any condition or qualification, is bound to state such condition, &c., clearly and precisely; if this be not done, or if the answer, though ambiguous, be capable of being construed as an acceptance pure and simple, of the offer, the party making the offer is justified in treating the answer in that sense and in acting upon it. *The English and Foreign Credit Company v. Arduin (H.L.)*, 40 Law J. Rep. (n.s.) Exch. 108; Law Rep. 5 E. & I. App. 64.

13.—Letter by house agents to the defendant as follows: "We have been requested by Mrs. D. to find her a lodging house in this neighbourhood, and we forward for your approval particulars of two which we think will suit." Enclosed were particulars, *inter alia*, of a house, No. 22, Belgrave Square, with statement of the terms on which the house might be had. Letter in reply from B.: "I have decided on taking No. 22, Belgrave Road, and have spoken to my private agent, Mr. C., who

will arrange matters with you, if you will kindly put yourselves in communication with him. I leave town this afternoon, so if you have occasion to write to me, please address to Cirencester":—Held, that the two letters did not constitute a complete contract. *Stanley v. Dowdeswell*, Law Rep. 10 C. P. 102.

*Offer to take shares in a company: revocation of offer.* [See COMPANY, G 15.]

(b) *Transmission by post.*

14.—A proposed contract is not binding on the proposer until its acceptance by the other party has been communicated to him, and posting a letter communicating the acceptance to him, is not sufficient to make it binding on him if he does not in fact receive the letter—*Dunlop v. Higgins* (1 H. L. Cas. 381) discussed. *The British and American Telegraph Company (Lim.) v. Colson*, 40 Law J. Rep. (N.S.) Exch. 97; Law Rep. 6 Exch. 108.

(c) *By telegram: mistake of telegraph clerk.*

[And see COMPANY, G 14–16.]

15.—The defendant wrote to the plaintiffs enquiring upon what terms they could supply him with fifty rifles. The plaintiffs having answered, stating terms, they received a telegram from the defendant directing them to forward "the rifles." They accordingly forwarded fifty rifles. It turned out that the message as directed to be sent by the defendant was for "three" rifles, but the telegraph clerk had mistaken the word "three" for "the." The defendant refused to accept more than three rifles:—Held, in an action for the price of the remaining forty-seven rifles, that the defendant was not bound by the mistake of the telegraph clerk, and the plaintiffs therefore could not recover. *Henkel v. Pape*, 40 Law J. Rep. (N.S.) Exch. 15; Law Rep. 6 Exch. 7.

(C) RATIFICATION.

16.—A contract made when one of the parties to it is so drunk as to be incapable of transacting business or knowing what he is about is not void but voidable only, and may be enforced against him, if ratified after he becomes sober; and this, though his condition was known to the other party to the contract at the time of making it. *Mathews v. Baxter*, 42 Law J. Rep. (N.S.) Exch. 73; Law Rep. 8 Exch. 132.

17.—J. indorsed to the plaintiff a promissory note, bearing a signature which he stated to be the defendant's, but which was a forgery. Shortly before the note became due, the plaintiff, hearing from the defendant that the signature was a forgery, threatened to prosecute J.; whereupon the defendant, to prevent his doing so, said that he would pay the money, and signed a memorandum to the effect that he held himself responsible for the note, describing it as bearing his signature, and of a certain date. The plaintiff having sued the defendant upon the note, the Judge ruled that the defendant had ratified the forged signature, and directed a verdict for the plaintiff:—Held (per Kelly, C.B., Channell, B., and Pigott, B., dis-

sentiente Martin, B.), that this ruling was wrong, because the defendant's arrangement was not a ratification of a signature, written by an agent claiming to have authority from the defendant in that behalf, but an agreement upon the defendant's part to become liable on the bill in consideration of the plaintiff's forbearing to prosecute J., which agreement was void as against public policy; and further, because no act in its inception illegal and void, such as a forgery, can be ratified by matter subsequent; and that the defendant was not estopped from setting up the forgery as a defence to the action. *Brook v. Hook*, 40 Law J. Rep. (N.S.) Exch. 50; Law Rep. 6 Exch. 89.

*Ultra vires contract by directors: whether capable of ratification by shareholders.* [See COMPANY, D, 56, 57.]

(D) CONSTRUCTION.

(a) *Words ejusdem generis.*

*Construction of words ejusdem generis.* [See COMPANY, D 1.]

(b) *Words of expectancy.*

18.—Contract to purchase a lot of spars, "say about 600," averaging a certain length:—Held, that these were words of expectancy, and that the purchasers were bound to take 603 spars, of which only 496 averaged the stipulated length. *McConnell v. Murphy*, Law Rep. P. C. 203.

[And see SHIPPING LAW, E 5; SALE, 4.]

(c) *Alternative contract.*

19.—A declaration alleged that the defendant received certain bills of lading and drafts on the terms that on the acceptance of the latter by one B., the former should be delivered to him, that the defendant should present such accepted drafts to B. for payment, and remit to the plaintiff the proceeds if the same should be paid, and if the said drafts should not be paid, either return the same to the plaintiff, or pay him the amount for reward to the defendant; that everything happened to entitle the plaintiff to have the drafts returned or the amount thereof paid by the defendant, yet the defendant did not return the said drafts, nor did he pay the plaintiff their amount. Judgment went by default, and it appeared that the drafts were of no value:—Held, by the majority of the Court (Keating, J., Brett, J., and Grove, J.), that the true construction of the declaration was that the defendant promised if he did not return the drafts, to pay their amount, which was therefore recoverable; but per Bovill, C.J., the contract alleged was only alternative, to return the drafts or pay their amount, and that only the nominal damages arising from the least burdensome alternative were recoverable. *Deveril v. Burnell*, 42 Law J. Rep. (N.S.) C. P. 214; Law Rep. 8 C. P. 475.

(d) *Description of subject-matter: penalty or liquidated damages.*

20.—By an agreement for the disposal to the defendant of the plaintiff's interest and goodwill

in a public-house, the premises were described as "the house and premises he now occupies, known by the sign of the White Hart, with stabling and garden, situate and being at," &c. The agreement contained a stipulation that the plaintiff was not, during the defendant's tenancy of the premises, to be concerned in the trade of a licensed victualling house within the distance of two miles from the said premises, under a penalty of 100*l.* It also contained stipulations by the defendant to purchase certain effects and stock by valuation, and it stated that if the defendant was not accepted by the landlord as tenant at a certain rent or under, a deposit money of 50*l.* should be returned, and the agreement should be void, and concluded thus: "If either party shall refuse or neglect to perform all and every part of this agreement, they hereby promise and agree to pay to the other who shall be willing to complete the same the sum of 100*l.* as damages, and recoverable in any of her Majesty's Courts of law":—Held, that the words, "he now occupies," could not be rejected, and therefore a coach-house which belonged to the premises, but which was shewn by extrinsic evidence to be at the time of the agreement not in the occupation of the plaintiff but of a person to whom the plaintiff had let it for a term then unexpired, was not included in the agreement. Held also, that the 100*l.* mentioned at the end of the agreement as damages, was a penalty and not liquidated damages. *Magee v. Lavel*, 43 Law J. Rep. (N.S.) C.P. 181; Law Rep. 9 C. P. 107.

(e) *Condition precedent.*

21.—Agreement by the defendant to purchase a business in the event of the profits being proved to be 7*l.* per week, and to pay by instalments. The defendant having entered on the premises and business, and sold them to a third person,—Held, that he could not, in an action for the instalments, set up as a defence by way of condition precedent, that the profits had not been proved to be 7*l.* per week. *Carter v. Scargill*, Law Rep. 10 Q. B. 564.

22.—By an agreement in which C. was described as a vendor, and P. as a purchaser, C. agreed to ship a cargo of ice, and on the same being shipped, to forward to P. bills of lading, on receipt of which P. was to "take upon himself all risks and dangers of the sea, &c.," P. agreeing also "to buy and receive the ice on its arrival," taking the ice from alongside the ship, and paying for it in cash on delivery at the rate of 20*s.* per ton, weighed on board during delivery:—Held (reversing the judgment of the Court of Exchequer, 39 Law J. Rep. (N.S.) Exch. 150), that upon the true construction of the agreement, the effect of the clause as to risks and dangers of the seas was not merely to save C. from liability for non-delivery, but to bind P. to insure the cargo on receiving the bill of lading; and that the ship and cargo having been lost on the voyage through perils of the seas, P. was liable to pay C. the price of the value of the cargo. *Castle v. Playford*

(Exch. Ch.), 41 Law J. Rep. (N.S.) Exch. 44; Law Rep. 7 Exch. 98.

*Arbitration clause: indivisible agreement: reference a condition precedent.* [See ARBITRATION, 9.]

*Shipping contract: refusal to load cargo.* [See SHIPPING LAW, E 5.]

(f) *Work and labour.*

23.—By a contract between the plaintiffs, the owners of a steam-ship, and the defendants, engineers, the defendants were to supply new boilers and various parts of machinery for the ship, and to alter the engines according to a specification, and the engines and boilers and connections were to be completed ready for sea and tried under steam previous to being handed over to the plaintiffs. Due notice was to be given by the plaintiffs to the defendants of the date at which the ship was to be placed in the hands of the defendants, after the work was ready, to have the engines completed. The price to be 5,800*l.*, payable as the work progressed, as follows: viz., when boilers were plated, 2,000*l.*; when the whole of the work was ready for fixing on board, 2,000*l.*; and when the ship was fully completed and tried under steam, 1,800*l.* These payments were to be made only on the certificate of the plaintiffs' inspector, that the conditions entitling the defendants to receive such payments had been fulfilled. The whole of the old materials necessarily taken from the vessel by reason of the execution of the contract was to become the property of the defendants, and the value of such old materials was 353*l.*

The plaintiffs gave the defendants due notice that the vessel was ready to be placed in their hands on a certain date, but on hearing that the defendants could not promise to be ready by that date, the plaintiffs sent her on a voyage, on which she was lost by perils of the sea. The boilers were plated by a certain day, and afterwards, on a certain other day, the whole of the work was ready for fixing on board the vessel, and the plaintiffs' inspector having, on each occasion, given the necessary certificate, the plaintiffs paid the first and second 2,000*l.*, according to the contract. At the time of the payment of such second 2,000*l.*, the plaintiffs knew but the defendants did not know of the loss of the vessel:—Held, that the contract was substantially one for work and labour to be done by the defendants, and that the two payments of 2,000*l.* each were intended only to be paid on account of a contract to be performed as a whole, and that therefore as the full performance of the contract had been rendered impossible by the loss of the vessel, no property in any portion of the work certified by the inspector to have been properly done, and in respect of which the two sums were so respectively paid, had passed to the plaintiffs, so as to entitle them to recover in detinue for its detention. *The Anglo-Egyptian Navigation Company (Lim.) v. Rennie*, 44 Law J. Rep. (N.S.) C.P. 130; Law Rep. 10 C. P. 271.

Held also, that the plaintiffs could not recover back the two sums of 2,000*l.*, or either of them, in an action for money had and received. *Ibid.*

**24.**—The plaintiff had been employed by a Local Board of Health to construct certain main sewer works. On the 19th of March, 1866, the Local Board gave notice to the owners of certain houses to connect their house drains with the main sewer within twenty-one days. Before the expiration of the said twenty-one days, and during the construction of the main sewer, the surveyor of the board proposed to the plaintiff that he, the plaintiff, should construct the connection between the house drains and the main sewer. The plaintiff said he was willing to do the work if the board would see him paid. The owners of the houses did not proceed in any way to do the work required of them, and before the expiration of the twenty-one days the construction of the connections was commenced by the plaintiff under the following circumstances. Having completed the main sewer, the plaintiff was leaving the work, when the surveyor stopped him and requested him not to go away, as there was more work to be done. The plaintiff asked him who was to be responsible for the payment, to which the surveyor answered that the defendant, who was the chairman of the Local Board, was waiting to see the plaintiff about it. The plaintiff then had an interview with the defendant, at which the defendant said, "What objection have you to making the connections?" The plaintiff said, "I have none, if you or the board will order the work, or become responsible for the payment." The defendant said, "Go on and do the work, and I will see you paid." Accordingly the plaintiff constructed and completed the connections. He afterwards applied to the Local Board for payment, but the said Local Board disclaimed all responsibility, on the ground that the board had never entered into any agreement with the plaintiff, nor by any resolution or order authorised any officer of the board to agree with him for the performance of the work. The plaintiff then commenced an action against the defendant:—Held, that whether or not the parties or either of them intended only a contract of suretyship, there was a personal contract by the chairman, on which he was personally liable, and not merely a promise to answer for the debt, default or miscarriage of another, such as would require a memorandum thereof in writing under 29 Car. 2. c. 3, s. 4. *Lakeman v. Mountstephen* (H. L.), 43 Law J. Rep. (n.s.) Q. B. 188; Law Rep. 7 E. & I. App. 17: affirming the Court of Exchequer Chamber (*nom. Mountstephen v. Lakeman*), 41 Law J. Rep. (n.s.) Q. B. 67; Law Rep. 7 Q. B. 196, overruling a previous decision of the Queen's Bench, 39 Law J. Rep. (n.s.) Q. B. 188.

*Contract of service: term of service.* [See MASTER AND SERVANT, 2.]

*Contract of service: concealment of material fact.* [See MASTER AND SERVANT, 1.]

(g) *Contract to teach apprentice.*

**25.**—To a declaration setting out an agreement by the defendant to teach the plaintiff's son a trade, and containing the following proviso—"Provided always that he obeys all commands, and gives his service entirely to the business during office hours," and alleging a wrongful dismissal, the defendant pleaded justifying the dismissal on the ground that the son had habitually neglected his duties, &c.:—Held, a good plea. *Westwick v. Theodor*, 44 Law J. Rep. (n.s.) Q. B. 110; Law Rep. 10 Q. B. 224.

(h) *Implied warranty.*

**26.**—The plaintiff having inspected certain plans and specifications which had been prepared by an engineer for the defendants, contracted with the latter to build a bridge according thereto. The work was begun, but the mode of erection prescribed by the plans and specifications proved defective, and an alteration was necessarily made under the direction of the engineer, whereby the plaintiff incurred a loss of valuable time in completing the bridge. He brought an action for compensation:—Held (affirming the judgment of the Court of Exchequer, 43 Law J. Rep. (n.s.) Exch. 115; Law Rep. 9 Exch. 163), that there was no implied warranty on the part of the defendants that the work could be done in the mode prescribed by the plans and specifications, and that the plaintiff was therefore not entitled to recover. *Thorn v. The Mayor, &c., of London*, (Exch. Ch.), 44 Law J. Rep. (n.s.) Exch. 62; Law Rep. 10 Exch. 112: affirmed, on appeal to the House of Lords, 45 Law J. Rep. (n.s.) Exch. 487; Law Rep. 1 App. Cas. 120.

Unless, in ascertaining the existence of an implied covenant where there is an express one, it is obvious that the covenant sought to be implied must have been present either palpably or latently in the minds of the contracting parties when the contract was made, so that if they had been called upon to express it everybody of ordinary intelligence and knowledge of business must conclude that both would have expressed it in the desired form, the Court has no right to imply such a covenant. *Per Brett, J. Ibid.*

**27.**—An agreement between an author and a publisher for the latter to publish the author's book at the publisher's expense and pay the author a royalty on the copies sold, does not imply an agreement on the part of the author not to bring out a second edition until the first is sold off. *Warne v. Routledge*, 43 Law J. Rep. (n.s.) Chanc. 604; Law Rep. 18 Eq. 497.

**28.**—By a building contract between the plaintiffs and the defendants, it was agreed that the plaintiffs should, in the most workmanlike, &c., manner, and with the best materials, before the 1st of December, 1867, roof in, and before the 15th of May, 1868, completely finish according to certain specifications, a farm-house and buildings, but subject to certain extras, alterations, or additions, which might be made as in the agreement mentioned; and that the time mentioned in the

agreement for the completion of the works should be of the essence of the contract, so that if the plaintiffs should not, on the said 1st of December, 1867, roof in, and on the said 15th of May, 1868, complete and make fit and ready for occupation, respectively, the said works, the plaintiffs should pay to the defendants as and for liquidated damages the sum of 3*l.* for every day from and after the said 1st of December, 1867, and 15th of May, 1868, respectively, until such day as the said works should be roofed in and completed, respectively, and the defendants might deduct such sum of 3*l.* per day from any moneys which might be due at any time from the defendants to the plaintiffs, or obtain payment of the same in any way they might think fit:—Held, that the plaintiffs undertook to execute not only the works specified, but also all alterations within the time prescribed in the contract, and that it was no implied condition of the contract that the alterations should be such as could reasonably be completed within this time. *Jones v. St. John's College, Oxford*, 40 Law J. Rep. (n.s.) Q. B. 80; Law Rep. 6 Q. B. 115.

*Westwood v. The Secretary of State for India* (7 Law Times, N.S. 736) explained. *Ibid.*

29.—The plaintiff lent money to a building society, established under 6 & 7 Will. 4. c. 32, and received the following certificate:—"I. P. Benefit Building Society. This is to certify that R. has this day deposited the sum of 70*l.* with the I. P. Benefit Building Society, for a period of three months certain, upon which interest at the rate of 5*l.* per cent. per annum will be allowed." This certificate was signed "W. L. (the defendants), directors." The plaintiff afterwards discovered that the rules of the society did not empower it to borrow money, and sued the defendants:—Held, the Court having power to draw inferences of fact, that the defendants were personally liable, as the certificate amounted to a warranty on their part that the society had power to borrow money. *Richardson v. Williamson*, 40 Law J. Rep. (n.s.) Q. B. 145; Law Rep. 6 Q. B. 276.

[And see *BANKRUPTCY*, E 1; *MINE*, 10; *SALE*, 3, 4.]

(i) *Implied indemnity.*

30.—The declaration was upon a promise to indemnify. The plaintiffs were in possession of certain waggons, which were claimed by a coal company. They were also claimed by the defendant, and the plaintiffs therefore requested an indemnity from him. This the defendant did not expressly give, but at a subsequent time requested that the waggons should be given up to him. The plaintiffs thereupon sent the waggons to the defendant. The coal company afterwards sued the plaintiffs, and obtained compensation from them on the ground, as the fact was, that the waggons belonged to the company. At the trial the jury found a verdict for the plaintiffs:—Held, that the present action was maintainable, for upon the above facts the jury were entitled to find that the defendant had by implication promised to in-

demnify the plaintiffs against the consequences of delivering the waggons to him. *Dugdale v. Lovering*, 44 Law J. Rep. (n.s.) C. P. 197; Law Rep. 10 C. P. 196.

*Implied contract of indemnity: advertisement of goods for sale by auction.* [See *AUCTION*, 3.]

*Transfer of shares: implied contract by transferee to indemnify transferor.* [See *COMPANY*, G 44, 45.]

*Implied indemnity by assignment of lease.* [See *LEASE*, 30.]

(k) *Implied negative clause.*

31.—Where an actor enters into a contract to perform at a particular theatre during a particular period, a negative stipulation to the effect that he will not perform elsewhere during that period, though not expressed, will be implied. *Montague v. Flockton*, 42 Law J. Rep. (n.s.) Chanc. 677; Law Rep. 16 Eq. 189.

*Implied negative clause: right to injunction.* [See *INJUNCTION*, 5.]

(l) *Implied condition: personal skill.*

32.—A contract by a musician to play at a concert at a specified time, being a contract dependent on the personal skill of the artist, is, though no condition be expressed in words, based on the assumption of sufficient health, and is subject to an implied condition that if the musician be, without his own default, disabled by illness to perform, he shall be excused. *Robinson v. Davison*, 40 Law J. Rep. (n.s.) Exch. 172; Law Rep. 6 Exch. 269.

Quære—whether it is also an implied term of the contract, that if disabled by illness he shall give the other party to the contract notice thereof within a reasonable time after he knows of the disability. *Ibid.*

(m) *Interest; right to.*

33.—A contract between a railway company and their contractor, which contemplated that from time to time certain sums, ascertainable at the end of each month, would be paid over, and provided for monthly payments, was not considered to be one to pay sums at certain specified times, so as to carry interest. For payment of interest, there must be an express agreement except in mercantile contracts, such as bills of exchange, and promissory notes, and some cases which are subject to special usage in trade. And interest can only be recovered under the 3 & 4 Will. 4. c. 42, s. 28, where there is a demand in writing of a sum certain payable at a certain time *Hill v. The South Staffordshire Railway Company*, 43 Law J. Rep. (n.s.) Chanc. 556; Law Rep. 18 Eq. 154.

*Mildmay v. Methuen* (3 Drew. 91) and *Macintosh v. The Great Western Railway Company* (4 Giff. 683) not followed. *Ibid.*

Costs were allowed to the plaintiffs, though they failed in great part of their claim. *Ibid.*

(n) *Lex loci.*[See *LEX LOCI*; *SHIPPING LAW*, K.]

## (E) EVIDENCE.

(a) *Parol evidence to vary.*

**34.**—An agreement in writing as follows, "I hereby agree to accept the situation as foreman of the Works of R. & Co., Flock and Shoddy Manufacturers, &c., and to do all in my power to serve them faithfully, and promote the welfare of their firm, on receiving a salary of 2l. per week, and house to live in, from the 19th of April, 1871."—Held, a weekly hiring, and that oral evidence tending to shew that a hiring for a year was intended was inadmissible. *Evans v. Roe*, Law Rep. 7 C. P. 138.

(b) *Evidence of custom of trade.*

**35.**—When letters contain certain terms which may form the basis of a contract, it is necessary to ascertain from the letters whether the terms are finally arrived at, and if they are not, verbal evidence is admissible to shew that a different contract has been entered into. *Johnson v. Appleby*, 43 Law J. Rep. (N.S.) C. P. 146; Law Rep. 9 C. P. 158.

The plaintiff proposed by letter to enter into the defendant's service as salesman; the term of service was to be for one year, and a list of customers was to be drawn up. The defendant replied by letter stating that the terms of the plaintiff's letter required further definition, but requesting him to come on an appointed day. The plaintiff entered upon the defendant's service, but was dismissed before the expiration of the year with a month's notice. The plaintiff having sued for a wrongful dismissal, at the trial, evidence was tendered of a custom to dismiss salesmen at a month's notice; the Judge rejected the evidence, on the ground that the letters contained a complete contract in writing:—Held, that the evidence was admissible, as the contract in the letters was incomplete. *Ibid.*

(c) *Contemporaneous verbal promise.*

**36.**—The defendant demised to the plaintiff a messuage in an unfinished state by a written agreement. Before and at the time of the plaintiff's signing the agreement, the defendant verbally promised the plaintiff to put the messuage into a condition fit for habitation. Amongst the things which the defendant undertook to do upon the messuage was the construction of a water-closet. In an action for the breach of the defendant's promise to put the messuage into a condition fit for habitation,—Held, that the defendant's verbal promise to finish the messuage was collateral to the written lease; that evidence of the promise was admissible at the trial; and that the defendant's undertaking to build a water-closet in the messuage was not a contract for an interest in land within the fourth section of the Statute of Frauds, and therefore need not be in writing. *Mann v. Numm*, 43 Law J. Rep. (N.S.) C. P. 241.

(d) *Partial spoliation of written contract.*

**37.**—The plaintiff built a house on land of the defendant under a written agreement with him containing provisions for payment, on certificates of the defendant's architect, and stipulations as to orders for extras. The contract, while in the custody of the architect, was altered in a material particular relating to such orders. The main work only having been certified and paid for, the plaintiff sued the defendant upon a *quantum meruit* to obtain payment for certain extra work done, and he put the written agreement in evidence:—Held, that the alteration by the architect must be treated as if made by the defendant himself, but, nevertheless, that the plaintiff could not recover because the work having been done on land, no contract could be implied by law from the mere retention of that which could not be returned, and it appeared that a special written bargain had been made, the terms of which, however, could not be proved by the plaintiff, as the agreement containing them having been vitiated by a material alteration, was inadmissible, although sufficiently existing in specie to be capable of shewing that an express contract had been entered into under which the work was done. *Pattison v. Luckley*, 44 Law J. Rep. (N.S.) Exch. 180; Law Rep. 10 Exch. 330.

## (F) RESCISSION AND RECTIFICATION.

**38.**—The defendant contracted for sale and delivery to the plaintiffs of 250 tons of pig iron at a certain price per ton; the iron to be delivered in two parcels of 125 tons each, and payment to be made fourteen days after the delivery of each parcel. The whole of the first parcel was delivered, but only by instalments, and after repeated applications for it by the plaintiffs. As the price of iron was rising in the market, the plaintiffs refused to pay for the price of the first parcel until the rest contracted for was delivered, but there was no inability on their part to pay for the same:—Held, that such refusal to pay, though it rendered the plaintiffs liable to an action, did not, under the circumstances, amount to a refusal to perform the contract, so as to free the defendant from his obligation to deliver the rest of the iron. *Freeth v. Burr*, 43 Law J. Rep. (N.S.) C. P. 91; Law Rep. 9 C. P. 208.

**39.**—A builder made a tender, undertaking to sign a contract to execute for a certain sum certain works described in some rough sketches and verbal explanations of an architect. The architect subsequently sent by special messenger to the builder a contract to perform for the sum named the works delineated and described in certain plans and specifications thereto annexed. These differed materially from the works described in the rough sketches and verbal explanations on which the builder had made his tender. The builder, however, signed the contract without any examination, and completed the works according to the plans annexed to it. He then filed a bill, claiming to have an account taken of the works executed by him on the basis on which he

had made his tender:—Held, that as the mistake under which he signed the contract was due to his own negligence, and he had not taken proceedings for rectifying the contract as soon as he discovered it, he was not entitled to any relief in this respect. *Kimberley v Dick*, 41 Law J. Rep. (N.S.) Chanc. 38; Law Rep. 18 Eq. 1.

40.—Arrangement between A. and B., who together owned certain land supposed to contain petroleum, and C., by which B. assumed to be the sole owner, and was to sell to C. for a certain sum if C. could form a company to buy the land for a larger sum, C. keeping the difference for himself. A. wrote a letter to members of the company, which was proved to have influenced them, advising the purchase, but not disclosing his interest; the company having purchased, and afterwards discovered the facts,—Held, that they were entitled to a rescission of their contract. Where laches is set up as a defence by a party proved guilty of fraud, the onus lies on him to shew when the other party became aware of the facts. *The Lindsay Petroleum Company v. Hurd*, Law Rep. 5 P. C. 221.

*Rescission of contract of sale of goods.* [See SALE, 17–19.]

*Mistake.* [See supra No. 15.]

(G) STATUTORY LIABILITY.

41.—By the Civil Code of Lower Canada, Article 1,688, it is provided that, "If a building perish in whole or part within ten years, from a defect in construction, or even from the unfavourable nature of the ground, the architect superintending the work and the builder are jointly and severally liable for the loss." The appellant, a builder, entered into an agreement with the respondent, the rector of the cathedral of Montreal, to build a new cathedral on foundations which had already been constructed by another builder. Shortly before the completion of the work the tower sank, and other damage occurred, owing to the insufficiency of the foundations:—Held, that inasmuch as the contract did not limit the appellant's liability to his own work he was liable for the damage caused by the insufficiency of the foundations. *Wardle v. Bethune*, 41 Law J. Rep. (N.S.) P. C. 1; Law Rep. 4 P. C. 33.

*Contract by Colonial Government with allottees of land.* [See COLONIAL LAW, 36.]

(H) ASSIGNMENT OF CONTRACT.

42.—An agreement to assign a contract only places the assignee in the position of the assignor, subject to, not freed from his obligations under the contract. *Shaw v. Foster* (H. L.), 42 Law J. Rep. (N.S.) Chanc. 49; Law Rep. 5 E. & I. App. 321.

*Contract by corporation: what contracts ought to be under common seal.* [See CORPORATION, 1, 2.]

CONTRIBUTORY NEGLIGENCE.

[See NEGLIGENCE.]

Digest, 1870—1875.

CONVERSION.

*Apportionment of income of unconverted investments.* [See TENANT FOR LIFE, 12–17.]

*Conversion of lunatic's estate by order of Court of Chancery.* [See LUNATIC, 9.]

*Effect of decree in partition suit.* [See PARTITION, 21, 22.]

*Conversion of land of partnership.* [See PARTNERSHIP, 8.]

*Discretion of trustees as to conversion.* [See TRUST, B 6, 7.]

*What amounts to conversion of property in goods.* [See TROVER, 6–7.]

CONVICTION.

*Second conviction.* [See AUTREFOIS CONVICT.]

COPYHOLDS.

(A) CUSTOM.

(a) *Heriot custom.*

(b) *Grant for lives in reversion.*

(B) ADMISSION.

(a) *Heir.*

(b) *Remainder-man.*

(C) FINES: INFANT'S COPYHOLD.

(D) ENFRANCHISEMENT.

(A) CUSTOM.

(a) *Heriot custom.*

1.—To an action for trespass by seizing two beasts of the plaintiff, the defendant pleaded that they were taken as customary heriots, and the plaintiff replied a discontinuance of taking heriots for more than twenty years, and that the right to heriots then accrued to the lord within the meaning of the Statute of Limitations, 3 & 4 Will. 4. c. 42:—Held, on demurrer, that the replication was bad. *Zouche v. Dalbiac*, 44 Law J. Rep. (N.S.) Exch. 109; Law Rep. 10 Exch. 172.

(b) *Grant for lives in reversion.*

2.—A custom in a manor that the lord may grant three lives, one in possession and two in reversion, but that if the lives in reversion do not come into possession before his death, the succeeding lord may treat the grants of such lives as a nullity, and grant again, is a good custom. *The Queen v. Venn*, 44 Law J. Rep. (N.S.) Q. B. 158; Law Rep. 10 Q. B. 310.

(B) ADMISSION.

(a) *Heir.*

3.—A devise of copyhold estate under the Wills Act (7 Will. 4 & 1 Vict. c. 26), s. 3, conveys no estate to the devisee before admission, and where

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the devisee does not intervene, the heir has a right to be admitted. *Garland v. Mead*, 40 Law J. Rep. (n.s.) Q. B. 179; Law Rep. 6 Q. B. 441.

A copyholder devised his estate to trustees, who proved the will, but did not claim admittance. The heir then claimed admittance, which was refused by the lord, who proceeded to seize the premises for want of a tenant:—Held (by Cockburn, C.J., and Blackburn, J., upon the construction of the statute, by Lush, J., solely in deference to the authorities), that the seizure could not be justified, as the devise without admission conveyed no estate to the devisee, and that in the absence of any claim by him, the heir retained his common law right to be admitted. *Ibid*.

(b) *Remainderman*.

4.—The uncle of C. E. I., who was tenant in fee of lands in the manor of R., according to the custom of the manor devised his estate for a term of 500 years upon certain trusts, and, subject to the term, to C. E. I. in fee. Upon the death of the uncle, the lord admitted C. E. I., who was an infant, and received a full fine in respect of the admittance. The lord further insisted that the trustees, the termors for 500 years, should also be admitted, and should pay a fine in respect of that term. They refused to do so, whereupon, after proclamation, he seized *quousque* and brought ejectment to try his right to the additional fine:—Held, affirming the judgment of the Court of Queen's Bench (41 Law J. Rep. (n.s.) Q. B. 263; Law Rep. 7 Q. B. 683), that he was not entitled to the fine, and could not maintain the action. *Everingham v. Ivatt* (Exch. Ch.), 42 Law J. Rep. (n.s.) Q. B. 203; Law Rep. 8 Q. B. 388.

(C) FINES: INFANT'S COPYHOLD.

5.—The Court has no jurisdiction to direct a fine in respect of copyholds to which an infant has become entitled as customary heir of an intestate to be raised by a mortgage of the copyholds. *Harbroe v. Combes*, 43 Law J. Rep. (n.s.) Chanc. 336.

(D) ENFRANCHISEMENT.

6.—Where the lord of a manor requires the enfranchisement of copyhold lands under the 15 & 16 Vict. c. 51, and the consideration to be paid to the lord for the enfranchisement is to be ascertained by valuation under the Act, it is enacted, by section 16, that "in making any valuation under this Act the valuers shall take into account the facilities for improvement . . . and all other circumstances affecting or relating to the land which shall be included in such enfranchisement, and all advantages to arise therefrom, and shall make due allowance for the same." Part of certain land required to be enfranchised by the lord of the manor was the subject of an unexpired lease granted with the license of the lord for a term of twenty-one years, and with another part of the same land was included in a testamentary settlement, and was subject to the trusts thereof. The settlement contained a power of leasing in the trustees. The land was building land, valuable

as such by reason of its situation and aptitude for building, except that a portion of the land had no communication with a highway but through the said other lands or through lands belonging to third parties:—Held, that in assessing the compensation or consideration payable to the lord on the enfranchisement, such lease and settlement were to be taken into consideration by the valuers as obstacles in the way of the facilities for improvement, and in reduction of any compensation payable to the lord in respect of such facilities. *Arden v. Wilson*, 41 Law J. Rep. (n.s.) C. P. 273; Law Rep. 7 C. P. 535.

7.—Where a lord of a manor, who takes proceedings under the Copyhold Acts to compel a tenant to enfranchise, sets up a special custom entitling him to one-third of the timber, if there be evidence, it is the exclusive province of the Copyhold Commissioners to determine whether the custom is proved, and the Court will not interfere with their decision; the valuers acting under the second part of section 8 of 21 & 22 Vict. c. 94, are not bound to state in their award what proportion of the rent-charge should be deferred, or such particulars as might enable the Commissioners to defer payment of the whole rent-charge or any part thereof; and though the pecuniary circumstances of the tenant ought not to be taken into account in determining whether there is special hardship under 15 & 16 Vict. c. 51, s. 35, and the Commissioners inquire into them, and though the Court think, looking to the particular interest, &c., of the tenant, that there is hardship, yet the Court are not at liberty to interfere with the decision of the Commissioners that there is no such hardship. *Reynolds v. The Lord of the Manor of Woodham Walter*, 41 Law J. Rep. (n.s.) C. P. 281; Law Rep. 7 C. P. 639.

COPYRIGHT.

- (A) REGISTRATION.
- (B) LICENSE TO PUBLISH.
- (C) COPYRIGHT OF DESIGNS.
- (D) DRAMATIC COPYRIGHT.
- (E) INFRINGEMENT AND PRACY.
- (F) EXTENSION OF TERM.

[International Copyright.—15 & 16 Vict. c. 12, amended as to dramatic pieces. 38 & 39 Vict. c. 12.]

(A) REGISTRATION.

[And see *infra* Nos. 4-6.]

1.—A bird's-eye view of a seat of war is a book within the meaning of 5 & 6 Vict. c. 45, s. 2, and no copyright can be acquired in it unless it be registered at Stationers' Hall under the provisions of that Act. *Stannard v. Lee*, 40 Law J. Rep. (n.s.) Chanc. 489; Law Rep. 6 Chanc. 346.

2.—A print or engraving which is the property of a partnership firm need not bear the name of every member of the firm, under the statute 8 Geo. 2, c. 13. The name of the firm alone is a



sufficient compliance with the statute. *Rock v. Lazarus*, 42 Law J. Rep. (N.S.) Chanc. 105; Law Rep. 15 Eq. 104.

### (B) LICENSE TO PUBLISH.

3.—A married woman agreed with some publishers that they should publish a book she had written at their own expense, and sell it at a shilling a copy, paying her a royalty of a penny for every copy sold, reckoning thirteen copies as twelve. She afterwards gave notice to terminate this agreement and made a fresh arrangement with other publishers for the bringing out of a revised edition. The first publishers sought to restrain the further publication of the book until the copies printed by them under their agreement with the authoress were sold:—Held, that they were not entitled to any such relief, as they were endeavouring to import into the contract a term which it did not contain. *Warne v. Routledge*, 43 Law J. Rep. (N.S.) Chanc. 604; Law Rep. 18 Eq. 497.

Semle—if the married woman had expressly entered into a contract restricting her right to publish the book, such contract might have been enforced by injunction against her, or any person claiming under her with notice. *Ibid.*

### (C) COPYRIGHT OF DESIGNS.

[The Copyright of Designs Acts amended. Powers and duties of the Board of Trade transferred to Commissioners of Patents. 38 & 39 Vict. c. 93.]

4.—Where a pattern of an article has been registered under the above Acts the design will be infringed by the sale of an article to all appearance the same though not actually identical. *McCrea v. Holdsworth*, Law Rep. 6 Chanc. 418.

5.—The plaintiffs were registered, under the Copyright of Designs Act (5 & 6 Vict. c. 100), as proprietors of a double card-basket, made in the form of a single basket placed on the bottom of another, the lower one forming the stand or base of the article. They admitted that the form of the single basket had long been known to the public, but contended that the combination of two single baskets in the form of a double basket was a "new and original design," and as such entitled to the protection of the Act. They also admitted after the filing of the bill, but without amending it, that they had first seen the design in a shop in Germany, and had imported it into England under an arrangement with the actual designer:—Held, first, that the article was not a "new and original design" so as to entitle it to protection within the meaning of the Act; and secondly, that even if it were so, the plaintiffs were not the persons entitled to the protection of the Act. *Lazarus v. Charles*, 42 Law J. Rep. (N.S.) Chanc. 507; Law Rep. 16 Eq. 117.

6.—The plaintiff employed W. to compile a work for him, called "Monumental Designs," being illustrations of tombstones, and intended as an "advertisement" in his business. W. registered the work as the plaintiff's property, under 5 & 6 Vict. c. 45. The defendant printed several sheets of de-

signs identical with those of the plaintiff, but only sold one of the sheets, and that sale was made to the plaintiff himself. The defendant, when remonstrated with, offered, after notice of motion for an injunction, to cancel the unsold sheets, and destroy the stones from which they were taken, but claimed to be paid his costs. The plaintiff refused such payment; and on the hearing of the cause, an injunction, previously granted, was made perpetual, with costs. *Grace v. Neuman*, 44 Law J. Rep. (N.S.) Chanc. 298; Law Rep. 19 Eq. 623.

### (D) DRAMATIC COPYRIGHT.

7.—H. wrote a story which he printed and published. He afterwards wrote a drama, being the same as the story with slight alterations. He sold the copyright to the plaintiff. After this was done, and after the story was published, G. wrote a drama founded upon the story. The defendant produced G.'s drama upon the stage:—Held, that the plaintiff had no copyright, for the infringement of which he could maintain an action against the defendant. *Toole v. Young*, 43 Law J. Rep. (N.S.) Q. B. 170; Law Rep. 9 Q. B. 523.

8.—In an action for infringing the right to the exclusive representation of a drama if it be only proved that part of the drama has been represented by the defendant, it is necessary for the plaintiff to establish as a matter of fact that the part represented is a material and substantial portion of the drama. *Chatterton v. Cave*, 44 Law J. Rep. (N.S.) C. P. 386; Law Rep. 10 C. P. 572.

The law relating to dramatic literary property is governed by the same principles as the law relating to ordinary copyright (per Lord Coleridge, C.J., and Lindley, J.). *Ibid.*

A theatrical situation is dramatic property within 3 & 4 Will. 4. c. 15, and the author thereof, or his assignee, is entitled to be protected against any one representing the same without his consent (per Brett, J.). The right to represent a dramatic piece or entertainment may be assigned separately from the words in the text thereof (per Brett, J., and Grove, J.). *Ibid.*

L. prepared from a French original a dramatic piece, and assigned the sole right to represent it to the plaintiffs. P. adapted a version from the same French original, but in preparing it borrowed two theatrical situations from L.'s dramatic piece: the two theatrical situations were not either material or substantial portions of the dramatic piece assigned to the plaintiffs. The defendant caused to be represented on the stage the version prepared by P., including the two theatrical situations:—Held, that the plaintiffs could not maintain an action against the defendant pursuant to 3 & 4 Will. 4. c. 15 for the infringement of their sole right of representing the dramatic piece prepared by L. and assigned to them by him. *Ibid.*

9.—In order to be joint authors of a dramatic piece, within the meaning of the Dramatic Copyright Act, 3 & 4 Will. 4. c. 15, there must be a co-operation by the authors in the prosecution of a common design. And therefore, where A., the lessee of a theatre, engaged B. to write a dramatic piece for his theatre, and after B. had written it,

A., without B.'s co-operation, made alterations in it, which, though not materially affecting it as originally designed, introduced new incidents, and made the piece more attractive on the stage, it was held, that A. did not thereby become a joint author of such piece with B. *Levy v. Rutley*, 40 Law J. Rep. (N.S.) C. P. 244; Law Rep. 6 C. P. 523.

#### (E) INFRINGEMENT AND PIRACY.

10.—Between 1849 and 1867 there appeared in the weekly numbers of *Punch* many woodcuts caricaturing Napoleon III. In 1871 the defendant published a book, of which Part I. consisted of a letter-press history of Napoleon's life. Part II. was called, "The same story as told by popular caricatures of the last thirty years," and consisted of woodcuts copied from many English and foreign publications. Nine of these were exact copies in reduced size of the whole or part of the nine woodcuts which had appeared in nine separate numbers of *Punch* during the above period, and were inserted without any acknowledgment that they had appeared in *Punch*. The registered proprietors of *Punch* brought an action for this infringement of their copyright in the above nine numbers of *Punch*, each of which was described in the declaration as a "book or sheet of letter-press." The Court having found as a fact that the defendant's book was published with the same object as *Punch*, namely, to amuse the public and to make a profit by the sale,—Held, therefore, that there had been an infringement. *Bradbury v. Hotten*, 42 Law J. Rep. (N.S.) Exch. 28; Law Rep. 8 Exch. 1.

11.—The defendant having sold to the plaintiff the copyright of *Beeton's Christmas Annual* together with the right to use the defendant's name, and having also agreed to give his whole time to the plaintiffs and engage in no other business:—Held, that he must be restrained from issuing advertisements of a rival work. *Ward v. Beeton*, Law Rep. 19 Eq. 207.

12.—C. published a book, which he registered at Stationers' Hall, entitled *The Illustrated Furnishing Guide*, containing illustrations of articles of furniture made by him, with estimates and remarks on furnishing. W. shortly afterwards published a similar book entitled *F. W. & Co.'s Illustrated Furnishing Guide*, in which many of the drawings of furniture had been copied direct from those in C.'s book, and certain portions of the letterpress of C.'s book were reproduced verbatim:—Held, on suit by C. to restrain the publication of W.'s book, that the plaintiff was entitled to an injunction as to the pirated letterpress, but not as regarded the illustrations, as they were but illustrated advertisements of articles sold by W., which he had a perfect right to sell, and there could be no copyright in an advertisement. *Cobbett v. Woodward*, 41 Law J. Rep. (N.S.) Chanc. 656; Law Rep. 14 Eq. 407.

13.—The "offence" mentioned in the 15th section of 5 & 6 Vict. c. 45, which gives to the proprietor of a copyright a special action on the case, is not co-extensive with the "offence"

referred to in section 26 of the same Act, with respect to which all actions, suits, bills, indictments or informations must be brought, sued, and commenced within twelve calendar months next after such offence committed. Therefore, a plaintiff who allowed a defendant to publish one edition of a work containing piracies from his works, and then, after the lapse of more than twelve months, filed a bill in equity to restrain the publication of a second edition of the defendant's work, with the same and other piracies in it, was neither compelled to proceed at law under the 15th section, nor prevented from suing in equity, by the 26th section of the statute. *Hogg v. Scott*, 43 Law J. Rep. (N.S.) Chanc. 705; Law Rep. 18 Eq. 444.

Special facts constituting the piracy complained of by the plaintiff, and circumstances under which he was held not to have acquiesced in the defendant's act; but to be entitled to an injunction with costs. *Ibid*.

[And see supra Nos. 5, 6.]

#### (F) EXTENSION OF TERM.

14.—A committee of seven persons on behalf of a religious body compiled a hymn-book, which was registered under 54 Geo. 3. c. 156, as the property of the compilers, but was published by and sold for the benefit of the religious body. No minute of consent having been registered under the Act of 5 & 6 Vict. c. 45,—Held, that the term of the copyright had not been extended under that Act, but ceased on the death of the last survivor of the seven compilers. *Morrials v. Gibbons*, 43 Law J. Rep. (N.S.) Chanc. 774; Law Rep. 9 Chanc. 518.

#### CORONER.

Perjury was alleged to have been committed in taking a false oath on a material issue at the hearing of a County Coroner's inquisition held before a deputy coroner in the absence of the coroner. The 6 & 7 Vict. c. 83, s. 1, gave a county coroner power to appoint a deputy, provided that no such deputy should act for any coroner except during the illness of the said coroner, or during his absence from any lawful or reasonable cause. On the trial of the indictment for perjury the prosecution gave evidence that the coroner, who was an attorney in practice, and registrar of the County Court, and held other offices, was absent from his home and place of business in order to take a vacation, such absence and vacation, and air and exercise having been recommended to him by his medical advisers as necessary for his health, which had become permanently impaired from an operation which he had undergone. He spent three or four days in every week shooting. The vacation for registrars was appointed at that period of the year, and that was the only time of the year during which he obtained a vacation. The Judge held at the trial that there was lawful or reasonable cause for the absence of the coroner, and the prisoner was

found guilty:—Held, that the question of lawful or reasonable cause was to be decided by the Judge and not by the jury, that there was some evidence upon which the Judge could so decide, and that the conviction was right. *The Queen v. Johnson*, 42 Law J. Rep. (n.s.) M. C. 41; Law Rep. 2 C. C. R. 16.

*Salary of.* [See COUNTY CORONER.]

## CORPORATION.

*Grant of annuity by resolution not under seal.*

1.—Certain trustees were created by 13 & 14 Vict. c. cix. a body corporate, for the management of the navigation of a river, with a common seal and perpetual succession. The statute empowered them to levy tolls, and enacted, s. 76, "that it shall be lawful for the trustees, from time to time, to pay and allow to any officer or servant of the trustees whose services may, from any other cause than that of misconduct, be no longer required by the trustees, such annuity or other allowance as, having regard to length of service and all the other circumstances of the case, may, in the judgment of the trustees, be reasonable and proper; and the trustees may, from time to time, pay and allow such annuity or allowance out of the moneys which may come to their hands by virtue of the powers and provisions" of certain Acts.

The plaintiff, who had been their clerk, removable at their will and pleasure, for forty years, having in 1865 resigned, owing to ill-health, the trustees duly passed a resolution (not sealed), that his resignation "be accepted, and that a retiring pension of 300*l.* per annum, free of income tax, be granted to him during the remainder of his life." The pension was duly paid quarterly for some years, until the defendants,—who had meanwhile been substituted by statute for the trustees, with all their powers, and subject to all their liabilities,—duly passed a resolution to reduce the pension to 150*l.* per annum, to be paid during their pleasure, and made the first quarterly payment on the reduced scale.

The plaintiff having brought an action to recover the difference for that quarter,—Held (reversing the decision of the Court below, 42 Law J. Rep. (n.s.) Exch. 141; Law Rep. 8 Exch. 290), that the resolution of 1865 was revocable, and that the plaintiff could not recover. *Marchant v. The Lee Conservancy Board*, (Exch. Ch.), 43 Law J. Rep. (n.s.) Exch. 44; Law Rep. 9 Exch. 60.

*Appointment of clerk to workhouse.*

2.—The clerk to the master of a workhouse is not an inferior servant, nor is his nomination a matter of immediate necessity, and therefore his appointment by a board of guardians being a corporation by 5 & 6 Will. 4. c. 69, s. 7, ought to be under their common seal. *Austin v. The Guardians of St. Matthew, Bethnal Green*, 43 Law J. Rep. (n.s.) C. P. 100; Law Rep. 9 C. P. 91.

The defendants, who were a corporate body under 5 & 6 Will. 4. c. 69, s. 7, appointed the plaintiff clerk to the master of a workhouse; during his tenure of office he was discharged; his appointment was not by deed. He then sued for a wrongful dismissal, and the jury found in his favour:—Held, that the action would not lie, and that the defendants were entitled to have the verdict entered for them on the ground that the plaintiff's appointment was not under seal. *Ibid.*

## COSTS AT LAW.

[And see MANDAMUS, PRODUCTION, 18.]

### (A) COSTS OF PLAINTIFF.

- (a) *Rule as to plaintiff's costs under County Court Act, 1867, 30 & 31 Vict. c. 142.*
- (b) *Arbitration.*
- (c) *Judgment by consent in ejectment.*
- (d) *Admiralty jurisdiction of County Court.*

### (B) COSTS OF PROSECUTION.

### (C) COSTS OF APPEAL.

### (D) JURISDICTION TO AWARD.

- (a) *Interest on costs of appeal.*
- (b) *Costs out of money taken from person convicted at time of apprehension.*
- (c) *Discretion of Judge.*
- (d) *Rule to enter nonsuit.*

### (E) SECURITY FOR COSTS.

### (F) TAXATION.

- (a) *Counsel's fees.*
- (b) *Parliamentary election petition.*
- (c) *Costs to abide event.*
- (d) *Scale of taxation.*

### (G) ACTION TO RECOVER.

### (A) COSTS OF PLAINTIFF.

- (a) *Rule as to plaintiff's costs under County Court Act, 1867, 30 & 31 Vict. c. 142.*

1.—A declaration alleged that the defendant at the time of the promise and negligence therein alleged, was the owner of a hackney cab at the time of the promise conducted by his servant; that the plaintiff at his request hired it of him, and the defendant promised to convey the plaintiff's luggage safely, but not regarding his duty or promise negligently lost the same:—Held, that the action was founded on contract, and that as a sum not exceeding 20*l.* was recovered, the plaintiff was deprived of costs under 30 & 31 Vict. c. 142, s. 5. *Baylis v. Lintott*, 42 Law J. Rep. (n.s.) C. P. 119; Law Rep. 8 C. P. 345.

2.—Where an action commenced in a superior Court has been remitted to a County Court, under the 10th section of the County Courts Act, 1867, the superior Court has no longer any jurisdiction to make an order for costs under the 5th section. *Moodie v. Steward*, 40 Law J. Rep. (n.s.) Exch. 25; Law Rep. 6 Exch. 35.

3.—The plaintiff sued L. for 365*l.* for goods sold and delivered. On the day after the writ

was issued L. paid the plaintiff 319*l.*, which he accepted on account of his claim. After declaration L. pleaded in abatement the non-joinder of H., whereupon the plaintiff amended the writ and declaration under section 38 of the Common Law Procedure Act, 1852, by adding the name of H. as joint contractor. Both defendants pleaded never indebted, and also a plea that after the writ in the action had been issued against the defendant L. and before the action was commenced against the other defendant by amendment pursuant to the said 38th section, the defendants satisfied the plaintiff's claim by payment. The cause having been referred to an arbitrator, costs to abide the event, with power to the arbitrator to certify as a Judge at Nisi Prius, the arbitrator by his award found that the defendants were indebted to the plaintiff in 322*l.*, and that the defendants did, as in their plea alleged, satisfy 319*l.*, part of such debt, by payment, and the arbitrator directed that the verdict should therefore be entered for the plaintiff for 3*l.*, being the difference between the two sums of 322*l.* and 319*l.*, and he gave no certificate as to costs:—Held, that the only action in which the plaintiff recovered, being the action against both the defendants, he was deprived of his costs by section 5 of the County Courts Act, 1867, inasmuch as he recovered in that action less than 20*l.*, and he was not allowed to tax his costs of the cause against the defendant L. alone. *Balmain v. Lickfold*, 44 Law J. Rep. (N.S.) C. P. 94; Law Rep. 10 C. P. 203.

4.—The plaintiff commenced an action in detinue in the Lord Mayor's Court. At the instance of the defendant, it was removed by *certiorari* into the Court of Queen's Bench, where the plaintiff recovered 8*l.* The Judge who tried the cause refused to certify under the 5th section, to give the plaintiff his costs:—Held, that he was not entitled to his costs of the action. *Pellas v. Breslau*, 40 Law J. Rep. (N.S.) Q. B. 161; Law Rep. 6 Q. B. 438.

5.—In an action of trespass *quare clausum fregit* where the defendant pleaded several pleas foreign to the real question in issue, the plaintiff obtained a verdict for forty shillings; and the Judge refused to certify that there was sufficient reason for bringing the action in a superior Court. The Court afterwards, being of opinion that there was sufficient reason for bringing the action in the superior Court, and that if it had been commenced in the County Court it might undoubtedly have been removed to the superior Court, allowed the plaintiff his costs by rule, notwithstanding that the Judge who tried the cause had, on the same materials, refused to certify.—*Hatch v. Lewis* (31 Law J. Rep. (N.S.) Exch. 26) distinguished. *Hinde v. Sheppard*, 41 Law J. Rep. (N.S.) Exch. 25; Law Rep. 7 Exch. 21.

6.—An action founded both on contract and on tort having been referred to arbitration by consent of the parties, the costs of the reference to be in the discretion of the arbitrator, the arbitrator awarded the plaintiff less than 20*l.* in respect of the contract, and less than 10*l.* in respect of the tort, and directed that the defendant should pay

the plaintiff's costs of the reference:—Held, that there was nothing in the 5th section of the County Courts Act, 1867, to prevent the parties agreeing that the costs of the reference should be in the arbitrator's discretion, and that the plaintiff ought therefore (even without obtaining the certificate in that section mentioned) to have his costs of the reference. *Forshaw v. De Witt*, 40 Law J. Rep. (N.S.) Exch. 153; Law Rep. 6 Exch. 200.

7.—Reference of a cause and other matters in difference, the costs of the cause to abide the costs of the reference. The arbitrator awarded the plaintiff 259*l.* 1*s.* in the cause, and the defendant 242*l.* 10*s.* as to the other matters, and directed the latter sum to be deducted from the damages and costs recoverable by the plaintiff in the action, and the balance to be paid to the plaintiff:—Held, that the event of the reference was in favour of the plaintiff, and that section 5 of the County Courts Act, 1867, had no application to the case so as to deprive him of his costs. *Stevens v. Chapman*, 40 Law J. Rep. (N.S.) Exch. 123; Law Rep. 6 Exch. 213.

8.—A case on appeal as to whether a defendant was entitled in law to a verdict, stated, "if the Court shall be of opinion in the affirmative, the verdict is to be entered for the defendant, with costs of defence." The defendant having succeeded on appeal,—Held, that the plaintiff was not precluded from applying for a certificate, that he had reasonable ground for making the defendant a party. "Reasonable ground" is a mixed question of law and facts. *Swift v. Jewsbury*, Law Rep. 9 Q. B. 560.

#### (b) Arbitration.

9.—On a reference of a cause involving an enquiry into a mass of accounts, an order was made by a Judge, on the application of the plaintiff, that an accountant, to be named by the arbitrator, should inspect the defendant's books, and take copies or extracts from them relating to the matters in question in them. This was done, and the charges of the accountant were paid by the plaintiff. The result of the investigation and report of the accountant to the arbitrator was that much expense in the inquiry was saved:—Held, that the plaintiff, in whose favour the award was made, was not entitled to have the costs of the accountant taxed against the defendant. *Nolan v. Copeman*, 42 Law J. Rep. (N.S.) Q. B. 44; Law Rep. 8 Q. B. 84.

[And see *supra* Nos. 3, 6, 7, 8, and ARBITRATION, 29, 30.]

#### (c) Judgment by consent in ejectment.

10.—In an action of ejectment two persons obtained leave to appear and defend for part. They then took out a summons upon which the Judge, by consent, made an order that the plaintiffs be at liberty to sign judgment; execution to be stayed for six weeks:—Held, that the plaintiffs were entitled to their costs on signing judgment. *Dalbiac v. De la Court*, 44 Law J. Rep. (N.S.) Exch. 129; Law Rep. 10 Exch. 210.

*(d) Admiralty jurisdiction of County Court.*

**11.**—A County Court, to which Admiralty jurisdiction is given by 31 & 32 Vict. c. 71, has Admiralty jurisdiction over a claim not exceeding 300*l.*, for damages for negligence causing a collision between a barge of the defendant and a ship of the plaintiff in a river within the body of a county forming part of its district. Therefore, where an action was brought in respect of such a claim for a collision in the Thames, in which, after judgment in default of a plea, the damages were assessed on a writ of enquiry at 15*l.*, and no certificate was given that the cause was a proper one to be brought in the superior Court, the plaintiff was held not entitled to the costs of the action under 31 & 32 Vict. c. 71, s. 9. *Purkis v. Flower*, 43 Law J. Rep. (N.S.) Q. B. 33; Law Rep. 9 Q. B. 114.

*(B) COSTS OF PROSECUTION.*

**12.**—By 16 & 17 Vict. c. 30, s. 5, after reciting that "it is expedient to make further provision for preventing the vexatious removal of indictments into the Court of Queen's Bench," it is enacted, "whenever any writ of *certiorari* to remove an indictment into the said Court shall be awarded at the instance of a defendant or defendants, the recognisance now by law required to be entered into before the allowance of such writ shall contain the further provision following, that is to say that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs incurred subsequent to the removal of such indictment," &c.:—Held, that the prosecutor is entitled to his costs in the case of an indictment removed by *certiorari* under this section, though he is not "the party grieved or injured" to whom costs are limited by the previous Act, 5 & 6 W. & M. c. 11, s. 3. *The Queen v. Oastler*, 43 Law J. Rep. (N.S.) Q. B. 42; Law Rep. 9 Q. B. 132.

*(C) COSTS OF APPEAL.*

**13.**—The House of Lords having reversed, without saying anything as to costs, a judgment of the Exchequer Chamber which affirmed a decision of the Court of Common Pleas in favour of the defendants, that Court refused an application by the plaintiff to have his costs in the Exchequer Chamber granted him. *Peek v. The North Staffordshire Railway Company* (4 B. & S. 627) commented on. *Gann v. Johnson*, 40 Law J. Rep. (N.S.) C. P. 227; Law Rep. 6 C. P. 461.

*(D) JURISDICTION TO AWARD.**(a) Interest on costs of appeal.*

**14.**—Where on appeal a judgment of one of the superior Courts is affirmed, such Court has no power to allow interest upon the costs of the appeal. *The Lancashire and Yorkshire Railway Company v. Gidlow*, 43 Law J. Rep. (N.S.) Exch. 1; Law Rep. 9 Exch. 35.

A verdict for the plaintiffs was set aside and a verdict entered for the defendant by a judgment of this Court. The defendant thereupon signed

judgment for his costs, and the plaintiffs appealed to the Exchequer Chamber, and afterwards to the House of Lords. Both Courts affirmed the judgment below with costs:—Held, that this Court had no power, either by statute 1 & 2 Vict. c. 110, s. 17, or Reg. Gen. Trinity Term, 1867, to allow to the defendant interest on the costs of the appeal to the Exchequer Chamber or House of Lords. *Ibid.*

*(b) Costs out of money taken from person convicted at time of apprehension.*

**15.**—By 33 & 34 Vict. c. 23, s. 3, power is given to any Court, by which judgment is pronounced, upon the conviction of any person for treason or felony, in addition to such sentence as may otherwise by law be passed, to condemn such person to the payment of the whole or any part of the costs or expenses of the prosecution; and the payment of such costs and expenses, or any part thereof, may be ordered by the Court to be made out of any moneys taken from such person on his apprehension. By the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, s. 17, until a trustee is appointed, the registrar shall be the trustee for the purposes of that Act, and immediately upon the order of adjudication being made, the property of the bankrupt shall vest in the registrar, and on the appointment of a trustee shall pass to him. R. was convicted of felony at the May Sessions of the Central Criminal Court; and the Court, after passing sentence, made an order, under 33 & 34 Vict. c. 23, s. 3, for the payment of the costs of the prosecution out of money taken from him at the time of his apprehension. He had been arrested on the 4th of the previous April, and on the 24th of April he was adjudged bankrupt:—Held,—without deciding what would have been the case if the money in question, though in the possession of, had not really belonged to the bankrupt, or if the act of bankruptcy had been previous to his arrest,—that the order was valid, as the subsequent bankruptcy could not affect the right of the Criminal Court, which had vested at the time of the arrest. *The Queen v. Roberts*, 43 Law J. Rep. (N.S.) M. C. 17; Law Rep. 9 Q. B. 77.

*(c) Discretion of Judge.*

**16.**—It is in the discretion of the Judge at the trial to certify, under 30 & 31 Vict. c. 142, s. 5, that there was sufficient cause for bringing such action in the superior Court, so as to enable the plaintiff to have his costs, where the sum recovered is less than the amount required by that statute to entitle him to costs, and the Judge is not deprived of such discretion and bound to certify, because a right to land may be in issue in the cause; nor will the Court afterwards overrule such discretion, unless there be strong grounds for shewing that it was wrongly exercised. *Strachey v. Osborne*, 44 Law J. Rep. (N.S.) C. P. 6; Law Rep. 10 C. P. 92.

*(d) Rule to enter nonsuit.*

**17.**—Where a rule is obtained to enter a nonsuit in the Mayor's Court, London, costs of the appli-

cation cannot be allowed unless asked by the rule. *Phillips v. Bridge*, Law Rep. 9 C. P. 324.

#### (E) SECURITY FOR COSTS.

**18.**—Where the plaintiff in an action of trover filed a petition for liquidation and a receiver was appointed:—Held, that as being an insolvent person suing as trustee for another, he was rightly ordered to give security for costs. *Malcolm v. Hodgkinson*, Law Rep. 8 Q. B. 209.

**19.**—By section 2 of 31 & 32 Vict. c. 54, a certificate of a judgment obtained or entered up in any of the Courts of Queen's Bench, Common Pleas, or Exchequer, may be registered in Edinburgh, and from the date of the registration shall be of the same force and effect as a decret of the Court of Session, and all proceedings shall and may be had and taken on an extract of such certificate, as if the judgment of which it is a certificate had been a decret originally pronounced in the Court of Session, &c.:—Held, that the effect of this enactment is that the reason for the old practice of staying proceedings unless a plaintiff permanently resident in Scotland gives security for costs, has now ceased, and that proceedings will not be now stayed on such grounds. *Raeburn v. Andrew*, 43 Law J. Rep. (n.s.) Q. B. 73; Law Rep. 9 Q. B. 118.

**20.**—When an order has been properly made for a plaintiff to give security for costs, on the ground that he is a foreigner living abroad, he is not entitled to have the order rescinded, when he afterwards comes to reside within the jurisdiction of the Court. *Westenberg v. Mortimore*, 44 Law J. Rep. (n.s.) C. P. 289; Law Rep. 10 C. P. 438.

#### (F) TAXATION.

##### (a) Counsel's fees.

**21.**—Upon taxation of costs between party and party in a cause, the trial of which lasts more than one day, refreshers to counsel may be allowed if the Master in the exercise of his discretion thinks that the circumstances of the case render it proper to allow them. *Lawrie v. Wilson*, 44 Law J. Rep. (n.s.) C. P. 87; Law Rep. 10 C. P. 152.

**22.**—There is no rule which on the taxation of costs as between party and party forbids the allowance of a further fee to counsel on the occasion of delivering a further brief, although such further brief contain no new matter, but only a new arrangement in a more compendious form of matter which was in the first brief. Where, therefore, after briefs had been delivered, the plaintiffs' counsel desired to be furnished with a tabulated statement of some of the facts, and the Master on taxing the plaintiffs' costs as between party and party, in the exercise of his discretion having allowed additional fees to counsel on the delivery of such tabulated statement, a Judge at chambers ordered the Master to review the taxation, and to disallow such additional fees, on the ground that it was not competent to the Master to allow such fees where no new matter had

been furnished, the Court held that the Judge had acted on an erroneous principle, and set aside such order. *Wakefield v. Brown*, 43 Law J. Rep. (n.s.) C. P. 222; Law Rep. 9 C. P. 410.

Quære—if the Court will reverse the decision of a Judge at chambers, where such Judge has only reviewed the discretion of the Master in the taxation of costs. *Ibid.*

##### (b) Parliamentary election petition.

**23.**—Upon the taxation of the costs of a parliamentary election petition, it is within the discretion of the Master to allow a lump sum for "Instructions for Brief," provided the items making up the lump sum have been brought before him, so as to enable him to determine whether it represents reasonable and proper charges. *Barnstaple Election Petition; Fleming v. Cave*, 44 Law J. Rep. (n.s.) C. P. 200.

##### (c) Costs to abide event.

**24.**—By a rule for a new trial the costs were to abide the event. On the first trial the plaintiff had obtained a verdict for 66*l.* odd; as to 5*l.* there was no dispute, and the defendant had leave to move for a new trial, on the ground that the verdict was against the weight of evidence and the damages excessive, unless the plaintiff would consent to reduce the damages to 5*l.* The defendant obtained a rule *nisi* for a new trial on such ground, which was subsequently made absolute, the costs to abide the event, and afterwards and before the second trial, the defendant paid into Court 5*l.* 2*s.* 10*d.*, under an order by consent. At the second trial the defendant had a verdict:—Held, that the plaintiff was not entitled to the costs of the first trial, and that the "event" referred to in the rule meant the dispute as to the balance between the 66*l.* 19*s.* 6*d.* and the 5*l.* *Jones v. Williams*, 42 Law J. Rep. (n.s.) Q. B. 48; Law Rep. 8 Q. B. 280.

##### (d) Scale of taxation.

**25.**—If in an action of debt where the writ is endorsed with more than 50*l.* the plaintiff recovers less than 20*l.*, and the Judge certifies under 30 & 31 Vict. c. 142, s. 5, that there was sufficient reason for bringing the action in the superior Court, the effect of the seventh direction to the Masters, Hilary Term, 1853, is that the plaintiff's costs must be taxed on the lower scale. *Smith v. Hailey*, 42 Law J. Rep. (n.s.) Exch. 5; Law Rep. 8 Exch. 16.

#### (G) ACTION TO RECOVER.

**26.**—An action lies to recover the costs on an indictment for libel given by 6 & 7 Vict. c. 96 s. 8. *Richardson v. Willis*, 42 Law J. Rep. (n.s.) Exch. 68.

[And see SHIPPING LAW, I 12.]

## COSTS IN EQUITY.

[And see INTERPLEADER; LANDS CLAUSES ACT.]

- (A) INFORMATION AND BILL.
- (B) IMPROPER ALLEGATIONS IN PLEADINGS.
  - (a) Irrelevant charges.
  - (b) Charges of fraud withdrawn.
- (C) DEMURRER.
  - (a) *Ore tenus*.
  - (b) Neglect to raise defence by demurrer.
- (D) ACCOUNTS AND ENQUIRIES.
- (E) PLURALITY OF SUITS.
- (F) APPEAL.
- (G) ADMINISTRATION SUITS.
- (H) FORECLOSURE SUITS.
- (I) SUIT TO RESTRAIN INFRINGEMENT OF TRADE MARK.
- (K) SPECIFIC PERFORMANCE.
- (L) PETITIONS.
  - (a) Two petitions.
  - (b) Stop order.
  - (c) Respondent appearing unnecessarily.
  - (d) Payment out and reinvestment.
- (M) MOTIONS.
- (N) DISCLAIMING DEFENDANT.
- (O) TRUSTEES AND EXECUTORS.
- (P) APPORTIONMENT OF COSTS.
- (Q) COSTS.
  - (a) Of the day.
  - (b) As between solicitor and client.
- (R) COUNTY COURT SCALE.
- (S) SECURITY FOR COSTS.
- (T) TAXATION.
  - (a) Right to tax.
  - (b) Summons in matter of charity.
  - (c) Order to tax: name of partnership.
  - (d) Discretion of Taxing Master.
  - (e) Scale of taxation.
    - (1) Higher or lower.
    - (2) Chancery or Parliamentary.
    - (3) Issues tried by Court.
  - (f) Briefs to counsel: third counsel.
  - (g) Evidence and witnesses.
  - (h) Costs partially awarded.

## (A) INFORMATION AND BILL.

1.—A decree in a suit and information directed the plaintiff's costs thereof to be paid by the defendants:—Held, that the plaintiff's costs of obtaining the Attorney-General's fiat before filing the information, and in respect of proceedings entitled in the suit, which had been taken before the Attorney-General, with reference to the withdrawal of his fiat pending an appeal, were costs in the cause, payable by the defendants. *The Attorney-General v. The Corporation of Halifax*, 41 Law J. Rep. (N.S.) Chanc. 100; Law Rep. 12 Eq. 263.

## (B) IMPROPER ALLEGATIONS IN PLEADINGS.

## (a) Irrelevant charges.

2.—A plaintiff, who had introduced into his bill irrelevant charges of fraud against the defendant,

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upon his bill being dismissed with costs, was ordered to pay the defendant's costs, so far as they had been increased by such charges, as between solicitor and client. *Forester v. Read*, Law Rep. 6 Chanc. 40.

## (b) Charges of fraud withdrawn.

3.—The Court will at the hearing of a cause, and without any special application, order the plaintiff to pay the additional costs occasioned by a case made and allegations inserted in an amended bill, which have been struck out and abandoned by re-amendment. *Mounsey v. Burnham* (1 Hare, 22) not followed. *Finch v. Westrope*, 40 Law J. Rep. (N.S.) Chanc. 441; Law Rep. 12 Eq. 24.

[And see PRINCIPAL AND AGENT, 21.]

## (C) DEMURRER.

## (a) Ore tenus.

4.—Demurrer being sustained only on a ground alleged *ore tenus*, the plaintiff was allowed his costs under Cons. Ord. XIV. rule 1. *Ward v. The Sittingbourne Railway Company*, 43 Law J. Rep. (N.S.) Chanc. 533; Law Rep. 9 Chanc. 488.

## (b) Neglect to raise defence by demurrer.

5.—In a suit by a purchaser for specific performance a vendor was allowed full costs, notwithstanding that he had not raised by demurrer the defence of uncertainty of contract, on the ground of which the bill was dismissed. *Pearce v. Watts*, 44 Law J. Rep. (N.S.) Chanc. 492; Law Rep. 20 Eq. 492.

6.—The practice of the Court in allowing to a successful defendant, who might have raised his defence by demurrer, such costs only as he would have been entitled to if he had demurred will only prevail where upon the bill the plaintiff is entitled to no relief, and not where, having a right to some relief, he seeks other. *Bush v. The Trowbridge Water Company*, 44 Law J. Rep. (N.S.) Chanc. 645; Law Rep. 10 Chanc. 459.

## (D) ACCOUNTS AND ENQUIRIES.

7.—Where by a decree the costs of the suit are given to one party, but further consideration is not reserved, the costs of all subsequent accounts and enquiries necessary to the working out of the decree are included, whatever may be the result of the accounts and enquiries. But if the party to whom the costs are given by the decree brings in under an enquiry irrelevant matters not coming within its terms, he will be ordered to pay his opponent's costs of the enquiry, so far as it relates to the irrelevant matters. *Krehl v. Park*, 44 Law J. Rep. (N.S.) Chanc. 286; Law Rep. 10 Chanc. 334.

An application for such an order may be made by motion under the liberty to apply to the Court reserved by the decree. *Ibid*.

8.—Where a plaintiff who had been deprived of the conduct of an administration suit attended the taking of accounts in chambers, he was held not entitled to his costs. *Armstrong v. Armstrong*, Law Rep. 12 Eq. 614.

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## (E) PLURALITY OF SUITS.

9.—Where a party claims his costs out of a fund paid into Court in an old suit, and a second suit is instituted with respect to the fund, which latter suit afterwards abates, the proper course for the claimant to adopt is to present a petition, entitled in both suits, stating the special facts of the case, and praying relief accordingly. *Harris v. Rich*, and *De Rozas v. Rich*, 43 Law J. Rep. (n.s.) Chanc. 440.

*Concurrent suits: transfer.* [See PRACTICE IN EQUITY, 47.]

## (F) APPEAL.

10.—It is the common rule of the Court of Appeal not to give the costs of the appeal to a successful appellant, though such costs may be given under exceptional circumstances. *Denny v. Hancock*, 40 Law J. Rep. (n.s.) Chanc. 193; Law Rep. 6 Chanc. 138.

11.—The rule that the Court of Appeal does not give to the successful appellant the costs of the appeal is not altered, although it has power to give such costs in special cases. *Alexander v. Mills*, 40 Law J. Rep. (n.s.) Chanc. 73; Law Rep. 6 Chanc. 124.

12.—The right of a mortgagee in a suit for redemption or foreclosure to his general costs of suit, unless he has forfeited it by some improper defence or other misconduct, is well established, and does not rest upon any exercise of that discretion of the Court which in litigious causes is generally not subject to review. Therefore, where the Court below has disallowed the mortgagee his costs of such a suit, an appeal will lie for them. *Cotterell v. Stratton*, 42 Law J. Rep. (n.s.) Chanc. 417; Law Rep. 8 Chanc. 295.

The appellant in such a case, if successful, will be entitled to add his costs of appeal to his security. *Ibid.*

A mortgagee in possession will not be refused his costs on the ground merely that the demand which he made before suit has been found, after charging him with an occupation rent and rents not received, and disallowing certain parts of his expenditure, to be more than the sum actually due at the filing of the bill. *Ibid.*

13.—The costs of a motion to stay proceedings under a decree, pending an appeal to the House of Lords, must, in the absence of special circumstances, be paid by the party making the application. *Burdick v. Garrick* (39 Law J. Rep. (n.s.) Chanc. 661; Law Rep. 5 Chanc. 543) not followed. *Merry v. Nickalls*, 42 Law J. Rep. (n.s.) Chanc. 479; Law Rep. 8 Chanc. 205.

14.—A successful appellant from the County Court is entitled to the costs of the appeal as well as of the proceedings in the Court below. *Ashby v. Sedgwick*, 42 Law J. Rep. (n.s.) Chanc. 355; Law Rep. 15 Eq. 245.

15.—Where exceptions for scandal had been overruled in the Court below, but allowed on appeal, the Court gave the successful appellant his costs both of the appeal and in the Court below as between solicitor and client. *Christie v.*

*Christie*, 42 Law J. Rep. (n.s.) Chanc. 544; Law Rep. 8 Chanc. 499.

## (G) ADMINISTRATION SUITS.

16.—The bill in an administration suit raised a question regarding a testatrix's will, upon the decision of which depended the plaintiff's title to any interest in her estate. The decision being against the plaintiff taking any interest, his bill was dismissed with costs. *Anderson v. Anderson*, 41 Law J. Rep. (n.s.) Chanc. 247.

17.—Specific and residuary devises and specific bequests must contribute rateably to the payment of such part of the costs of an administration suit as the personal estate is insufficient to satisfy. *Bagot v. Legge* (2 Dr. & Sm. 259) considered. *Jackson v. Pearce*, Law Rep. 19 Eq. 96.

18.—A direction that legatees should contribute rateably to testamentary expenses in exoneration of the residue:—Held, not to apply to the costs of an administration suit. *In re Biel's Estate*; *Gray v. Warner*, 42 Law J. Rep. (n.s.) Chanc. 556; Law Rep. 16 Eq. 577.

19.—In a suit to administer specifically devised real estate a question was raised as to whether certain land was comprised in the devise or passed to the heir-at-law. It was held to be comprised in the devise, but there were other lands which descended:—Held, that the costs of the suit could not be thrown on the descended estates in exoneration of the devised estates, since the descended estates were not being administered in the suit; but the heir-at-law might be ordered to pay a proportional amount of the costs of the suit, corresponding to the value of the descended estates. *Hardwick v. Hardwick*, 42 Law J. Rep. (n.s.) Chanc. 636; Law Rep. 16 Eq. 168.

20.—The legal estate of a deceased testator being outstanding in a lessee who was one of the two executors, the heir-at-law filed a bill against the devisees and executors, to set aside the will. An issue was directed and the will established as valid:—Held, that the bill must be dismissed without costs as against the devisees. *Banks v. Goodfellow*, 40 Law J. Rep. (n.s.) Chanc. 511; Law Rep. 11 Eq. 472.

21.—In a suit by legal mortgagees of real estate for sale of the mortgaged property, and for the general administration of the mortgagor's estate, the proceeds of the mortgaged property will be applied in payment to the mortgagees of their principal, interest and costs, in priority to the payment to devisees or executors, who have been made parties, of their costs of the suit. *Pinchard v. Fellows*, 43 Law J. Rep. (n.s.) Chanc. 227; Law Rep. 17 Eq. 421.

22.—In a simple administration suit instituted by a legal mortgagee, the balance of the proceeds of the mortgaged property will be applied in payment of the costs of the suit of the personal representative in priority to the mortgagee's costs of realising the security. *In re Spensley's Estate*; *Harrison v. Spensley*, 42 Law J. Rep. (n.s.) Chanc. 21; Law Rep. 15 Eq. 16.

23.—Next-of-kin who unsuccessfully opposed charitable legacies allowed costs only as between



party and party, notwithstanding *Carter v. Green*, 3 Kay & J. 591. *Wilkinson v. Barber*, 41 Law J. Rep. (n.s.) Chanc. 721; Law Rep. 14 Eq. 96.

*Administration suit by mortgagee: costs of mortgagee paid off in summary manner.*  
[See MORTGAGE, 52.]

#### (H) FORECLOSURE SUITS.

**24.**—Mortgagees in possession filed a bill for foreclosure. The bill was amended, and a sale made with consent of the defendants, the owners of the equity of redemption:—Held, that the plaintiffs were entitled to be paid their costs before any costs were allowed the defendants. *Cook v. Hart*, 41 Law J. Rep. (n.s.) Chanc. 143; Law Rep. 12 Eq. 459.

[And see *supra* No. 12.]

#### (I) SUIT TO RESTRAIN INFRINGEMENT OF TRADE MARK.

**25.**—Bill by the plaintiff, a merchant, to restrain the defendant, an agent, who received goods from the Continent, and forwarded them to parties in England for a commission, from forwarding goods bearing a forged imitation of the plaintiff's trade mark. On a first application, the defendant readily gave the names of the persons from whom and to whom the goods were sent, but declined to give an undertaking not to take them out of the dock:—Held, that under the circumstances the defendant should neither pay nor receive costs. *Upmann v. Elkan*; *Allones v. Elkan*, 40 Law J. Rep. (n.s.) Chanc. 475; Law Rep. 12 Eq. 140.

Semble—if he had refused to give his principal's name, he would have had to pay costs, and if he had undertaken without suit in the terms prayed, he would have been entitled to his costs. A person to whom the goods were sent, and who was innocent of fraud, was made a party:—Held, that he was entitled to his costs. *Ibid.*

The persons by whom the goods were sent were in communication with their agents during the proceedings, and having no property within the jurisdiction, except the goods, were not made parties to the suit:—Held, that the plaintiff's costs should be charged on the goods, with liberty for the owners to intervene. *Ibid.*

**26.**—Bill by the plaintiff, a merchant, to restrain the defendant, an agent, who received goods from the Continent, and forwarded them to parties in England for a commission, from forwarding goods bearing a forged imitation of the plaintiff's trade mark. On a first application, the defendant, who was innocent of the fraud, readily gave the names of the persons by whom the goods were sent, and offered to erase the forged marks:—Held, affirming the decision of the Master of the Rolls, that costs ought not to be given against the defendant. *Upmann v. Elkan*, 41 Law J. Rep. (n.s.) Chanc. 246; Law Rep. 7 Chanc. 130.

**27.**—Where the plaintiffs and the defendants in a suit to restrain infringement of a trade mark were alike engaged in the manufacture and sale of an article which was intended to deceive the

public the Court, on dismissing the bill, declined to give costs. *Estcourt v. The Estcourt Hope Essence Company (Lim.)*, 44 Law J. Rep. (n.s.) Chanc. 223; Law Rep. 10 Chanc. 276.

#### (K) SPECIFIC PERFORMANCE.

**28.**—A decree for specific performance of a contract having been made as against two defendants in a suit which had been rendered necessary by the misconduct of one of them, ordered, that as between the two defendants, the costs ordered to be paid by both of them to the plaintiff ought to be borne by the one whose misconduct caused the suit. *Wilson v. Thomson*, 44 Law J. Rep. (n.s.) Chanc. 527; Law Rep. 20 Eq. 459.

#### (L) PETITIONS.

##### (a) Two petitions.

**29.**—When two petitions are presented on the same day in the same matter, the Court will order the costs of the more perfect petition only to be paid out of the fund, notwithstanding that the less perfect petition was presented first. *In re Pring's Trusts*, 42 Law J. Rep. (n.s.) Chanc. 473.

##### (b) Stop order.

**30.**—An incumbrancer presented a petition for a stop order on a fund in Court, he had not applied to the mortgagor to consent to one being granted on summons:—Held, that the petitioner must pay the difference between the costs of obtaining a stop order on a summons at chambers, and the costs of the petition. *Wellesley v. Mornington*, 41 Law J. Rep. (n.s.) Chanc. 77.

##### (c) Respondent appearing unnecessarily.

**31.**—Where a petitioner does not, on serving a respondent who has no interest, tender him a sufficient sum to enable him to consult a solicitor, the petitioner must pay his costs of appearing. *Wood v. Boucher*, 40 Law J. Rep. (n.s.) Chanc. 112; Law Rep. 6 Chanc. 77.

##### (d) Payment out and reinvestment.

**32.**—Where a special Act giving compulsory powers of taking land only, provides that the company shall pay the costs of reinvestment, the company is not liable to pay the costs of payment out to parties entitled, even where the money was originally paid into the Court of Exchequer. *In re Harrison's Estate*, 40 Law J. Rep. (n.s.) Chanc. 77.

**33.**—A fund was paid into Court under the Trustee Relief Act; and a petition was presented by the tenant for life for payment of the dividends to her. If the fund had not been paid into Court it would have been necessary to appoint new trustees:—Held, that the costs of the appearance of the trustees should be paid out of the corpus. *In re Wood's Trusts*, 40 Law J. Rep. (n.s.) Chanc. 179; Law Rep. 11 Eq. 155.

**34.**—Costs not allowed on a petition for payment out of money towards paying off incumbrances, under a local Act, which provided only for the payment by the parties taking the land of

the costs of a reinvestment in land. *In re Lord Stanley of Alderley's Estate*, Law Rep. 14 Eq. 227.

**35.**—Where the private Act of a railway company provided that moneys paid in for the purchase of land should be re-invested in land, and gave the Court power to order the "costs of all purchases," together with the "necessary costs of obtaining such order" to be paid by the company:—Held, that the Court had no power to order costs to be paid by the company upon a petition for the absolute transfer of the fund in Court. *In re Williams' Estate*, Law Rep. 12 Eq. 488.

**36.**—A proceeding under a statute is not a proceeding in equity, and the Court will only allow such costs as are authorised by the statute. *In re the Spitalfields Schools* (Law Rep. 10 Eq. 671) not followed. *In re the Charity Schools of St. Dunstan-in-the-West*, Law Rep. 12 Eq. 537.

**37.**—Money owed by a company was paid into Court. On petition for payment out, the liquidator was allowed costs of appearance, but not costs incurred previously to payment in investigating the title of rival claimants. *Bonelli's Electric Telegraph Company; Cook's Claim*, 44 Law J. Rep. (N.S.) Chanc. 207; Law Rep. 18 Eq. 656.

*Costs under Lands Clauses Act.* [See LANDS CLAUSES ACT.]

#### (M) MOTIONS.

**38.**—Where a motion for an injunction involving the merits of the cause was ordered to stand over to the hearing, and afterwards the bill was changed into an information and bill, and at the hearing a decree for a perpetual injunction was made with costs, the plaintiff's costs of the motion, though not specifically mentioned, are costs in the cause, and will be allowed him on taxation. *The Attorney-General v. Lonsdale*, 40 Law J. Rep. (N.S.) Chanc. 198; Law Rep. 6 Chanc. 141.

**39.**—A motion for a receiver made by the plaintiff in a partnership suit was ordered to stand over till the hearing of the cause, and no order was made as to the costs of the motion. Afterwards the common order was made for dismissing the bill for want of prosecution:—Held, that the defendant's costs of the motion must be allowed him as costs in the cause. *Corcoran v. Witt*, 41 Law J. Rep. (N.S.) Chanc. 67; Law Rep. 13 Eq. 53.

*Motion to dismiss: continuing suit.* [See PRACTICE IN EQUITY, 54.]

#### (N) DISCLAIMING DEFENDANT.

**40.**—The defendant to a foreclosure suit who disclaims will not be entitled to his costs of appearing on subsequent proceedings, even though served with notice of them. *Davis v. Whitmore* (28 Beav. 617) overruled; *Ford v. The Earl of Chesterfield* (22 Law J. Rep. (N.S.) Chanc. 630) approved of. *Clarke v. Tolman*, 42 Law J. Rep. (N.S.) Chanc. 23.

#### (O) TRUSTEES AND EXECUTORS.

**41.**—A trustee refused to join his co-trustee in suing to recover trust property, and put in an

answer. He was disallowed costs. *Gompertz v. Kensit*, 41 Law J. Rep. (N.S.) Chanc. 382; Law Rep. 13 Eq. 369.

**42.**—After the institution of a suit by creditors to set aside a voluntary settlement, the settlor became bankrupt, and the settlement was set aside by the Court of Bankruptcy. The plaintiffs, whose claim under the bankruptcy had been allowed, although opposed by the trustees of the settlement, wrote to the latter offering to dismiss the bill as against them without costs, the plaintiffs to have their costs out of the estate. The trustees having declined this proposal:—Held, that they must pay the plaintiffs' costs since the date of that offer; that the plaintiffs were entitled to their costs down to that date out of the estate realised in bankruptcy, and that the trustee in bankruptcy ought to have applied to the Court to stop the suit, and was entitled only to the costs of realising the estate. *Tanqueray v. Bowles*, Law Rep. 14 Eq. 151.

**43.**—An executor died insolvent, having misapplied the assets. An administration suit having been instituted against his executors, who had received part of the testator's estate, they duly accounted for what they had received:—Held, that they were entitled to the costs of accounts against themselves, but not to costs of accounts against the estate of the insolvent executor, and that as to other costs of suit, being parties in both capacities, they should have half the costs. *Palmer v. Jones*, 43 Law J. Rep. (N.S.) Chanc. 349.

**44.**—Though a solicitor who accidentally (or upon separate retainers) represents two or more parties ought to distinguish the charges incurred for each separate party, yet where there is a joint retainer (as by trustees not severing in their defence) he can enforce the whole bill of costs incurred against either of the parties. *Watson v. Row*, 43 Law J. Rep. (N.S.) Chanc. 664; Law Rep. 18 Eq. 680.

*In re Colquhoun* (5 De Gex, M. & G. 35; 1 Sm. & Giff. App. i.; 22 Law J. Rep. (N.S.) Chanc. 484; 23 Ibid. 515); and *Harmer v. Harris* (1 Russ. 155) considered. Ibid.

Two trustees gave a joint retainer in a suit to administer the trust estate. One became insolvent and was indebted to the estate:—Held, that the surviving trustee should have the whole costs of himself and his co-trustee allowed out of the estate without any set-off in respect of the estate. Ibid.

*Trustee having constructive notice refused costs, although not held liable for negligence.* [See TRUST, B 19.]

*Trustee's costs of payment into Court.* [See TRUSTEE, D 7.]

#### (P) APPORTIONMENT OF COSTS.

[And see infra Nos. 79, 80.]

**45.**—In the absence of special circumstances the entire costs of a partition suit ought to be borne by the parties in proportion to the value of their respective shares. *Cannon v. Johnson*, 40

Law J. Rep. (n.s.) Chanc. 46; Law Rep. 11 Eq. 90.

**46.**—In a partnership suit where the matters in dispute were referred to arbitration, instead of accounts being taken in chambers:—Held, that the costs of the suit and of the reference and award ought to be borne by the plaintiff and the defendant in proportion to their shares in the partnership. *Newton v. Taylor*, Law Rep. 19 Eq. 14.

(Q) COSTS.

(a) Of the day.

**47.**—Where it appears on the bill that the suit is defective for want of parties, a defendant who takes the objection at the hearing is entitled to the costs of the day, though he has not taken the objection by his answer. *Rousell v. Morris*, 43 Law J. Rep. (n.s.) Chanc. 97; Law Rep. 17 Eq. 20.

(b) As between solicitor and client.

**48.**—An arbitrator had power in a reference in a suit in Chancery to award costs:—Held (affirming the decision of Bacon, V.C.), that he might give costs as between solicitor and client. *Mordue v. Palmer*, 40 Law J. Rep. (n.s.) Chanc. 8; Law Rep. 6 Chanc. 22.

**49.**—The Court has no jurisdiction to give costs as between solicitor and client, except in cases of scandal, or where the defendant fills a fiduciary position. *Turner v. Collins*, 40 Law J. Rep. (n.s.) Chanc. 614; Law Rep. 12 Eq. 438.

(R) COUNTY COURT SCALE.

**50.**—A plaintiff who sues in Chancery for a sum within the County Court limit, and obtains a decree, is entitled to the usual costs, and not merely to those which he would have been allowed in the County Court. *Brown v. Rye*, 43 Law J. Rep. (n.s.) Chanc. 228; Law Rep. 17 Eq. 343.

(S) SECURITY FOR COSTS.

**51.**—A bill was filed by a limited company in liquidation to set aside a mortgage which the defendants were foreclosing, or to have the accounts taken on a footing totally different from that suggested in the foreclosure suit, and was expressed to be a cross-bill to the foreclosure suit:—Held, affirming the decision below, 41 Law J. Rep. (n.s.) Chanc. 151, that the bill was not a mere cross-bill, and that the plaintiff company must give security for costs. *The City of Moscow Gas Company (Lim.) v. The International Financial Society (Lim.)*, 41 Law J. Rep. (n.s.) Chanc. 350; Law Rep. 7 Chanc. 255.

Semle—that even if it had been a mere cross-bill, the plaintiff company being in liquidation must give security for costs. *Ibid.*

**52.**—The bond of an officer in Her Majesty's service, whose regiment is stationed out of the jurisdiction of the Court, is a sufficient security for the costs of a plaintiff in a Chancery suit, resident out of the jurisdiction. *Miller v. Hales*, 43 Law J. Rep. (n.s.) Chanc. 446; Law Rep. 17 Eq. 430.

**53.**—Upon appeal by a defendant, it having been proved that he was a man without property, and had no substantial interest in the suit, but was defending it on behalf of another person, he was ordered to give security for costs. *The Mayor, &c., of Hastings v. Ivall*, 43 Law J. Rep. (n.s.) Chanc. 728; Law Rep. 9 Chanc. 758.

(T) TAXATION.

(a) Right to tax.

**54.**—Where a solicitor has obtained a charging order on money recovered by his means, and such money is paid into the Court of Chancery for distribution amongst the parties entitled within a year from the delivery of the solicitor's bill, the solicitor is not entitled to have his costs paid without taxation out of the fund in Court, although more than a year may have subsequently elapsed from the delivery of the bill. *De Bay v. Griffin*, Law Rep. 10 Chanc. 291.

**55.**—Where a solicitor, during the continuance of a suit sent in bills of costs from time to time to his client and received acceptances from him with which he credited his client in certain cash accounts which were kept during the suit, but none of which accounts were ever settled, and the greater part of the bills were delivered more than twelve months before a summons for taxation of costs was taken out, but within that period the solicitor wrote to his client a letter stating that he intended to increase some of his charges in the earlier bills,—Held, that the effect of the letter was to bring down all the bills as one, and to render them all liable to taxation. *In re Cartwright*, 42 Law J. Rep. (n.s.) Chanc. 735; Law Rep. 16 Eq. 469.

What are "special circumstances" within 6 & 7 Vict. c. 73, s. 37. *Ibid.*

**56.**—The continuance of the relationship of solicitor and client is not of itself such a special circumstance that the Court will on account of it order the taxation of a bill of costs twelve months after it has been delivered. The Court will not after a lapse of twelve months go into questions of excessive charge, unless it can be proved that there are items of gross overcharge amounting to fraud. *In re Elmslie & Company; Ex parte the Tower Subway Company*, 42 Law J. Rep. (n.s.) Chanc. 570; Law Rep. 16 Eq. 326.

**57.**—The solicitor of a company delivered his bill of costs three months before the winding-up. After the winding-up, he delivered to the liquidator a second bill, comprising the period intervening between the delivery of the first bill and the date of the winding-up. No step was taken until more than twelve months had elapsed since the delivery of either bill:—Held, that notwithstanding the lapse of time, both bills were still subject to taxation. *In re the Marseilles Extension Railway and Land Company (Lim.)*; *Evans's case*, 40 Law J. Rep. (n.s.) Chanc. 197; Law Rep. 11 Eq. 151.

**58.**—When a client has paid his solicitor's bill under pressure before delivery of the bill he is entitled to have it taxed, at any time before the

expiration of a year. *In re Fielder; Ex parte Bailey*, 40 Law J. Rep. (n.s.) Chanc. 615.

**59.**—When one solicitor asks another to look up some old deeds in his possession, and offers to pay his costs, the bill for these costs is taxable in the usual way. *In re Bowen*, 41 Law J. Rep. (n.s.) Chanc. 327.

**60.**—Though it is not necessary that the person employed as returning officer at the first election of a school board should be a solicitor, nevertheless if he is so, the board, who are directed to pay his expenses, may have his bill taxed in the usual way. *In re Jones*, 41 Law J. Rep. (n.s.) Chanc. 367; Law Rep. 13 Eq. 336.

(b) *Summons in matter of charity.*

**61.**—On an application by the Attorney-General in the matter of a charity, asking for the taxation of costs, &c., not costs in the matter, the summons should state the matters in respect of which such costs are asked for. *In re Dulwich College*, Law Rep. 15 Eq. 294.

(c) *Order to tax: name of partnership.*

**62.**—C. had acted as solicitor for X., and before his bill was paid he took P. into partnership. X. then paid the bill by cheque to the order of C. and P., and received an acknowledgment in their joint names, but in P.'s handwriting. He then took out an order to tax the bill as against C. and P. They then wrote to him informing him that C. alone was interested in the bill, and requested him to get the order altered so as to be against C. alone, but this he declined to do:—Held, that the order must be discharged, C. consenting to an order against himself alone. *In re Curmot*, 40 Law J. Rep. (n.s.) Chanc. 608.

(d) *Discretion of Taxing Master.*

**63.**—The Court refused to entertain the question whether the Taxing Master had properly disallowed costs of separate answers. *Beattie v. Ebury*, 43 Law J. Rep. (n.s.) Chanc. 80.

(e) *Scale of taxation.*

(1) *Higher or lower.*

**64.**—In a suit to enforce a charge or lien for an amount under 1,000*l.* against purchasers of real estate for an account of the amount due, and for a receiver and sale, the costs ought to be taxed upon the lower scale. *Paddon v. Winch*, 44 Law J. Rep. (n.s.) Chanc. 568; Law Rep. 20 Eq. 449.

**65.**—In estimating the value of an estate of a testator for the purpose of ascertaining whether costs are to be paid on the higher or lower scale, the value of the estate at the death of the testator is to be looked at, although the costs of a suit to get in part of the assets may reduce that amount. *Steward v. Nurse*, 43 Law J. Rep. (n.s.) Chanc. 384.

**66.**—A building society made an advance on mortgage of 900*l.*, to be repaid with interest by 120 monthly payments. These payments, as well as the payment of certain fines, were, under the rules of the society, secured by the mortgage

deed. A sum of 300*l.* became due to the society for such fines beyond the amount due for principal. The sum due to the society was found on taking the accounts to be about 517*l.* The Taxing Master allowed costs on the lower scale only, and Malins, V.C., refused to vary the certificate, Law Rep. 17 Eq. 543. Upon appeal,—Held, that the Taxing Master was right. *Cotterell v. Stratton*, 43 Law J. Rep. (n.s.) Chanc. 573; Law Rep. 9 Chanc. 514.

(2) *Chancery or Parliamentary.*

**67.**—The costs of applications under 33 & 34 Vict. c. 78 (the Tramways Act, 1870), to the Board of Trade for provisional orders are to be taxed, not on the Parliamentary but on the Chancery scale. *In re Morley*, Law Rep. 20 Eq. 17.

(3) *Issues tried by Court.*

**68.**—The costs of the trial by the Court of questions of fact ordered to be taxed as at Common Law. *Hill v. Hibbit*, 41 Law J. Rep. (n.s.) Chanc. 703; Law Rep. 14 Eq. 221.

(4) *County Court scale.*

[See supra No. 50.]

(f) *Briefs to counsel: third counsel.*

**69.**—In a heavy suit, where all the pleadings had been prepared by a junior who was, before the hearing, called within the bar, and a brief had, on the hearing, been delivered to a third counsel, another junior, it was held, that though the fact that a junior having been called within the bar, was not sufficient to warrant the employment of a third counsel, yet owing to the magnitude and complication of the case, and the length of time occupied in the hearing, the costs of a third counsel ought to have been allowed on taxation. *In re Charles Lafitte & Company (Lim.)*, 44 Law J. Rep. (n.s.) Chanc. 633; Law Rep. 20 Eq. 650.

**70.**—Neither the great length of proceedings, nor the time the cause took to argue, nor the fact that there was an arrangement between two co-defendants, that one should employ three counsel and the other only one, will be considered sufficient reason for the interference by the Judge, with the discretion of the Taxing Master, in disallowing the costs of the third counsel. *The Merchant Bank v. Maud*, 44 Law J. Rep. (n.s.) Chanc. 581; Law Rep. 20 Eq. 452.

**71.**—Where the junior counsel who has prepared the pleadings in the suit is called within the bar before the hearing, and after a retainer has been given to a leader (the propriety of which retainer is a question to be considered), the costs of giving briefs to the leader so retained, the junior who has been called within the bar, and a new junior will be allowed on taxation between party and party. *Cousens v. Cousens*, 41 Law J. Rep. (n.s.) Chanc. 166; Law Rep. 7 Chanc. 48.

The Court of appeal will not interfere with the discretion of the Taxing Master as to the amount of counsel's fees. *Ibid.*

**72.**—During the progress of a suit the junior

counsel for the defendant, who had prepared the pleadings, took silk. Prior to this a Queen's Counsel had been engaged upon an interlocutory application relative to the mode of taking evidence. The defendant at the hearing employed three counsel, viz., the leading counsel above referred to, the junior who had taken silk, and a new junior:—Held, that under the above circumstances alone he was not entitled to charge in his bill of costs against the plaintiff (whose bill was dismissed with costs) the costs of the three counsel. *Cousens v. Cousens* (41 Law J. Rep. (n.s.) Chanc. 166) observed upon. *Betts v. Cleaver*, 41 Law J. Rep. (n.s.) Chanc. 663; Law Rep. 7 Chanc. 513.

**73.**—The circumstance that a junior counsel in a cause has been appointed one of Her Majesty's Counsel [is not a sufficient reason for allowing costs of briefs to three counsel. Memorandum, Law Rep. 10 Chanc. 540.

[And see *infra* No. 78.

(g) *Evidence and witnesses.*

**74.**—An accountant had been employed to examine books for the purpose of preparing an affidavit, and had also been employed in extracting items of profit and loss and recording them in supplemental books, and in setting up new journals and ledgers:—Held, that the Taxing-Master was right both in making an allowance of five guineas a day to the accountant for such time as he had been employed in preparing to give evidence, and in refusing to make any allowance in respect of work done by him as an accountant. *In re Charles Lafitte & Company (Lim.)*, 44 Law J. Rep. (n.s.) Chanc. 633; Law Rep. 20 Eq. 650.

**75.**—In a patent suit in which the plaintiffs, after the briefs were delivered, but before the hearing, took the common order dismissing their bill with costs,—Held, on taxation of the costs, and notwithstanding the Judge had not certified what particulars had been proved, that the defendants were entitled to allowances in respect of drawing and settling by counsel particulars of breaches. Held also, that they were entitled to an allowance in respect of the charges of scientific witnesses and that such allowance was not limited by the rules of taxation at common law, and also that they were entitled to an allowance in respect of the cost of a model; but the Court followed the Taxing Master's decision as to amount. *Batley v. Kynoch* (No. 2), 44 Law J. Rep. (n.s.) Chanc. 565; Law Rep. 20 Eq. 632.

**76.**—Fifteen bills were filed by the same plaintiff against persons who, as he alleged, had infringed his patent. The same solicitor acted for the defendant in all the suits, and the questions to be tried in all the suits were substantially the same. The plaintiff being required to put in an affidavit of documents in each suit filed fifteen affidavits, which were precisely alike in all respects except the names, being in fact lithographed copies of the same draft. He gave notice to the defendant's solicitor that they were all alike, and offered him a lithographed copy. The defendant's

solicitor examined the affidavits at the office, and took an office copy in one suit. All the bills were dismissed with costs:—Held, that the defendant's solicitor was not entitled to charge in the bill of costs for perusing the affidavit in each suit. *Betts v. Cleaver*, 41 Law J. Rep. (n.s.) Chanc. 663; Law Rep. 7 Chanc. 513.

Decision of Bacon, V.C., reversed on both points. *Ibid.*

**77.**—Where a plaintiff produces a witness before the examiner for cross-examination he is thereupon entitled *ex debito justitiae* to an order for taxation and payment of the costs, and he does not lose his right by allowing the cross-examination to proceed. *Richards v. Goddard*, Law Rep. 10 Chanc. 288.

**78.**—Costs of explanatory drawings by a defendant in a patent suit in explanation of several cases which he had set up in anticipation disallowed as unnecessary. Costs of attendance on cross-examination of a solicitor's clerk in addition to the solicitor not allowed. The usual counsel's fee for cross-examination of 5*l.* 5*s.* a day after the first day may be increased to 7*l.* 7*s.* in a heavy case. 7*l.* 7*s.* a day allowed to a scientific witness to read up a case so as to give evidence. The rule as to costs of more than two counsel being disallowed is not inflexible, but will not be lightly departed from. Refreshers will be allowed in heavy Chancery cases after the first two days. *Smith v. Buller*, Law Rep. 19 Eq. 473.

(h) *Costs partially awarded.*

**79.**—A defendant was ordered to pay costs of suit "so far as the same had been increased by his answer impeaching the validity of plaintiff's security:—Held, first, that the costs must be apportioned according to *Heighington v. Grant* (1 Beav. 228); second, that the plaintiff's extra costs of employing a third counsel, allowed owing to the complexity of the case, were costs within the order; third, that the order included the costs of those parts of the bill which were in anticipation of the objection taken by the answer. *Begbie v. Fenwick*. *Fenwick v. Begbie*, Law Rep. 6 Chanc. 869.

**80.**—Bill dismissed with costs so far as it sought to set aside B's security:—Held, that the costs incurred by B. in proving the consideration for his security, and consequent thereon, were the increase of costs to be paid by the plaintiff, and that the costs of the hearing were to be apportioned according to the number of folios. *Begbie v. Fenwick*; *Fenwick v. Begbie*, Law Rep. 6 Chanc. 869.

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## COUNSEL.

*Fees: allowance of, on taxation.* [See COSTS IN EQUITY, 69-73; COSTS AT LAW, 21-23.]

*Counsel's opinions, privilege.* [See PRODUCTION, 18.]

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## COUNTY BUILDINGS LOANS.

[The time for repayment of loans borrowed under 7 Geo. 4. c. 63, extended to thirty years. 35 Vict. c. 7.]

## COUNTY CORONER.

Where the salary of a coroner, in office at the passing of 23 & 24 Vict. c. 116, s. 4, has been fixed for the first time at an amount not less than the average amount of the fees, mileage, and allowances received during five years preceding the 31st of December, 1859, and is subsequently revised after a period of five years, the salary may be fixed at a less amount than the average amount which the coroner would have received during the preceding five years. *Ex parte Driffield*, Law Rep. 7 Q. B. 207.

## COUNTY COURT.

## (A) JURISDICTION OF COUNTY COURT.

## (a) Jurisdiction at law.

- (1) County Court district.
- (2) Amendment.
- (3) Contempt.
- (4) Committal of debtor.
- (5) Execution against high bailiff.
- (6) Effect of warrant of possession.
- (7) Costs of action remitted.

## (b) Jurisdiction in Equity.

- (c) Admiralty.
- (d) Probate.
- (e) Bankruptcy.

## (B) TRANSFER OF ACTION OR SUIT.

- (a) To superior Court.
- (b) To adjoining district.

## (C) NEW TRIAL.

## (D) INTERPLEADER.

## (E) APPEAL.

- (a) Case on appeal.
- (b) Notice of appeal.
- (c) Time for giving security.
- (d) Death of respondent.
- (e) Costs.

## (F) OFFICERS OF THE COURT.

[The County Court (Buildings) Act, 15 & 16 Vict. c. 28, amended. 33 & 34 Vict. c. 15.]

[Repeal of portions of previous Acts. Provisions as to judgment by default, summonses to witnesses, power of judges and appeal within eight days without special case. 38 & 39 Vict. c. 50.]

## (A) JURISDICTION OF COUNTY COURT.

## (a) Jurisdiction at law.

## (1) County Court district.

1.—A verbal offer to buy goods for more than 10*l.* having been made to the vendor's agent within the district of a County Court, was communi-

cated to the vendor at his residence outside the district, where he accepted it and signed a memorandum within section 17 of the Statute of Frauds. This memorandum with a counterpart he sent by post to the purchaser, who signed the counterpart within the district. The vendor having delivered the goods to the plaintiff's agent outside the district, the purchaser issued a plaint in the County Court against the vendor to recover damages for deficiency in weight:—Held, that the cause of action arose in part of the district, so as to give the County Court jurisdiction under 30 & 31 Vict. c. 142, s. 1. *In re Green v. Beach*, 42 Law J. Rep. (N.S.) Exch. 151; Law Rep. 8 Exch. 208.

2.—Under section 21 of 19 & 20 Vict. c. 108, where an action is brought against the high bailiff of a County Court, for not executing a warrant, a summons may issue in any adjoining district, the Judge of which is not the Judge of a Court of which the defendant is an officer, whether or not such adjoining district is in the same county in which the defendant neglected to execute the warrant. *Partridge v. Elkington*, 40 Law J. Rep. (N.S.) Q. B. 49; Law Rep. 6 Q. B. 82.

## (2) Amendment.

3.—When a cause after issue joined is ordered to be tried in a County Court, under 19 & 20 Vict. c. 108, s. 26, the Judge of the County Court has at the trial the same power of amending a misjoinder of the defendants as a Judge of a superior Court sitting at Nisi Prius has under section 37 of the Common Law Procedure Act, 1852. *Reminson v. Walker*, 41 Law J. Rep. (N.S.) Exch. 43; Law Rep. 7 Exch. 143.

4.—By the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 57, the local authority constituted by the Act may exercise compulsory powers with regard to horses and other animals, "and the local authorities may recover the expenses of the execution by them of this section from the owner of the horse or animal:—Held, that in proceedings in the County Court to recover such expenses, where the plaintiff was described as "J. M., the inspector appointed by the local authority for the county of H. under the Contagious Diseases (Animals) Act, 1869," first, that the County Court Judge might, without the defendant's consent, amend the plaint by substituting the proper description of the party suing; secondly, that the plaint was rightly amended by describing the action as brought by "the local authority for the county of H.," as section 57 enabled the local authority to sue for the expenses under that description, although they were not a corporation. *Mills v. Scott*, 42 Law J. Rep. (N.S.) Q. B. 234; Law Rep. 8 Q. B. 496.

## (3) Contempt.

[And see DEBTORS ACT, 2, 3; BANKRUPTCY N 9.]

5.—A County Court Judge has no power to commit anyone for contempt which has not occurred in the face of the Court. *Ex parte Jolliffe*,

42 Law J. Rep. (N.S.) Q. B. 121; Law Rep. 8 Q. B. 134, *nom. The Queen v. Leffroy*.

The fact that the County Courts Act, 9 & 10 Vict. c. 95 (ss. 113, 114) gives a limited power of summarily dealing with contempt committed in face of the Court, but is silent as to contempt committed out of Court, is a strong, if not conclusive, argument against the summary power of a County Court Judge to punish for such contempt. *Ibid*.

#### (4) Committal of debtor.

6.—A judgment debtor having made default in payment of the judgment debt which had been recovered against him in the County Court, and which he had been ordered to pay forthwith, the County Court Judge made an order for his commitment to prison for forty days. The debtor was arrested thereon, but was subsequently discharged on the ground of his being privileged at the time of such arrest, as a witness returning from the sessions. The debtor was again, and whilst the order for committal was still in force, summoned upon a judgment summons, and a second order for his committal for the same default in not paying the judgment debt was made by the County Court Judge:—Held, that the Judge had no power to make such second order, as the first had not been executed. *Horsnail v. Bruce*, 42 Law J. Rep. (N.S.) C. P. 140; Law Rep. 8 C. P. 378.

Held also, by Bovill, C.J., and Brett, J., that where a judgment debt is not payable by instalments there is no power under section 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), to commit the debtor more than once for default in not paying such debt. *Ibid*.

[And see DEBTORS ACT, 14-18.]

#### (5) Execution against high bailiff.

7.—The Judge of a County Court made an order against the high bailiff for payment of certain sums of money and costs, the costs to be settled by the registrar. The amount of costs was settled by the registrar, but not formally approved by the Judge. Orders for payment were drawn up under seal of the Court, and served on the high bailiff. Default having been made in payment, the registrar issued a warrant of execution for the sums and costs. The registrar, after consulting the Judge, specially appointed one W. R., who was not a bailiff of the Court, to act as assistant bailiff in the execution of the warrant, which was given under the seal of the Court, directed to "W. R. and others, the bailiffs thereof," and signed by the registrar. Acting under this warrant, W. R. levied on the goods of the high bailiff, who thereupon brought trespass against the registrar:—Held, that although the Judge had not personally exercised his discretion as to the amount of costs, yet there was a valid order in existence, and the Court had inherent power to enforce its process, and the right mode of doing so had been adopted, inasmuch as the analogy afforded by the practice of the superior Courts

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which appoint coroners or elisors to execute judgments against sheriffs, had been followed by appointing a special person to levy the distress; that the registrar was therefore justified in making that appointment, and consequently that he was not liable in trespass for the acts of R. done in pursuance thereof. *Bellamy v. Hoyle*, 41 Law J. Rep. (N.S.) Exch. 169; Law Rep. 10 Exch. 220.

#### (6) Effect of warrant of possession.

8.—A warrant of possession obtained under 19 & 20 Vict. c. 108, s. 50, by a landlord proceeding in the County Court against his tenant, but not against the person actually in possession, is not conclusive against the latter, who may notwithstanding the warrant bring an action of trespass against the landlord, if the landlord had not in fact a right to the possession of the premises. So held by Channell, B., and Pigott, B.; contra by Martin, B. *Hudson v. Walker*, 41 Law J. Rep. (N.S.) Exch. 51; Law Rep. 7 Exch. 55, *nom. Hodson v. Walker*.

#### (7) Costs of action remitted.

9.—Where an action commenced in a superior Court has been remitted to a County Court, under the 10th section of the County Courts Act, 1867, the superior Court has no longer any jurisdiction to make an order for costs under the 5th section.

Semle—that there is jurisdiction in the County Court. *Moodie v. Steward*, 40 Law J. Rep. (N.S.) Exch. 25; Law Rep. 6 Exch. 35.

*Master and servant: claim for wages: summary jurisdiction.* [See MASTER AND SERVANT, 17.]

#### (b) Jurisdiction in Equity.

10.—A creditor of an intestate having brought an action against the executor *de son tort*, for the recovery of his debt, an injunction staying the action was granted by the County Court Judge, acting under the County Court Order XII. r. 1, upon the *ex parte* application of the plaintiff in an administration suit against the rightful administrator of the intestate and the executor *de son tort*, but before any decree had been made in the suit:—Held, on appeal, that Order XII. r. 1, gave no authority to the County Court Judge to grant the injunction, and that he was wrong in granting it on an *ex parte* application. Order of injunction accordingly discharged. *Nokes v. Gandy*, 43 Law J. Rep. (N.S.) Chanc. 276; Law Rep. 17 Eq. 297.

11.—The jurisdiction in equity conferred by the County Courts Equitable Jurisdiction Act, section 1, extends to the assignees, whether by act of law or for value, of the various classes of suitors specified therein. *Turner v. Renmoldson*, 42 Law J. Rep. (N.S.) Chanc. 510; Law Rep. 16 Eq. 37.

#### (c) Admiralty jurisdiction.

12.—A County Court, to which Admiralty jurisdiction is given by 31 & 32 Vict. c. 71, has

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Admiralty jurisdiction over a claim not exceeding 300*l.* for damages for negligence causing a collision between a barge of the defendant and a ship of the plaintiff in a river within the body of a county forming part of its district. *Purkis v. Flower*, 43 Law J. Rep. (N.S.) Q. B. 33; Law Rep. 9 Q. B. 114.

13.—By the Admiralty Act, 1861 (24 & 25 Vict. c. 10), s. 5, the High Court of Admiralty shall have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales. By 31 & 32 Vict. c. 71, s. 3, sub-section 2, any County Court having Admiralty jurisdiction shall have jurisdiction over necessities up to 150*l.* A suit for necessities was instituted in a County Court under the last section, and the plaintiff obtained judgment. After judgment an application was made for a new trial, on the ground that at the time of the institution of the suit the shipowner was domiciled in England. The County Court Judge refused to interfere:—Held, that a prohibition could not be granted, as upon the construction of the Admiralty Act, 1861, section 5, the objection to the jurisdiction of the County Court ought to have been made before judgment, and could not be taken afterwards. *Ex parte Michael*, 41 Law J. Rep. (N.S.) Q. B. 349.

14.—The County Court Acts, 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, do not give a County Court appointed to have Admiralty jurisdiction under those statutes a jurisdiction which the High Court of Admiralty never possessed; therefore such County Court has no jurisdiction to entertain a suit for damages for breach of a charter-party. *In re the Madge Wildfire, Simpson v. Blues*, 41 Law J. Rep. (N.S.) C. P. 121; Law Rep. 7 C. P. 290.

15.—If, in an action in a superior Court on a charter-party for freight or demurrage, the plaintiff claims and recovers a sum greater than 20*l.* and less than 300*l.*, he is entitled to costs; for over such causes, 31 & 32 Vict. c. 71, and 32 & 33 Vict. c. 51, s. 2, confer no jurisdiction on a County Court appointed to have Admiralty jurisdiction. The last case approved. *Gunnsted v. Price*, and *Fulmore v. Wait*, 44 Law J. Rep. (N.S.) Exch. 44; Law Rep. 10 Exch. 65.

[And see ADMIRALTY, 7-11.]

(d) *Jurisdiction in Probate.*

16.—In estimating the value of the real estate to which a deceased was entitled at the time of his death for the purpose of deciding whether the County Court has jurisdiction, charges upon such estate cannot be taken into consideration. *Davies v. Brecknell*, 40 Law J. Rep. (N.S.) P. & M. 15; Law Rep. 2 P. & D. 177.

If the estate be of the value of 300*l.*, but the value of the deceased's interest in it is reduced by mortgage to less than 300*l.*, the County Court has no jurisdiction. *Ibid.*

(e) *Jurisdiction in Bankruptcy.*

17.—H., who was a debtor to the estate of C., a bankrupt, seized in the Vice-Admiralty Court at Sierra Leone, a vessel which formed part of the bankrupt's estate, for a debt claimed to be due to him for necessities supplied to such ship, and thereupon the trustee in bankruptcy of C. obtained an interim injunction from the County Court of Manchester, in which C.'s bankruptcy proceedings had been instituted, to restrain H. from prosecuting his suit in the Vice-Admiralty Court at Sierra Leone, and pending the continuance of such injunction, issues were directed by the Judge of such County Court to be tried before him, as to whether H. had a lien on such ship for necessities. Upon an application by H. for a prohibition to prohibit such County Court proceedings,—Held, that the County Court Judge had jurisdiction under section 72 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), to grant the injunction and to try such issues, if he deemed it expedient to do so for the purpose of doing complete justice or making a complete distribution of the bankrupt's property, and that if such Court was improperly exercising its jurisdiction in the matter, the remedy of H. was by appeal to the Court of Appeal in Bankruptcy. *Halliday v. Harris*, 43 Law J. Rep. (N.S.) C. P. 350; Law Rep. 9 C. P. 668.

*Bankruptcy: composition: jurisdiction of County Court Judge to declare securities forfeited.* [See BANKRUPTCY, M 9.]

(B) TRANSFER OF ACTION OR SUIT.

(a) *To superior Court.*

18.—A plaint was instituted in the County Court for the administration of the estate of a testator, alleging (as the plaintiffs then believed to be the fact) that the estate was worth less than 500*l.* Previous to the hearing, notice was given by the defendant to the plaintiffs that the estate was worth more than 500*l.*, and at the hearing this was proved to be the case. The Judge made an order transferring the suit to the Court of Chancery:—Held, that he was right in so doing. *Birks v. Silverwood*, 41 Law J. Rep. (N.S.) Chanc. 638; Law Rep. 14 Eq. 101.

A County Court plaint alleged that the subject matter of the suit was less than 500*l.* in value, but upon the suit coming on for hearing it was proved that the value exceeded 500*l.*, whereupon the County Court Judge, acting under section 14 of the County Courts Act, 1867, dismissed the plaint with costs. Upon appeal:—Held (reversing the decision of the County Court Judge), that he ought to have directed the suit to be transferred to the Court of Chancery, under section 9 of the County Courts Act, 1865. Section 14 of the Act of 1867 applies only to actions and suits relating to matters over which the County Courts have no jurisdiction. *Thomson v. Flinn* (43 Law J. Rep. (N.S.) Chanc. 256; Law Rep. 17 Eq. 415. *Birks v. Silverwood*, 41 Law J. Rep. (N.S.) Chanc. 638; Law Rep. 14 Eq. 101) observed upon. *Ibid.*



(b) *To adjoining district.*

**19.**—Where a redemption suit was commenced in the Court of Chancery against the registrar of the County Court, within the jurisdiction of which the property dealt with by the suit lay,—Held, that an order might properly be made under 30 & 31 Vict. c. 142, s. 8, to transfer the suit to the County Court of the adjoining district; the word “action” in section 21 of 19 & 20 Vict. c. 108 includes suit. *Linford v. Gudgeon*, 40 Law J. Rep. (N.S.) Chanc. 514; Law Rep. 6 Chanc. 359.

## (C) NEW TRIAL.

**20.**—By the County Court rule 104, notice to try a case by a jury (under 9 & 10 Vict. c. 95, ss. 70, 71) is to be given “three clear days before the day of hearing;” and by rule 105, where the notice has not been given in due time, or if at the hearing both parties desire to try by jury, the Judge may, on such terms as he shall think fit, adjourn the cause, &c. A cause was ordered to be tried in a County Court, and the 18th of February was appointed for the hearing. The defendant posted a demand for a jury which did not arrive three days before the 18th, and on the 16th made a fresh demand. On the 18th, the case, on account of the non-attendance of the defendant’s counsel, was adjourned by consent till the 19th of March; and on that day, no jury having been summoned, the case was tried without a jury in spite of the defendant’s protest, and the plaintiff obtained a verdict:—Held, that the defendant was not entitled to a new trial, for “the day of hearing” meant the day originally fixed for hearing, so that the demand for a jury was too late, and that the adjournment did not aid, as it was not an adjournment ordered by the Judge in the exercise of his discretion, for the purpose of allowing a jury to be summoned. *Fletcher v. Baker*, 43 Law J. Rep. (N.S.) Q. B. 112; Law Rep. 9 Q. B. 370.

## (D) INTERPLEADER.

**21.**—The plaintiff having claimed goods, seized under an execution from a County Court, an interpleader summons issued under section 31 of the County Court Act, 1867, and the plaintiff gave particulars, but did not therein claim damages as directed by Rule 175. His claim to the goods was adjudicated upon by the County Court Judge, who made an order which was in the plaintiff’s favour with respect to part of the goods. An action being subsequently brought by the plaintiff in the Court of Exchequer against the execution creditor for special damages resulting from the seizure of the goods,—Held, that the claim of damages should have been made at the time and in the manner prescribed by the above Act and Rule, and that the order of the County Court Judge being “final and conclusive,” the action could not be maintained. *Death v. Harrison*, 40 Law J. Rep. (N.S.) Exch. 26; Law Rep. 6 Exch. 15.

**22.**—Judgment having been recovered in the County Court by the plaintiff against the proprietor of a large hotel for a debt of trifling

amount, execution was issued by warrant to the bailiff, who levied at the hotel by a formal seizure of the goods and money therein. A claim was made by the defendant to the property seized, whereupon an interpleader summons was taken out, and he gave particulars claiming “the goods and money seized by virtue of the warrant,” upon the ground that they were his property, having been purchased by him from one M. on the 1st of July, and at the time of the seizure being in possession of the claimant, and never having been the property of the debtor. The Judge deeming these particulars to be insufficient to satisfy the requirements of Rule 174 of the County Court Rules, 1867, whereby the claimant must, five clear days before the hearing of the interpleader summons, leave with the registrar a particular of the goods alleged to be his property, and also the grounds of his claim, refused to hear the claim. A rule having been obtained to compel him to do so,—Held (per Kelly, C.B., and Amphlett, B.), that the particulars were all that could be given, and that he was wrong. (Per Bramwell, B., and Cleasby, B.), that they were insufficient, and that he was right. *Richardson v. Wright*, 44 Law J. Rep. (N.S.) Exch. 230; Law Rep. 10 Exch. 367.

## (E) APPEAL.

*Practice on appeals in Equity.* [See PRACTICE IN EQUITY, 34, 35.]

*Practice on Admiralty appeals.* [See ADMIRALTY, 5, 25, 26.]

(a) *Case on appeal.*

**23.**—A County Court Judge having tried an action for malicious prosecution, ruled that the facts proved did not shew reasonable or probable cause justifying the defendant. The defendant having appealed on the ground that there was reasonable or probable cause, the Judge stated a case, in which he epitomised the evidence, saying, “the above statement gives the result of the evidence so far as is material for the determination of the questions raised for the Court of Appeal.” The defendant having obtained a rule under 19 & 20 Vict. c. 108, s. 43, calling on the Judge to set out the evidence so far as material to the question of reasonable or probable cause, this Court made the rule absolute without costs, holding that it was not enough for the Judge to state the result of the evidence, but that he ought to set out the evidence itself, in the same manner as a Judge of a superior Court would do in a case requiring the like particularity. *Thornevell v. Wigner*, 40 Law J. Rep. (N.S.) Exch. 48; Law Rep. 6 Exch. 87.

**24.**—At the hearing of a plaint before a County Court Judge he consulted the plaintiff, who gave due notice of appeal and deposited the amount fixed by the registrar who gave a receipt for it to the plaintiff, stating it to be received to abide the event of the appeal. The parties could not agree on a statement of facts, and the plaintiff applied to the Judge to settle and sign the case, but the Judge refused on the ground that no memorandum of the deposit with the conditions

on which it was deposited was approved by the registrar, left with him and signed by the party or his attorney in accordance with 19 & 20 Vict. c. 208, s. 71:—Held, that the statute had been substantially complied with, and upon the authority of *Griffin v. Colman* (28 Law J. Rep. (n.s.) Exch. 134), that the giving of such memorandum was not a condition precedent to the right to appeal. *Walters v. Coghlan*, 42 Law J. Rep. (n.s.) Q. B. 20; Law Rep. 8 Q. B. 61.

(b) *Notice of appeal.*

25.—Semble, notice of appeal against the determination of the Judge in a plaint in the County Court is in time where a nonsuit was entered at the trial, and an application to set aside the nonsuit afterwards refused, if it be given within ten days after the refusal to set aside the nonsuit. *Hemming v. Blanton*, 42 Law J. Rep. (n.s.) C. P. 158.

(c) *Time for giving security.*

26.—Notice of appeal from the decision of a County Court was duly given, and the registrar fixed a day for the execution of the bond by the appellants and the sureties. Upon the appointed day two of the three appellants attended before the registrar, but the sureties were not present, nor had the bond been prepared. The bond was subsequently prepared, and was executed by all the necessary parties but one, six days after the day originally fixed, and by that one seven days after that day. The respondent never waived the delay in the execution of the bond:—Held, that the requisite security had not been given by the appellants in due time, and that the appeal could not be heard by this Court. *Dowdeswell v. Francis*, 43 Law J. Rep. (n.s.) C. P. 248; Law Rep. 9 C. P. 423.

(d) *Death of respondent.*

27.—If, on an appeal from a County Court, the respondent die before the appeal be heard, the appellant will be allowed to proceed with his appeal on giving notice thereof to the representatives of the deceased respondent, or if no such notice can be given, upon giving notice to the parties interested. *Hemming v. Williams*, 40 Law J. Rep. (n.s.) C. P. 270; Law Rep. 6 C. P. 480.

(e) *Costs.*

*Rule as to plaintiff's costs.* [See Costs AT LAW, 1—8.]

*Costs of appeal in Equity.* [See Costs IN EQUITY, 14.]

*Costs of party suing in Chancery for sum within County Court limit.* [See Costs IN EQUITY, 50.]

(F) OFFICERS OF THE COURT.

*Suits against.* [See *supra* Nos. 7, 19.]

COUNTY DEBENTURES.

[Amendment of the law relating to securities for loans contracted by county authorities. 36 & 37 Vict. c. 35.]

COUNTY JUSTICES.

[Repeal of the disqualification of attorneys, solicitors, and proctors from being Justices of the peace. 34 & 35 Vict. c. 18.]

COUNTY PROPERTY.

[The above Act amended and applied to certain lands acquired by county Justices. Directions as to conveyance to the county clerk of the peace of lands purchased under 16 & 17 Vict. c. 97 (Lunatic Asylums). 34 & 35 Vict. c. 14.]

COURTS OF JUSTICE (SALARIES AND FUNDS) ACT, 1869.

[See CONTEMPT.]

COVENANT.

[See LANDLORD AND TENANT.]

(A) COVENANT IN RESTRAINT OF TRADE.

(B) COVENANT TO SETTLE PROPERTY, ETC.

(C) COVENANTS FOR TITLE AND QUIET ENJOYMENT.

(a) *Mine: damage by working: appointee.*

(b) *Lease for lives.*

(c) *Notice of restrictive covenant.*

(D) COVENANT TO PAY PREMIUMS ON POLICY.

(E) LIMITATION OF COVENANT IN TERMS GENERAL.

(A) COVENANT IN RESTRAINT OF TRADE.

1.—The traveller for a porter, ale, and spirit merchant bound himself by a bond not to "travel for any porter, ale, or spirit merchant, as agent, collector, or otherwise," within a certain distance of the town where the merchant carried on his business. The traveller travelled within the distance as agent and collector for a firm of brewers in the same town, who brewed and sold only beer, ale, and porter, and sold no liquor but of their own manufacture:—Held, that the brewers were not porter, ale, or spirit merchants within the meaning of the bond. *Josselyn v. Parson*, 41 Law J. Rep. (n.s.) Exch. 60; Law Rep. 7 Exch. 127.

2.—In determining whether there has been a branch of a covenant entered into by the assignor of a lease of premises, used for a particular business, "that he would not be concerned in that business within a certain distance of the assigned premises," the distance is not to be measured along the nearest practicable route between the two places of business, but along the shortest straight line that can be drawn from one to the other as on a map, without regard to the curvature or the inequalities of the surface of the earth,—affirming the judgment below, 41 Law J. Rep.

(n.s.) Exch. 28; Law Rep. 7 Exch. 127. *Moufflet v. Cole* (Exch. Ch.), 42 Law J. Rep. (n.s.) Exch. 8; Law Rep. 8 Exch. 32.

3.—The defendant entered into a covenant that he should not, at any time within two years from quitting Messrs. A. & Son's service, directly or indirectly sell, procure orders for the sale, or recommend, or be in anywise concerned or engaged in the sale or recommendation, either on his own account or for any other person or persons or any company, of any Burton ale, or beer or porter, or of any ale, beer or porter brewed at Burton, or offered for sale as such, other than the ale or beer or porter brewed by the firm:—Held, that the covenant went beyond anything that could be reasonably required for the plaintiffs' protection, and was inoperative independently of any absolute rule requiring a limitation of area. *Allopp v. Wheatcroft*, 42 Law J. Rep. (n.s.) Chanc. 12; Law Rep. 15 Eq. 59.

Semble—the want of such limitation would have avoided the covenant. *Ibid.*

The defendant having broken his express contract, was allowed no costs. *Ibid.*

4.—A covenant by an articulated clerk that he would not, at the expiration of the term of his articles, or at any time thereafter, either solely or jointly, directly or indirectly practise as a solicitor within the city of London or the counties of Middlesex or Essex, or directly or indirectly act for any client of the plaintiff or any partner of his, or for any person who should have been a client of the plaintiff or any partner of his at any time during the term of the articles, —Held, not unreasonable. *May v. O'Neill*, 44 Law J. Rep. (n.s.) Chanc. 660.

#### (B) COVENANT TO SETTLE PROPERTY, ETC.

*Covenant to settle on marriage.* [See MARRIAGE SETTLEMENT, 1, 2.]

*Covenants in settlements to settle after-acquired property.* [See MARRIAGE SETTLEMENT, 16—23.]

*Covenant for payment of annuity.* [See ANNUITY, 13, 14.]

#### (C) COVENANTS FOR TITLE AND QUIET ENJOYMENT.

##### (a) *Mine: damage by working.*

5.—The defendant being seised in fee of land and coal beneath it, in 1844 let the coal, by a written agreement, to lessees for a term of twenty-five years, with power to enter and work and carry away the coal across the land, and all other powers fit and necessary for the working and carrying. The lessees entered and worked and carried away coal, and after they had ceased, the defendant, in 1845, conveyed by deed a portion of the land to J., a purchaser, who had previously been through the workings, but was not shewn to have any knowledge of the agreement or its terms. By the deed the defendant covenanted with J., his appointees, heirs and assigns for title, for quiet enjoyment, and against incumbrances. In 1846 J. appointed the portion of land to the plaintiff,

a purchaser, who afterwards built houses thereon, and who had no knowledge of the workings until the land and houses subsided, in 1865. The subsidence was caused by the workings which had been carried on before the conveyance to J. In 1848 the lessees entered the mine and took fire-clay, which they had no right to take, and also fragments of coal of nominal value, but these acts did not contribute to cause the subsidence. In 1867 the plaintiff, as appointee of J., sued the defendant on the covenants, the declaration alleging as breaches of the covenants for title and quiet enjoyment, that, after the plaintiff became seised, the lessees entered and worked, whereby the damage was caused:—Held, that the benefit of the covenants passed to the plaintiff as appointee. Held also, that the variance between the declaration and the proof as to the time of working was fatal. *Spoor v. Green*, 43 Law J. Rep. (n.s.) Exch. 57; Law Rep. 9 Exch. 99.

Held also, per Bramwell, B., and Cleasby, B. (*dissentiente Kelly, C.B.*), that, as to the covenant for title, there was no breach, since J. had bought with notice of the workings, and the plaintiff must be taken to have bought the land without the coal; but that, even if the agreement constituted a breach, the cause of action was complete in J., and the plaintiff could not sue upon it; that the subsistence of the agreement during the plaintiff's possession was not a breach of the covenant against incumbrances, because, although the agreement gave the lessees the privilege of doing certain things upon the surface of the plaintiff's land necessary for the working the colliery, yet it did not appear that any such thing was or could be necessary to be done; that the covenant for quiet enjoyment was not broken by the acts of the lessees in 1848; and that the action was not maintainable. *Ibid.*

Held also, per Bramwell, B., that, assuming the agreement to be a breach of the covenant for title, it was not a continuing breach, and that the action was barred by the Statute of Limitations. Contra, per Kelly, C.B., that the true cause of action was the subsidence, and that the Statute of Limitations was no bar, and that the plaintiff, therefore, would, but for the variance, be entitled to the damages caused by the subsidence; also, that so long as the agreement subsisted, there was a continuing breach, which rendered the land of less value; and that the acts of the lessees in 1848 constituted a breach of the covenant for quiet enjoyment; and that the plaintiff was entitled to nominal damages. *Ibid.*

##### (b) *Lease for lives.*

6.—The defendant assigned by deed a lease for the lives of W., J., and H., to hold for the lives of W., J., and H., and the survivors and survivor of them, and covenanted that the lease "was a good, valid, and subsisting lease in the law for the lives of W., J., and H., and the survivors and survivor of them, and was not forfeited, surrendered, or become void or voidable." It was proved that J. had died before the making of the deed:—Held, by the Exchequer Chamber, affirming the decision

of the Queen's Bench (40 Law J. Rep. (N.S.) Q. B. 157; Law Rep. 6 Q. B. 469), that there was no breach of the covenant, as the defendant only undertook that the lease was subsisting, and not that the three lives were in existence at the date of the covenant. *Coates v. Collins*, 41 Law J. Rep. (N.S.) Q. B. 90; Law Rep. 7 Q. B. 144.

(c) *Notice of restrictive covenant.*

7.—In a conveyance in fee of land to the defendant he covenanted with the grantor not to permit any part of the premises to be used for selling beer. The defendant afterwards granted a lease of part of the land, with covenants by the lessee not to carry on certain trades, but not mentioning that of a seller of beer, and with the usual covenant by the lessor for quiet enjoyment. The term was assigned to the plaintiff, who having no notice of the defendant's restrictive covenant used the premises as a beershop, and being restrained by injunction in Chancery, at the suit of the vendor of the fee, sued the defendant for breach of the express covenant, for quiet enjoyment, and also for breach of a covenant for title alleged to be implied from the terms of the lease:—Held (affirming the judgment of the Court of Queen's Bench), that the covenant for quiet enjoyment excluded any implication of such an implied covenant, and that there had been no breach of the former covenant, as it did not guarantee to the tenant that he might lawfully use the land for any purpose not included in the restrictions in the lease. *Spencer v. Marriott* (1 B. & C. 457; 2 Dowl. & Ry. 665) affirmed. *Denmett v. Atherton*, 41 Law J. Rep. (N.S.) Q. B. 165; Law Rep. 7 Q. B. 316.

*Quiet enjoyment; lessee and sub-lessee of theatre: trespass.* [See TRESPASS, 1.]

*Covenant for further assurance: specialty debt.* [See ADMINISTRATION, 11.]

*Implied covenant on sale of business.* [See VENDOR AND PURCHASER, 11.]

(D) COVENANT TO PAY PREMIUMS ON POLICY.

8.—Where there is a covenant to pay the premiums on a policy of assurance in an assurance company, and the company has been ordered to be wound up since the date of the covenant, the covenantee has no equity to sustain a bill praying that the amount of the premiums may in future be paid to him. *Garniss v. Heinke*, 40 Law J. Rep. (N.S.) Chanc. 306.

(E) LIMITATION OF COVENANT IN TERMS GENERAL.

9.—The Taff Vale Railway obtained a lease from the trustees of the Bute Docks at Cardiff, of land which they required for the purposes of their railway. The lease was for 250 years. With a view to securing that the proposed railway should not be used so as to take custom from the docks in which they were interested, the trustees inserted a covenant in the lease, on the part of the railway, that the company, so far as they were able, should cause all minerals which should be conveyed upon

their line, or any part or branch of it, for shipment, to be shipped into vessels in the Bute Ship Canal (West Bute Dock), or in some basin or cut thereto belonging. Also, that when any minerals, &c., which should have been conveyed along the Taff Vale Railway, or any part or branch thereof, should be shipped into any vessel in any dock or basin whatsoever other than the said Bute Ship Canal (West Bute Dock), or in some dock, basin or cut belonging thereto, the Taff Vale Railway Company should pay to the owners of the said Bute Ship Canal for the time being the same wharfage dues in respect of such minerals as would have been payable for the same if such minerals had been shipped at the said Bute Ship Canal. After the line of railway had been constructed on the land so leased to the Taff Vale Railway Company, the company took a lease of another line (the Penarth Railway) which terminated at Penarth Docks on the south-west side of the river Ely, the Bute Docks being on the north-east side of that river. The Penarth Docks and the Penarth Railway were one concern; the whole was leased by the Taff Vale Railway Company. The two were connected at a station on the Taff Vale Railway:—Held, that the Penarth Railway was not a part or branch of the Taff Vale Railway; that the words in the covenant, "any dock or basin whatsoever," must be controlled by some limitation, and so controlled, the covenant must be confined to any dock or basin in connection with the Taff Vale Railway, or some part or branch of it, terminating in or at a dock or basin, and that as the Penarth Railway was not a part or branch of the Taff Vale Railway, the covenant did not apply to minerals shipped or unshipped at Penarth Harbour, though they were carried for a certain distance along the Taff Vale Railway. *The Taff Vale Railway Company v. Macnabb* (H. L.), 42 Law J. Rep. (N.S.) Q. B. 153; Law Rep. 6 E. & I. App. 169.

*Covenants as to working mines.* [See MINES, 8, 10.]

*Covenant in lease to use premises as a post office.* [See LEASE, 18.]

*Covenant by railway company to stop passenger trains at refreshment rooms.* [See RAILWAY COMPANY, 11.]

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CRIMINAL INFORMATION.

[See LIBEL.]

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CRIMINAL LUNATIC.

[See LUNATIC.]

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CROWN.

A Crown lessee of minerals under a Crown manor entered a farm within the manor and opened the surface in search of minerals. The occupier of

the farm brought an action of trespass to the land in this Court against the lessee. The Crown undertook to defend the action, and afterwards filed an English information and bill in this Court against the occupier and the copyhold tenant of the farm. The bill alleged that the Queen in right of her Crown was entitled as lady of the manor to search for and win, and to grant to others the right to search for and win, minerals within the manor, and had granted this right to the lessee; the bill then prayed that those rights might be declared:—Held, that the Crown, by virtue of its prerogative, was entitled to maintain this bill, and that since the bill would determine all the questions raised in the action, the occupier of the farm must be restrained from proceeding with the action till the hearing of the bill. *The Attorney-General v. Barker*, 41 Law J. Rep. (n.s.) Exch. 57; Law Rep. 7 Exch. 177.

*Power to make foreclosure decree against Crown.* [See MORTGAGE, 43.]

### CROWN LANDS.

[10 Geo. 4. c. 50. extended to the granting of mining leases. 36 & 37 Vict. c. 36.]

1.—The Crown Lands Alienation Act, 1861 (Colonial statute), by section 18 provides, "that at expiration of three years from the date of conditional purchase, &c., the balance of the purchase money shall be tendered, together with a declaration that such land has been from the date of occupation the *bonâ fide* residence, either of the original purchaser or of his alienee, &c., and a grant of the fee simple, &c., shall be made to the then rightful owner." The respondent entered into an agreement with the appellant to purchase for the appellant certain land under the above Act, and to fulfil all the conditions required by the Act, and to transfer the land to the appellant. The appellant advanced all the moneys required, and the respondent fulfilled all the conditions of the Act, but refused to transfer the land to the appellant on the ground that the agreement was contrary to the policy of the Act:—Held, that the agreement was not contrary to the policy of the Act, and that the respondent must be decreed to be trustee of the land for the appellant. *Barton v. Muir*, 44 Law J. Rep. (n.s.) P. C. 19; Law Rep. 6 P. C. 134.

2.—Lessees under the Victoria Land Acts, who have obtained a certificate under the Transfer of Land Act, 1866, and performed all obligations under their leases, including the obligation to improve under section 36 of the Land Act, 1862, and have not incurred any penalty, are entitled to grants in fee of their allotments without obtaining a certificate from the Board of Land and Works Act, under section 98 of the Land Act, 1869. The last-named section applies only to cases where a penalty has been incurred. *Winter v. The Attorney-General of Victoria*, Law Rep. 6 P. C. 378.

3.—By section 36 of the Crown Lands Occupation Act of 1861 (25 Vict. No. 2, New South

Wales), "The Governor, with the advice of the Executive Council, may make and proclaim regulations for carrying this Act into full effect, so as to provide for all proceedings, forms of leases and other instruments." By regulation 28, made in pursuance of this power, "Holders of Runs, of which the leases have not issued, may have their rights of lease transferred by an application addressed to the Chief Commissioner of Crown Lands," and "on such application being recorded, the applicant will be debarred from all further claim to the lease, the right to which will thenceforth become vested in the transferee:—Held, that the Governor had authority under the above statute to make the above regulation, and that such regulation was reasonable and valid. *Blackwood v. The London Chartered Bank of Australia*, 43 Law J. Rep. (n.s.) P. C. 25; Law Rep. 5 P. C. 92.

G., the holder of a run of which the lease had not been issued, being indebted to the appellants, delivered to them an application for transfer of their interest in the run. This application was not recorded. G. afterwards being indebted to the respondents, signed and delivered to them an application for transfer of their interest in the run. This application was recorded, and a lease was granted to the respondents:—Held, that the respondents had prior title to the lease. *Ibid.*

### CRUELTY TO ANIMALS.

[See ANIMALS.]

### CUSTOM.

[See COMMON.]

In order to establish a custom in a trade controlling the meaning of words, it must be shewn that the words are used in that trade, and are understood in a defined sense; and a habit of affixing a special meaning to words when used in one class of contracts, does not amount to a custom in the trade. *Abbott v. Bates*, 43 Law J. Rep. (n.s.) C. P. 150: affirmed, on appeal, 45 Law J. Rep. (n.s.) C. P. 117.

By articles of apprenticeship, which were in a common form, the defendant, who was a horse-trainer, agreed during the term of five years to instruct the plaintiff to pay him wages, and to provide him with meat, drink, lodging and all other necessaries. The plaintiff having sued for wages, the defendant alleged a set-off for clothing and washing supplied to the plaintiff, and relied upon a supposed custom in the trade of horse-trainers, whereby clothing and washing were not considered necessaries for apprentices. The evidence in support of the alleged custom shewed that horse-trainers were in the habit of deducting the costs of clothing and washing supplied to the articulated apprentices from the wages payable to them. There was no evidence of any other usage in the trade as to the meaning of the word "necessaries:—Held, that the

defendant had not proved the existence of a custom in the trade of horse-trainers as to the meaning of the word "necessaries;" that the word in the articles of apprenticeship was used in its ordinary sense; that the defendant was bound during the term of apprenticeship to supply the plaintiff with clothing and washing, and that the defence of set-off failed. *Ibid.*

*Evidence of.* [See CONTRACT, 35.]

*Custom of wine trade: goods in bonded warehouse.* [See BANKRUPTCY, G 7, 8.]

*Usage of trade or market, how far binding on principal of broker or agent.* [See BROKER, 2; PRINCIPAL AND AGENT, 1.]

*Evidence of custom of trade.* [See EVIDENCE, 5; CONTRACT, 35.]

*Evidence of custom making principal liable.* [See PRINCIPAL AND AGENT, 2, 3.]

*Custom to obstruct highway.* [See HIGHWAY, 11.]

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## CUSTOMS.

[See REVENUE, A.]

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## CY-PRÈS.

[See POWER, 11; CHARITY, 19-22.]

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## DAMAGES.

- (A) WHEN RECOVERABLE: LIQUIDATED DAMAGES OR PENALTY.
- (B) MEASURE AND CRITERION OF.
  - (a) *Sale of realty: defect of title.*
  - (b) *Default in delivery of goods.*
  - (c) *Contract of indemnity against breaches of covenant.*
  - (d) *Breach of covenant to repair.*
  - (e) *In other cases.*
  - (f) *Reduction of damages.*
- (C) REMOTENESS OF DAMAGE.
- (D) SPECIAL DAMAGE.
- (E) IN SUIT FOR INJUNCTION.

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### (A) WHEN RECOVERABLE: LIQUIDATED DAMAGES OR PENALTY.

1.—Where under an agreement money is paid to a stakeholder, and it is stipulated that on breach of any part of the agreement by one party, the sum deposited is to go to the other party, such sum is liquidated damages and not a penalty. *Lea v. Whittaker*, Law Rep. 8 C. P. 70.

2.—The plaintiff, having contracted to supply iron rails to a foreign company, applied to the defendants who wrote him—"We have this day sold you about 5,413 tons of iron rails . . . . . delivered f. o. b. at Newport. Payment to be

stated in the specification." By the specification "the delivery of the rails is to commence by the 15th of February, 1873, and to be completed by the 15th of April, 1873. The makers to have the option to begin delivery on the 15th of December, 1872. In the event of the makers exceeding the time of delivery above stipulated, they shall pay by way of fine 7s. 6d. per ton per week, this amount to be deducted out of the payment for the rails." The rails were to be stacked so that they might be tested, and payment to be made by bills. In the event of ships not being ready within fourteen days' notice being given, then the payment by the same bills was to be made against wharf warrants and engineer's certificate for each 500 tons stacked, and being to buyer's orders. The sellers undertaking to put f. o. b. when the vessel is ready. The workmen in the employ of the defendants struck work, and the defendants did not deliver any rails until the month of May. They continued the delivery from time to time, but the whole quantity was not delivered until the month of September:—Held, that the sum of 7s. 6d. per ton per week was a liquidated sum which the defendants were bound to pay to the plaintiff, but that it was only to be calculated from the 15th of May. *Bergheim v. The Blaenavon, &c., Company*, 44 Law J. Rep. (N.S.) Q. B. 92; Law Rep. 10 Q. B. 319.

*Proof for damages in bankruptcy.* [See BANKRUPTCY, E 1-3.]

*None recoverable for expulsion of member of voluntary society.* [See ACTION, 4.]

### (B) MEASURE AND CRITERION OF.

(a) *Sale of realty: defect of title.*

3.—If one contracts to sell real estate and is unable to complete from want of title, whether he be aware of the defect at the time of entering into the contract and does not disclose it, or not, and even if he never had title nor possession, nor any right to possession, yet in the absence of fraud the intending purchaser cannot, in an action for breach of the contract, recover damages beyond his deposit with interest and costs. *Flureau v. Thornhill* (2 W. Bl. 1078) approved. *Bain v. Fothergill* (H. L.), 43 Law J. Rep. (N.S.) Exch. 243; Law Rep. 7 E. & I. App. 158: affirming the Court below as reported, 40 Law J. Rep. (N.S.) Exch. 34; Law Rep. 6 Exch. 59.

By Lord Chelmsford.—The rule is, without exception, if a person enters into a contract for the sale of real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred, by an action for the breach of the contract. He can only obtain other damages by an action for deceit. *Hopkins v. Grazebrook* (6 B. & C. 31) overruled. *Ibid.*

4.—The plaintiff was entitled to the residue of a lease of the Bell Inn, part of which had been underlet. The defendants became the assignees of the underlease and of a term of 100 years, the reversion of the lease. They had contracted for the purchase of the freehold and other premises,

all of which were shortly to be conveyed to them. The plaintiff agreed to surrender part of the premises in his lease, and the defendants agreed to grant to him a certain entrance which should be made upon the premises which the defendants had contracted to purchase, and which he was to enjoy during the residue of the term for which he held the Bell. The defendants also agreed within eight months to execute a lease of the entrance with a covenant for quiet enjoyment. The plaintiff carried out his agreement to the substantial advantage of the defendants, who also made the entrance and put the plaintiff into possession of it. The defendants *bonâ fide* believed that they had power to do all that they promised to do, but they were unable to give possession of the entrance to the plaintiff, inasmuch as part of the ground upon which it was made, turned out to be the property of other persons:—Held, that the plaintiff was entitled to maintain an action against the defendant for more than nominal damages, but that the rule of law laid down in *Flureau v. Thornhill* (2 Wm. Bl. 1078) did not apply to the case. *Wall v. The City of London Real Property Company*, 43 Law J. Rep. (N.S.) Q. B. 75; Law Rep. 9 Q. B. 249.

(b) *Default in delivery of goods.*

5.—The defendant contracted with the plaintiff to deliver to him a certain quantity of goods by instalments at several fixed times. Before the time for delivering the first instalment the defendant gave the plaintiff notice of repudiation. The plaintiff waited till the period had arrived for delivering the last instalment, and then bought in the market the same quantity of goods, and brought this action to recover the difference between the contract price and the price he had paid:—Held, that the plaintiff was not bound to buy, or make a similar contract elsewhere, when he received the notice, and that the true measure of damages was the aggregate of the differences between the contract price and the marked price at the several times fixed for delivery. *Brown v. Muller*, 41 Law J. Rep. (N.S.) Exch. 214; Law Rep. 7 Exch. 319.

6.—Where in the case of a contract for the sale of goods to be delivered during certain specified times, the vendee treats a repudiation of such contract by the vendor as a breach of the whole contract, and brings his action for such breach before the expiration of the time for its performance, the true measure of damages is the difference between the market and contract price on each of the times when the goods ought to have been delivered, and if the amount of such damages can be diminished, because at the time such repudiation was so treated as a breach, it was possible to have made another forward contract with some other person for the supply of the goods during the remainder of the times contracted for, it is for the vendor to shew that such other contract could have been made. *Roper v. Johnson*, 42 Law J. Rep. (N.S.) C. P. 65; Law Rep. 8 C. P. 167.

7.—Where there was a breach by a vendor of a contract by him to deliver iron by monthly instalments, and the vendees bought iron in the

market to supply the deficiency, but there was no evidence of forbearance by the vendees at the request of the vendor,—Held, distinguishing *Ogle v. Earl Vane*, that the vendees could prove in the liquidation of the vendor only for the differences between the contract price and the prices of the days when the instalments ought to have been but were not delivered. *Ex parte the Llansamlet Tin Plate Company; In re Voss*, Law Rep. 16 Eq. 155.

8.—The plaintiff purchased champagne lying at the defendants' wharf at 14s. per dozen, and resold to a ship's captain about to sail at 24s. The defendants refused to deliver the wine, and the plaintiff was unable to fulfil his contract, champagne of a similar quality not being procurable in the market. Although the defendants had no knowledge of the sale, or of the purpose for which the plaintiff required delivery of the champagne:—Held, that the plaintiff was entitled as damages to the price at which he sold the champagne. *France v. Gaudet*, 40 Law J. Rep. (N.S.) Q. B. 121; Law Rep. 6 Q. B. 199.

9.—A consignor, having a contract with his consignees for delivery to the consignees of certain goods by a particular day at an exceptional price, with power in the consignees to reject the goods and rescind the contract if not performed to the day, delivered to a railway company goods within the contract, in time for delivery to the consignees within the time mentioned in the contract, and at the time of delivery the company had notice that the consignor was under a contract to deliver by the time mentioned in the contract, and was liable, in case of late delivery, to have the goods thrown on his hands. The company did not deliver the goods till after the time stipulated in the contract, and the consignees refused to receive them:—Held, that the measure of damages to which the company were liable was the difference between the market price of the goods on the day when they ought to have been delivered and on the day on which they were delivered, and any incidental expenses to which the consignor may have been put in finding a customer and reselling the goods; but that the company, under the notice which they had received, were not liable to repay to the consignor the difference between the exceptional price mentioned in the contract and the price of resale. *Horn v. The Midland Railway Company*, 41 Law J. Rep. (N.S.) C. P. 264; Law Rep. 7 C. P. 583.

10.—The defendant, in January, 1872, agreed to furnish the plaintiffs with a quantity of sets of wheels and axles, according to tracings, to be delivered on certain specified days, free on board at Hull. The plaintiffs were under a contract with a Russian railway company to deliver them 1,000 covered waggons, 500 on the 1st of May, 1872, and 500 on the 31st of May, 1873, under a penalty of two roubles per waggon for each day's delay in delivery. In the course of the negotiations between the plaintiffs and the defendant, the defendant was told by the plaintiffs that they wanted the wheels and axles to complete waggons which they were bound to deliver under penalties, but neither the precise day for the delivery nor the

amount of the penalties was mentioned. The defendant did not deliver the sets of wheels in time, and the plaintiffs in consequence had to pay certain penalties, but the Russian company consented to take one rouble a day, amounting in the whole to 100*l.*:—Held, that though the plaintiffs were not entitled to recover in an action for breach of contract, as a matter of right, the amount of the penalties, yet the jury might reasonably assess the damages at that amount. *Die Elbinger Actien-Gesell.-Schaft für Fabrication von Eisenbahn Material v. Armstrong*, 43 Law J. Rep. (N.S.) Q. B. 211; Law Rep. 9 Q. B. 473.

11.—The plaintiffs in the beginning of the year 1871, contracted to supply, at 4*s.* a pair, a large quantity of shoes to H. & Co., who required them to fulfil a contract for the supply of the French army during the late war. The last day for delivery by the plaintiffs was the 3rd of February, 1872, and all shoes not so delivered would be thrown back on the plaintiffs' hands. The plaintiffs delivered a certain quantity of shoes to the defendants (the Midland Railway Company) at Kettering, consigned to H. & Co., in London, in time to be delivered on that day. Notice was given to the station master that the plaintiffs were under contract to deliver on that day, and if not so delivered the shoes would be thrown on the plaintiffs' hands, but no further information. The shoes were not delivered by the defendants till the morning of the next day, and were rejected. The plaintiffs, using their utmost endeavours, could only sell the rejected shoes at 2*s.* 9*d.* a pair, and in consequence of the cessation of the war the consignees, but for their French contract, could not have sold them at a higher price even if duly received. The defendants paid into Court 20*l.*, which was sufficient to cover the incidental expenses and the ordinary damages to which the plaintiffs would be entitled, but the latter claimed to be entitled to recover the difference between 4*s.* and 2*s.* 9*d.* a pair:—Held, by the majority of the Court of Exchequer Chamber, affirming the judgment of the Court of Common Pleas (41 Law J. Rep. (N.S.) C. P. 264; Law Rep. 7 C. P. 583), that the plaintiffs were not entitled to recover the said difference. *Horn v. The Midland Railway Company* (Exch. Ch.), 42 Law J. Rep. (N.S.) C. P. 59; Law Rep. 8 C. P. 131.

Whether the rule in *Hadley v. Baxendale* (23 Law J. Rep. (N.S.) Exch. 179; 9 Exch. Rep. 341) is law seems questionable. *Ibid.*

12.—The defendants contracted to deliver on a day certain goods of a particular quality, and at an agreed price, but failed to do so. The plaintiff, who was under a contract to ship the goods, endeavoured to procure goods of a similar quality, but was unable to do so as there was no market for them. He therefore bought at an advanced price goods of a superior quality, and passed them on to his subvendee, from whom he did not receive any extra payment on account of the extra quality, and it was admitted that this was a reasonable course and the best he could have taken under the circumstances. In an action for breach of contract in not delivering the goods,—Held, that the mea-

sure of damages was the difference between the contract price and the cost to the plaintiff of the goods purchased by him in substitution. *Hinde v. Liddell*, 44 Law J. Rep. (N.S.) Q. B. 105; Law Rep. 10 Q. B. 265.

(c) *Contract to indemnify against breaches of covenant.*

13.—In consideration of B. promising to assign to A. all his interest in an agreement by which B. held certain premises, A. undertook to indemnify B. against breaches of the covenants and conditions in the agreement. No assignment was executed, but A. entered and held possession of the premises till the expiration of B.'s term (letting them fall out of repair) when B. was sued by his landlord for dilapidations. After giving A. notice of the action, B. paid 30*l.* into Court, which the jury found to be enough:—Held, in an action brought by B. against A. on his promise to indemnify him, that a good consideration appeared for the promise, and that B. was entitled to recover as damages the extra costs necessarily incurred by him, over and above the taxed costs paid to him, in defending the former action. *Howard v. Lovegrove*, 40 Law J. Rep. (N.S.) Exch. 13; Law Rep. 6 Exch. 43.

(d) *Breach of covenant to repair.*

14.—The plaintiffs, who were lessees of certain premises, underlet them to the defendant by a lease, in which there was the usual general covenant by the lessee to repair. The defendant having neglected to repair according to his covenant, the plaintiffs entered and did the repairs themselves in order to save a forfeiture of their own lease, with which they had been threatened by their landlord, and then and during the continuance of the lease to the defendant, the term of which had not expired, sued the defendant for breach of such covenant to repair:—Held, that the plaintiffs could only recover nominal damages, since by having done the necessary repairs, they had at the time the action was brought sustained no injury to the reversion. *Williams v. Williams*, 43 Law J. Rep. (N.S.) C. P. 382; Law Rep. 9 C. P. 659.

*Measure of damages: landlord and tenant: covenant to repair.* [See LEASE, 11.]

(e) *In other cases.*

*Principle of assessing under Lord Campbell's Act.* [See CAMPBELL'S ACT.]

*Charterer compelled to pay increased freight and higher price for goods owing to shipowner's default.* [See SHIPPING LAW, E 4.]

*Damages for refusal to load cargo.* [See SHIPPING LAW, E 5.]

*For wrongful working of mines.* [See MINE, 6, 11-24.]

*Alternative contract.* [See CONTRACT, 19.]

(f) *Reduction of damages.*

15.—The damages in an action for negligence causing personal injury to the plaintiff are not



subject to any deduction therefrom of money paid to him by an insurance office under a policy of insurance against accident, as compensation for the same injury. *Bradburn v. The Great Western Railway Company*, 44 Law J. Rep. (n.s.) Exch. 9; Law Rep. 10 Exch. 1.

16.—When a breach of contract has been committed with the owner of a ship whereby he is prevented from employing her upon an adventure, the damages payable to him cannot be reduced on the ground that he has earned a profit by sending another ship upon the same adventure in place of the first-mentioned ship. *Jebben v. The East and West India Dock Company*, 44 Law J. Rep. (n.s.) C. P. 181; Law Rep. 10 C. P. 300.

In an action by several plaintiffs for breach of contract, the damages payable to them cannot be reduced upon the ground that individual plaintiffs have derived a profit from the breach. *Ibid.*

The plaintiffs were twelve in number, and were owners of a ship called the J.; by the defendants' default she became unable to fulfil a contract to carry 240 emigrants from B. to A. The defendants were aware of this contract; five of the plaintiffs were part-owners of a ship called the H., and five of them were part-owners of a ship called the O. 202 out of the 240 emigrants were carried to A. in the H., and 25 more in the O. The plaintiffs having sued to recover damages in respect of the loss happening to them through being prevented from carrying the 240 emigrants in the J., the defendants contended that the gain to individual plaintiffs from carrying the 202 emigrants in the H. and the 25 emigrants in the O. must be taken into account in mitigation of damages:—Held, that the damages could not be so reduced; first, because even if there had been but one owner of the J., and the same person had been sole owner of the H. and the O., the profits made by him as owner of the two latter could not be deducted from the damages sustained by him as owner of the former; and secondly, because the contention of the defendants was in substance an attempt to set off against joint damage a several benefit. *Ibid.*

#### (C) REMOTENESS OF DAMAGE.

17.—B., a carrier, having contracted with H. to carry his pictures to Paris, made a second contract (containing different stipulations) with a railway company that the company should carry them to Calais. The pictures having been injured on the journey through the negligence of the railway company, H. brought an action against B. for the damage, claiming 1,000*l.* The railway company being requested by B. to defend the action, refused, repudiated all liability, and told B. he must deal with the action as he thought fit. B. defended the action, and H. recovered against him a verdict of 650*l.* for the damage to the pictures. B. having sued the railway company to recover the costs he had paid and incurred in defending H.'s action,—Held (reversing the judgment of the Court of Exchequer), that the two contracts being different and independent, B. could not recover the costs, since they were neither the natural and

proximate consequence of the railway company's default, nor incurred at the request of the company or for their benefit. *Mors le Blanch v. Wilson* (42 Law J. Rep. (n.s.) C. P. 70; Law Rep. 8 C. P. 227, 232) overruled (*Lush, J., dissentiente*). *Bazen-dale v. The London, Chatham, and Dover Railway Company* (Exch. Ch.), 44 Law J. Rep. (n.s.) Exch. 20; Law Rep. 10 Exch. 35.

18.—Where the appellants had imposed restrictions upon the coal traffic of the respondent, which the Court found to be improper and unreasonable,—Held, that damages for loss of custom arising from such restriction were not too remote. *The Lancashire and Yorkshire Railway Company v. Gidlow*, Law Rep. 7 E. & L. App. 517.

19.—Through negligence of a railway company's servants, the plaintiffs and their two young children were taken to a wrong station, where they could not obtain either accommodation or a conveyance, and had to walk home several miles in the middle of a wet night. The female plaintiff caught cold and was laid up for some time, and was unable to help her husband in his business, and he had to pay for medical attendance and other things, rendered necessary by the illness of his wife. The plaintiffs having recovered damages, 10*l.* for the personal inconvenience suffered by them, and 20*l.* in respect of the wife's illness,—Held, that the plaintiffs could recover damages for the inconvenience to which they had been exposed, but not for the illness of the wife or its consequences, the damages from these being too remote, and not flowing immediately from the cause of action. *Hobbs v. The London and South-Western Railway Company*, 44 Law J. Rep. (n.s.) Q. B. 49; Law Rep. 10 Q. B. 111.

20.—The defendants having contracted to supply the plaintiff with a service pipe, from their main to the meter on his premises, laid down a defective pipe from which the gas escaped. A workman, in the employ of a gas fitter, engaged by the plaintiff to lay down pipes upon his premises, negligently took a lighted candle for the purpose of finding out whence the escape proceeded. An explosion then took place, whereby damage was occasioned to the plaintiff's premises, and the plaintiff thereupon brought an action to recover compensation from the defendants:—Held, affirming the judgment of the Court below (39 Law J. Rep. (n.s.) Exch. 33), that he was entitled to recover. *Burrows v. The March Gas and Coke Company* (Exch. Ch.), 41 Law J. Rep. (n.s.) Exch. 46; Law Rep. 7 Exch. 96.

21.—The defendant washed a van of his on the part of the street opposite his coach-house, and the water so used ran along the gutter by the side of the street for about seventy feet down to the corner of another street, where, meeting an obstruction, it accumulated and expanded over part of the roadway, instead of going as usual into the sewer, and there being a sharp frost at the time it shortly became frozen over. The cleaning a van in the street was an offence under the Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 54, sub-sect. 1, but the defendant was not shewn to have known of the obstruction at the corner, and if he had

cleaned the van in the coach-house the water would also have gone into the same gutter in the street :—Held, that the defendant was not liable to the plaintiff for damage caused to his horse by slipping whilst passing over the frozen water at the corner, as such damage was too remote, and was not the immediate and proximate cause of the defendant's act. *Sharp v. Powell*, 41 Law J. Rep. (n.s.) C. P. 95; Law Rep. 7 C. P. 253.

**22.**—In an action by an executor for injury to the personal estate of his testator by breach of contract whereby bodily harm was inflicted upon the testator,—Held, that damages given in respect of the loss of profit in the testator's business were not too remote. *Bradshaw v. The Lancashire and Yorkshire Railway Company*, 44 Law J. Rep. (n.s.) C. P. 148; Law Rep 10 C. P. 189.

#### (D) SPECIAL DAMAGE.

**23.**—The defendant in consideration of certain property transferred to him, agreed to accept the plaintiff's drafts :—Held, that this was a special contract, and that the plaintiff was not precluded from recovering as damage for breach of it more than the principal money contracted to be paid and interest. *Larios v. Bonany y Gurety*, Law Rep. 5 P. C. 346.

*In action of slander.* [See SLANDER, 2.]  
*Trover: special damage by loss of bargain.*  
 [See TROVER, 8.]

#### (E) IN SUIT FOR INJUNCTION.

**24.**—Where under the special circumstances of the case, a plaintiff, whose light and air had been interfered with by the defendant, was not entitled to a mandatory injunction,—Held, that the Court would direct an enquiry as to damages.—Observations upon *Aynsley v. Glover* (43 Law J. Rep. (n.s.) Chanc. 777; Law Rep. 18 Eq. 544). *Lady Stanley of Alderley v. Earl of Shrewsbury*, 44 Law J. Rep. (n.s.) Chanc. 389; Law Rep. 19 Eq. 616.

**25.**—Where a building obstructing the access of light has been completed before bill filed, the Court has jurisdiction under Lord Cairns' Act (21 & 22 Vict. c. 27) to award damages, notwithstanding the plaintiff may not have made out such a case as would entitle him to a mandatory injunction; and *Durell v. Pritchard* (35 Law J. Rep. (n.s.) Chanc. 223) is not an authority for the contrary proposition. *The City of London Brewery Company v. Tennant*, 43 Law J. Rep. (n.s.) Chanc. 457; Law Rep. 9 Chanc. 212; and *Holmes v. Upton*, Law Rep. 9 Chanc. 214, n.

[And see INJUNCTION, 37-40.]

### DEBTOR AND CREDITOR.

#### (A) ASSIGNMENT OF DEBT.

#### (B) SECURITY FOR DEBT.

(a) *Charge on sums to become due from creditor.*

(b) *Lien on policy.*

#### (C) PAYMENT.

(a) *Payment by stranger: ratification.*

(b) *Term of loan: option.*

(c) *Appropriation of payments.*

#### (D) DISCHARGE OF DEBT.

(a) *By release.*

(b) *By acceptance of new debtor.*

#### (E) INTEREST.

#### (F) FRAUDULENT DEBTOR.

#### (A) ASSIGNMENT OF DEBT.

**1.**—The assignment for a valuable consideration of a future or contingent debt is effectual to pass the property therein; and when the debt comes into existence, it is payable to the assignee of the original creditor. *Percy v. Clements*, 43 Law J. Rep. (n.s.) C. P. 155.

L. requested the plaintiff to supply him with wine, which he intended to sell to M., and it was agreed between L., M. and the plaintiff, for a valuable consideration given by the plaintiff to L., that if M. accepted the wine, the price of it should be paid to the plaintiff instead of L. The agreement was made in December, 1873, and the plaintiff accordingly supplied the wine, which was delivered to M., and accepted by him in January, 1874 :—Held, that although the debt did not exist at the time when the agreement was made, the property in the debt vested in the plaintiff, and that upon the acceptance of the wine by M. the price thereof became payable to the plaintiff instead of to L. *Ibid.*

#### (B) SECURITY FOR DEBT.

(a) *Charge on sums to become due from creditor.*

**2.**—A creditor may have by contract a good charge for his debt on sums to become due from himself to the debtor. *Ex parte Mackay and Brown*; *In re Jeavons*, 42 Law J. Rep. (n.s.) Chanc. 68; Law Rep. 8 Chanc. 643.

(b) *Lien on policy.*

**3.**—A debtor deposited a policy on his own life with a creditor, and afterwards became bankrupt. The creditor did not prove for his debt in the bankruptcy, and the debtor continued to pay the premiums on the policy until his death :—Held, that the debtor's executrix had a lien on the proceeds of the policy for the premiums paid by the debtor after his bankruptcy, with simple interest at 4l. per cent. *Shearman v. The British Empire Mutual Assurance Association*, 41 Law J. Rep. (n.s.) Chanc. 466; Law Rep. 14 Eq. 4.

#### (C) PAYMENT.

(a) *Payment by stranger: ratification.*

**4.**—Where a creditor accepts payment of a debt from a stranger without the authority of the debtor, it is competent to the creditor, on discovering the want of authority and before any ratification of the payment by the debtor, to undo the payment by returning the money to the stranger; and the debtor cannot in such a case ratify the

payment by placing a plea of payment on the record in an action brought against him for the amount by the creditor. *Walter v. James*, 40 Law J. Rep. (N.S.) Exch. 104; Law Rep. 6 Exch. 124.

(b) *Term of loan: option.*

5.—The plaintiff lent the defendants a sum of money "for a term of nine or six months." After six months from the date of the loan, but before nine months had expired, the plaintiff sued for the amount:—Held, that the option as to the time of repayment was with the borrower, and that as the credit had not expired when the action commenced, the plaintiff could not recover. *Reed v. The Kilburn Co-operative and Industrial Society (Lim.)*, 44 Law J. Rep. (N.S.) Q. B. 126; Law Rep. 10 Q. B. 264.

(c) *Appropriation of payments.*

*As between a company and its bankers.*  
[See COMPANY, D 29.]

[And see BILL OF EXCHANGE, 23–31; BANKER, 12, 13.]

(D) DISCHARGE OF DEBT.

(a) *By release.*

[See RELEASE.]

(b) *By acceptance of new debtor.*

[See cases collected under COMPANY, Amalgamation.]

(c) *By order of discharge in bankruptcy.*

[See BANKRUPTCY, I.]

(E) INTEREST.

6.—It is not necessary in order to enable a jury, under 3 & 4 Will. 4. c. 42, s. 28, to allow interest upon a debt not payable at a time certain, that the demand in writing should be of a specific sum, it is sufficient to satisfy that enactment that the demand be of what is due, with notice that the debtor is required to pay interest thereon. *Geake v. Ross*, 44 Law J. Rep. (N.S.) C. P. 315.

7.—Goods were delivered under a contract contained in a letter of the plaintiff, as follows:—"In the event of my furnishing the hotel, the terms I should require would be one-third cash, and bills at six and twelve months for the balance." These terms were assented to:—Held, by Mellor, J., and Lush, J. (*Blackburn, J., dissentiente*), that the plaintiff was entitled to recover interest upon the amount of one-third which was to be paid in cash, inasmuch as that sum was payable by virtue of a "written instrument at a certain time" sufficiently to come within the 28th section of 3 & 4 Will. 4. c. 42. *Duncombe v. The Brighton Club and Norfolk Hotel Company*, 44 Law J. Rep. (N.S.) Q. B. 216; Law Rep. 10 Q. B. 371.

(F) FRAUDULENT DEBTOR.

[See DEBTORS ACT, 19–21; BANKRUPTCY, B 1–9; FRAUDULENT CONVEYANCE.]

## DEBTORS ACT.

(A) ABOLITION OF IMPRISONMENT FOR DEBT.

(a) *Enforcement of order of Irish Court of Chancery.*

(b) *Contempt of Court.*

(c) *Defaulting trustee.*

(d) *Defaulting attorney.*

(e) *Person arrested under sec. 6.*

(f) *Foreign attachment.*

(g) *Pendency of bankruptcy proceedings.*

(h) *Order for committal under sec. 5.*

(B) FRAUDULENT DEBTORS.

[Provisions for the abolition of imprisonment for debt in Ireland, and for the punishment of fraudulent debtors. 35 & 36 Vict. c. 57.]

[General Order of High Court of Chancery, 7th Jan. 1870. See 40 Law J. Rep. (N.S.) Chanc. 1.]

(A) ABOLITION OF IMPRISONMENT FOR DEBT.

(a) *Enforcement of order of Irish Court of Chancery.*

1.—The Debtors Act, 1869, applies to an application under 41 Geo. 3. c. 90, s. 6, to enforce an order of the Irish Court of Chancery. *Ferguson v. Ferguson*, 44 Law J. Rep. (N.S.) Chanc. 615; Law Rep. 10 Chanc. 661.

(b) *Contempt of Court.*

2.—Where a defendant, ordered to deliver bills to a receiver "or" pay moneys received in respect of them, said that he delivered over the only bill in his possession, and that he had cashed the others, but did not pay over the moneys received:—Held, that the Debtors Act, 1869, sec. 4, had no application, and that the defendant must be committed for breach of the order. *Harvey v. Hall*, Law Rep. 11 Eq. 31.

3.—An order of this Court is necessary, under the Debtors Act, 1869, for the discharge of a prisoner who has been in prison a year for contempt of Court. *In re Thompson's Estate; Natty v. Aylett*, 43 Law J. Rep. (N.S.) Chanc. 721.

(c) *Defaulting trustee.*

4.—The order of a local Court sitting in bankruptcy, directing payment of a sum to the trustee of a bankruptcy, does not impress upon the debtor a fiduciary relation towards the creditors of the bankrupt within section 4, sub-sec. 3, of the Debtors Act, 1869, so as to make him liable to committal in default of payment. The powers of arrest and imprisonment preserved by section 9 of the same Act are those only which are created by the Bankruptcy Act, 1869. *Ex parte Hooson; In re Chapman*, 42 Law J. Rep. (N.S.) Bankr. 19; Law Rep. 8 Chanc. 231.

5.—A trustee who has received trust money is deemed to have it in his possession until he discharges himself of his trust, and he may be attached, as being within the 3rd exception to section 4 of the Debtors Act, 1869, for making default in payment of a sum so received, and

ordered by a Court of equity to be paid by him, notwithstanding that he may have parted with the actual possession of or control over the money prior to the order for payment. *Middleton v. Chichester*, 40 Law J. Rep. (N.S.) Chanc. 237; Law Rep. 6 Chanc. 152.

But interest, due from him in respect of trust money so received, is not money in his possession or under his control, and an attachment will not issue for non-compliance with an order directing payment of such interest. *Ibid.*

6.—Though the exception in the Debtors Act, 1869, as to imprisonment for default by a trustee to pay “any sum in his possession or under his control,” applies where a trustee had improperly parted with the fund, it does not apply where, although through his wilful default, he never had it in his possession. *Ferguson v. Ferguson*, 44 Law J. Rep. (N.S.) Chanc. 615; Law Rep. 10 Chanc. 661.

Per James, L.J.—An attachment ought not to issue under any of the exceptions in section 4 of the Debtors Act, 1869, *ex parte*, but the debtor should have an opportunity of shewing that he is not within the exception. *Ibid.*

7.—In a case excepted from the operation of section 4 of the Debtors Act, 1869, abolishing imprisonment for default in payment of a sum of money, the Court has no discretion to refuse an application for leave to issue a writ of attachment against the person making default. In order to bring a trustee within the exception it is not necessary that the money should have been in his sole possession or control. *Evans v. Bear*, Law Rep. 10 Chanc. 76.

#### (d) Defaulting attorney.

8.—A solicitor was ordered to pay the costs of an unsuccessful appeal against a common order to tax his bill of costs, which had been obtained by his client:—Held, that the non-payment of the costs of the appeal was not a default in payment of money within the meaning of sub-section 4 of section 4 of the Debtors Act, 1869. *In re Hope*, 41 Law J. Rep. (N.S.) Chanc. 797; Law Rep. 7 Chanc. 523.

9.—An attorney was arrested under an attachment issued by a Court of law for contempt of Court in not obeying a previous order that he should pay to a client a sum which he had received for him while acting in the capacity of attorney. Before the attachment issued the attorney had been adjudicated a bankrupt, but when he was arrested the bankruptcy was not closed, nor had he obtained an order of discharge:—Held, that the Court of Bankruptcy ought not to order his release from custody, but ought to leave the Court of law to decide whether the attachment was merely a process to compel payment of a debt, or whether it was issued in the exercise of the Court's quasi criminal jurisdiction over its own officer. *Ex parte Deere*; *In re Deere*, 44 Law J. Rep. (N.S.) Bankr. 120; Law Rep. 10 Chanc. 658.

10.—A solicitor was ordered to pay money to a receiver of the Court, on pain of sequestration and imprisonment. His property was seized on a

*fi. fa.* under the order, but possession was given up under an agreement:—Held, on breach of the agreement by him, that he could not be attached under the order. *Harvey v. Hall*, 43 Law J. Rep. (N.S.) Chanc. 95; Law Rep. 16 Eq. 324.

*Against attorney disobeying rule for payment of money.* [See ATTORNEY, 25.]

#### (e) Person arrested under section 6.

11.—A defendant who has been arrested and imprisoned before final judgment, under the 6th section of the Debtors Act, 1869, is entitled to be discharged under the 4th section after final judgment has been obtained, notwithstanding that the judgment is still unsatisfied, and that the absence of the defendant from England may prejudice the plaintiff in obtaining the fruits of the judgment. *Hume v. Druyff*, 42 Law J. Rep. (N.S.) Exch. 145; Law Rep. 8 Exch. 214.

#### (f) Foreign attachment.

12.—Where in a proceeding by foreign attachment, the defendant renders himself in dissolution of the attachment, and the plaintiff goes on in the action and recovers judgment, the defendant is entitled to be discharged from custody by virtue of section 4 of the Debtors Act, 1869. The 29th section of that Act, which preserves the custom of foreign attachment, does not operate so as to make the defendant, under such circumstances, liable to be detained in custody. *Waine v. Wilkins*, 42 Law J. Rep. (N.S.) Q. B. 95; Law Rep. Q. B. 107, *nom. In re Wilkins*.

#### (g) Pendency of bankruptcy proceedings.

13.—A debtor who is liable to be arrested under section 4 of the Debtors Act, 1869, is protected from arrest by section 12 of the Bankruptcy Act, 1869, during the pendency of his bankruptcy or liquidation by arrangement. *Cobham v. Dalton*, 44 Law J. Rep. (N.S.) Chanc. 702; Law Rep. 10 Chanc. 655.

#### (h) Order for committal under section 5.

14.—Judgment having been obtained against a married woman in an action in which she did not plead coverture, a Judge has jurisdiction under the Debtors Act, 1869, section 5, to order her to pay the debt by instalments, without being satisfied that she has the means of paying. *Dillon v. Cunningham*, 42 Law J. Rep. (N.S.) Exch. 11; Law Rep. 8 Exch. 23.

15.—Order made under section 5 of the Debtors Act, 1869, for payment of a debt of 9,000*l.*, by half-yearly instalments of 250*l.*, and for committal in default of payment of the first instalment, the Court being satisfied that the debtor had the means to pay. *In re the Imperial Mercantile Credit Association (Lim.)*; *Lewis's case*, 42 Law J. Rep. (N.S.) Chanc. 379.

16.—An order of committal by a superior Court under the Debtors Act, 1869, section 5, is valid for the arrest of a debtor, though it has been made more than a year before, and has not been re-

newed. *Hermitage v. Kilpin*, 43 Law J. Rep. (N.S.) Exch. 127; Law Rep. 9 Exch. 205.

17.—The non-payment by a debtor of a composition according to the terms of a resolution, passed pursuant to section 126 of the Bankruptcy Act, 1869, revives not only the debt but also the rights and remedies of the creditor in respect thereof, as they would have existed if no such composition had been agreed to. Therefore, where after a Judge's order had been made under the Debtors Act, 1869, for the payment of a judgment debt by instalments, the judgment debtor took proceedings for liquidation under the Bankruptcy Act, 1869, and a resolution binding on the judgment creditor was passed, according to section 126, to accept a composition, and the debtor subsequently failed to pay the composition according to the terms of the resolution, it was held that the judgment creditor was entitled to proceed upon the Judge's order for the payment of the debt by instalments, as if there had been no composition, and accordingly to apply under section 5 of the Debtors Act, 1869, for the debtor's committal in case of his not paying such instalments when he had the means of paying. *Newell v. Van Praagh*, 43 Law J. Rep. (N.S.) C.P. 94; Law Rep. 9 C.P. 96.

18.—The Judge of a County Court has no power to make a second order for the committal of a judgment debtor for default in payment where the first order remains unexecuted, *e.g.*, where the debtor was discharged from arrest on the ground of his being privileged at the time of such arrest. Per Bovill, C.J., and Brett, J., the power of a County Court Judge under sections 98, 99 and 103 of 9 & 10 Vict. c. 95, to commit more than once for the same default is taken away by the Debtors Act, 1869, and he can now only make a single order of commitment not to exceed six weeks; but where the debt is payable by instalments each neglect to pay is a fresh default. *Horsnail v. Bruce*, 42 Law J. Rep. (N.S.) C.P. 140; Law Rep. 8 C.P. 378.

#### (B) FRAUDULENT DEBTORS.

19.—Section 71 of the Bankruptcy Act, 1869, giving a right of appeal against "any order of a local Bankruptcy Court in respect of a matter of fact or of law made in pursuance of this Act," gives a right of appeal against an order under section 16 of the Debtors Act, 1869, as to the prosecution of a fraudulent bankrupt. *Ex parte Dempsey; In re Dempsey*, 42 Law J. Rep. (N.S.) Bankr. 93; Law Rep. 8 Chanc. 676.

Semble, per Lord Justice James.—The word Court in the expression in section 16 of the Debtors Act, 1869, "Where a trustee in any bankruptcy reports to any Court exercising jurisdiction in bankruptcy," means any Court having original or appellate jurisdiction in that bankruptcy. *Ibid.*

The County Court Judge having held that a liquidating debtor had committed fraudulent acts under part 2 of the Debtors Act, 1869, but declined to order his prosecution under section 16,

on the ground that that section only applied in the case of bankruptcy:—Held, by the Chief Judge and by the Lords Justices, that that section applied in the case of liquidation also, and a prosecution was directed. *Ibid.*

20.—A deed of assignment of chattels by a debtor to trustees void as against assignees in bankruptcy of the debtor for want of registration, is nevertheless operative as between the immediate parties to it from the time of its operation until the proceedings in bankruptcy, so as to pass the property in the chattels from the debtor. *The Queen v. Creese*, 43 Law J. Rep. (N.S.) M.C. 51; Law Rep. 2 C.C.R. 105.

In December, 1872, a debtor made a deed of assignment of farming stock, &c., to trustees upon certain trusts, and the debtor continued to carry on the farm as the bailiff of the trustees in pursuance of the trusts of the deed. On the 14th and 16th of October, 1873, he removed certain stock and sold it, and handed the proceeds to third parties in fraud of the trustees and the objects of the deed. On the 17th of October he petitioned a County Court in Bankruptcy for liquidation of his affairs by arrangement, and on the 7th of January, 1871, was indicted and found guilty of having within four months before the commencement of the liquidation fraudulently removed a part of his property of the value of 10*l.* and upwards, contrary to the 5th sub-section of the 11th section of the Debtors Act, 1869:—Held, that at the time of the removal, the goods, &c., were not *his* property, and therefore the conviction must be quashed. *Ibid.*

21.—An application to a County Court Judge for an order to prosecute a debtor under the Debtors Act, 1869, must be made in writing, and be filed with the proceedings. *Ex parte Leonard; In re Leonard*, 44 Law J. Rep. (N.S.) Bankr. 80; Law Rep. 19 Eq. 269.

*Admissibility of evidence of trader in liquidation, on indictment.* [See EVIDENCE, 24.]

#### DEED.

- (A) EXECUTION.
  - (a) *Escrow.*
  - (b) *Evidence of execution.*
- (B) PARTIES: PERSONS HAVING POWERS OF DISTRESS.
- (C) CONSTRUCTION OF.
  - (a) *Parcels.*
  - (b) *General words.*
  - (c) *Limitations.*
    - (1) *Habendum invalid.*
    - (2) *Rule in Shelley's case.*
    - (3) "Survivor" read "other."
  - (d) *Option as to time of payment.*
  - (e) *Conditions.*
  - (f) *Contemporaneous documents.*
- (D) ESTOPPEL AND ADMISSION.
- (E) RECTIFICATION.

## (A) EXECUTION.

(a) *Escrow.*

1.—To determine whether an instrument is an escrow or not, the question is not merely whether the instrument was delivered to a third person to be held conditionally, but whether the delivery was of a character negating its being a delivery to the party who was to have the benefit of the instrument. *Watkins v. Nash*, 44 Law J. Rep. (N.S.) Chanc. 506; Law Rep. 20 Eq. 262.

(b) *Evidence of execution.*

2.—The execution of a deed may, on an unopposed petition, be proved under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 26, notwithstanding *In re Reay's Trusts* (1 Jur. N.S. 222). *In re Mair's Estate*, 42 Law J. Rep. (N.S.) Chanc. 882.

[And see EVIDENCE.]

## (B) PARTIES: PERSONS HAVING POWERS OF DISTRESS.

3.—A colliery company covenanted to appropriate 6d. per ton to secure money lent, and gave to the lenders power to appoint receivers and powers of distress over all their property:—Held, that on sale in liquidation of a colliery, the covenantees were not necessary parties to the conveyance. *In re the Sankey Brook Coal Company; Ex parte the Liquidators*, 41 Law J. Rep. (N.S.) Chanc. 119; Law Rep. 12 Eq. 472.

## (C) CONSTRUCTION OF.

(a) *Parcels.*

4.—The plaintiff purchased two adjoining houses, one of which he had agreed to sell to P., in whose occupation it then was. This house had in front a projecting portion, which, to the extent of between two and three feet, overlapped the adjoining house, so that it extended to some distance beyond the party-wall of the two houses. The door of the house was in the centre of the projection which formed a portico with a pillar, cornice, string-course and pediment, all of which in part overlapped the adjoining house of the plaintiff. P. conveyed his house to the defendant, who painted the front, including the whole of the projecting portion. In the conveyance to P., which the owner of the two houses had prepared at the plaintiff's request, the projecting part was not specifically mentioned as being conveyed. The plaintiff brought an action of trespass against the defendant:—Held (reversing the judgment of the Court below, Law Rep. 7 Q.B. 748), that the plaintiff was not entitled to recover, inasmuch as either the projecting portion passed by the conveyance to the defendant, or he had an easement in it. *Fox v. Clarke*, 43 Law J. Rep. (N.S.) Q.B. 178; Law Rep. 9 Q.B. 565.

5.—A. (by deed executed after the repeal of the Bankruptcy Act, 1861) assigned to B. for the benefit of his creditors, "All his goods and chattels, personal estate, substance and effects whatsoever, and all his right, title, property, benefit,

claim and demand whatever therein:—Held, that these words were sufficient to pass a term of years in certain premises; and that B., having executed the deed of assignment, and put a man in possession of the premises, and never having disclaimed the lease (though he had not expressly accepted it), was liable to the lessor as assignee of the term. *White v. Hunt*, 40 Law J. Rep. (N.S.) Exch. 23; Law Rep. 6 Exch. 32.

The ruling of Lord Tenterden, in *Carter v. Warne* (1 Moo. & M. 479) impugned. *Ibid.*

*Parcels: construction of deed and inventory when they vary.* [See MORTGAGE, 3.]

*Power: appointment: diminished fund: residue.* [See POWER, 18.]

*Warren of conies.* [See WARREN.]

(b) *General words.*

*Grant of right of way.* [See WAY, 3.]

[And see COMPANY, D 1.]

(c) *Limitations.*(1) *Habendum invalid.*

6.—The holder of an estate for life in realty granted the land to A. B., his executors, administrators and assigns, *habendum* from a future date for the term of the grantor's life:—Held, to pass an estate for life. *Boddington v. Robinson*, 44 Law J. Rep. (N.S.) Exch. 223; Law Rep. 10 Exch. 270.

The rule is that where there is an express grant in the premises of a deed, that grant cannot be prejudiced by the invalidity of the *habendum*, but where the premises contain only an implied grant, and the *habendum* is invalid, the conveyance fails. *Ibid.*

(2) *Rule in Shelley's Case.*

7.—Real estate was assured by deed unto and to the use of a trustee, his heirs and assigns, upon trust for a married woman for life to her separate use, and from and after the determination of that estate to stand seized thereof to such uses and upon such trusts as she should by will appoint, and in default of appointment to the use of the heirs and assigns of the married woman:—Held, by the Lords Justices (reversing the decision of the Master of the Rolls), that the legal fee was vested in the trustee; that all the subsequent limitations were merely equitable, and that therefore, under the rule in *Shelley's case*, the married woman took an equitable estate in fee, and could, with the concurrence of the trustee after her husband's death, make a good title in fee to the property, and one which the Court would force on an unwilling purchaser. *Cooper v. Kynoch*, 41 Law J. Rep. (N.S.) Chanc. 296; Law Rep. 7 Chanc. 398.

Distinction in construction of limitations in deeds and wills. *Ibid.*

(3) "*Survivor*" read "*other*."

8.—In a deed, as in a will, "*survivor*" may be read "*other*," in order to effect the intention of the parties. *In re Palmer's Settlements*, 44 Law J. Rep. (N.S.) Chanc. 247; Law Rep. 19 Eq. 320.

By a settlement executed by two sisters, E. and S., a trust fund was settled upon trust to pay the income to them equally during their joint lives, and after the death of one of them to the survivor for her life; and if either of them should die, leaving children, to pay one moiety to such children; and if either should die without leaving children, to pay the moiety of the deceased sister to the children (if any) of the "survivor," but if both of the sisters should die without leaving children, then over. E. predeceased S., and left children; then S. died without leaving children:—Held, that S.'s moiety passed to the children of E. *Ibid.*

(d) *Option as to time of payment.*

9.—Under various deeds and Acts of Parliament, certain waterworks became vested in a municipal corporation, the company to whom the works originally belonged being secured payment of interest on their share capital. The corporation had power to pay off the share capital on giving six months' notice. Notice to pay off was given, but the money was not paid:—Held, that the option to pay off could be exercised again. *Ward v. the Wolverhampton Waterworks Company*, 41 Law J. Rep. (N.S.) Chanc. 308; Law Rep. 13 Eq. 243.

(e) *Conditions.*

[See CONDITIONS.]

(f) *Contemporaneous documents.*

*Construction of contemporaneous documents.*  
[See COMPANY, D 47.]

(D) ESTOPPEL AND ADMISSION.

*Admission by deed.* [See EVIDENCE, 11.]  
*Estoppel by recitals, &c., in deed.* [See ESTOPPEL, 6, 7.]

(E) RECTIFICATION.

10.—Where a deed affecting the legal estate in land is rectified, no further conveyance need be directed. The deed when rectified becomes a proper conveyance. It is unnecessary to have the alterations directed by the decree actually made in the rectified deed; the endorsement of the decree is sufficient. *White v. White*, 42 Law J. Rep. (N.S.) Chanc. 288; Law Rep. 15 Eq. 247.

DEFAMATION.

[See LIBEL, SLANDER.]

DELAY.

*Effect of delay in institution of suit.* [See DIVORCE, 6, 7, 11, 12; PRINCIPAL AND AGENT, 5; UNDUE INFLUENCE, 4.]  
*As ground of defence.* [See FRAUD, 4.]  
DIGEST, 1870-1875.

DESERTION.

[See DIVORCE, H.]

DESIGNS.

[See COPYRIGHT, 4-6.]

DETINUE.

1.—Detinue does not lie against the maker of a promissory note after he has delivered it to a properly constituted stakeholder, although he may have forbidden the stakeholder to hand it over to the person claiming it, and in whose favour it was drawn. *Latter v. White* (H.L.), 41 Law J. Rep. (N.S.) Q. B. 342; Law Rep. 5 E. & I. App. 578.

The trustee of a composition deed or notes of the debtor or his surety for the benefit of the creditors, is such a stakeholder. *Ibid.*

2.—Final judgment recovered against one of two joint wrongdoers is a bar to an action against the other for the same cause of action, although such judgment be unsatisfied, but unless it be satisfied, the property in goods obtained by the wrongdoer is not changed so as to vest it in the person against whom such judgment was obtained. *Brinsmead v. Harrison*, 40 Law J. Rep. (N.S.) C. P. 281; Law Rep. 6 C. P. 584: affirmed, on appeal, 41 Law J. Rep. (N.S.) C. P. 190; Law Rep. 7 C. P. 547.

Therefore, where in detinue the defendant pleaded that the detention was committed by him jointly with A. B., and that the plaintiff had recovered final judgment in trover against A. B. for the conversion of the goods so detained, it was held a bad replication that such judgment was unsatisfied, but a good new assignment that the action was brought for a detention subsequent to such judgment. *Ibid.*

3.—The plaintiff in an action for the wrongful detention of a lease, recovered judgment for 100*l.*, to be reduced to nothing if the lease was returned. Execution was afterwards stayed for a month, to give the defendant time to search for the lease, which had been mislaid. Before the month had expired, the defendant filed a liquidation petition. The first meeting of the creditors was held after the expiration of the month, but the plaintiff had not then levied execution for the 100*l.* The lease was subsequently found, and was tendered to the plaintiff, who refused to accept it:—Held, that the 100*l.* was not a debt proveable under the petition. *Ex parte Scarth; In re Scarth*, 44 Law J. Rep. (N.S.) Bankr. 30; Law Rep. 10 Chanc. 234.

*Bailment: goods at sufferance wharf.* [See BAILMENT, 2.]

DEVISE.

[See WILL.]

G G

## DILAPIDATIONS.

[See CHURCH, H.]

## DISCOVERY.

[See PRODUCTION OF DOCUMENTS; ATTORNEY, 16; PATENT, 30; PLEADING IN EQUITY, 12-15; PRACTICE AT LAW, 10-19; PRACTICE IN EQUITY, 71-73.]

1.—Property in London was granted for a lease of ninety-nine years in 1763. At the expiration of the lease the reversioner found difficulty in identifying certain part of the property which had been generally described in the original lease as "seven and a half acres of pasture or meadow, and lying dispersedly in the common fields at Walworth, commonly called Lock's Fields." The property had during the lease been underlet and dealt with by instalments, some of which contained particular descriptions, which, as the reversioner contended, would help him to identify the houses and lands now in the defendant's occupation as his property, and he filed this bill for discovery of such underleases and instruments:—Held, on demurrer, that the plaintiff was entitled to the discovery. *Brown v. Wales*, 42 Law J. Rep. (n.s.) Chanc. 45; Law Rep. 15 Eq. 142.

Demurrer for multifariousness overruled, collusion being charged by the bill. *Ibid*.

2.—A person complaining of a libel in a newspaper may file a bill against the printer and publisher to ascertain the names of the proprietors, for the purpose of bringing his action against the proprietors alone. *Dixon v. Enoch*, 41 Law J. Rep. (n.s.) Chanc. 231; Law Rep. 13 Eq. 394.

3.—Communications (including a bill of costs) of suitor with his solicitor, relating to the matters in suit, before commencement of proceedings, held privileged, though the solicitor made an affidavit on behalf of the suitor. *Minet v. Morgan* (42 Law J. Rep. (n.s.) 627; Law Rep. 8 Chanc. 361) followed. *Turton v. Barber*, 43 Law J. Rep. (n.s.) Chanc. 468; Law Rep. 17 Eq. 329.

## DISENTAILING ASSURANCE.

[See FINES AND RECOVERIES.]

## DISORDERLY HOUSE.

[See HABITUAL CRIMINALS ACT; PUBLIC ENTERTAINMENT.]

## DISSENTERS.

Where the proceedings by which the minister of a religious congregation had been dismissed had not in the opinion of the Court been fairly

and properly conducted, the Court refused to lend its aid to such proceedings by an injunction to restrain him from officiating. *Dean v. Bennett*, 40 Law J. Rep. (n.s.) Chanc. 452; Law Rep. 6 Chanc. 489.

*Exemption of dissenting minister from toll.*  
[See TURNPIKE, 3.]

## DISTRESS.

*For annuity charged on land.* [See ANNUITY, 11, 12.]

*On cattle straying.* [See COMMON, 3.]

*For rent.* [See COMPANY, I 66, 67; LANDLORD AND TENANT, 7-13.]

*Power of, in lease.* [See LEASE, 21.]

## DISTRIBUTIONS, STATUTE OF.

If an intestate leaves no children, but grandchildren and great-grandchildren only, they take *per stirpes* and not *per capita*. *In re Ross's Trusts*, 41 Law J. Rep. (n.s.) Chanc. 130; Law Rep. 13 Eq. 286.

*Position of next-of-kin for the purposes of election.* [See ELECTION, 1.]

## DIVORCE.

## (A) JURISDICTION.

(a) *Domicil.*

(b) *Power to make rules.*

## (B) LEGITIMACY DECLARATION ACT.

## (C) NULLITY OF MARRIAGE.

(a) *Defect in the contract.*

(b) *Defect in the parties.*

(c) *Suit barred by delay.*

## (D) DISSOLUTION OF MARRIAGE.

(a) *When suit maintainable.*

(1) *Condonation.*

(2) *Previous judicial separation.*

(3) *Delay.*

(4) *Insanity of respondent.*

(b) *Effect of.*

## (E) JUDICIAL SEPARATION.

(a) *Wife's adultery no bar to suit.*

(b) *When granted in suit for dissolution.*

(1) *Suit by husband.*

(2) *Suit by wife.*

## (F) RESTITUTION OF CONJUGAL RIGHTS.

## (G) CRUELTY.

## (H) DESERTION.

## (I) CONVINCE AND COLLUSION.

## (K) PARTIES.

## (L) PLEADING.

(a) *To jurisdiction.*

(b) *Adultery after filing of petition.*

(c) *Particulars of cruelty.*

## (M) AMENDMENT OF PETITION.



(N) EVIDENCE.

- (a) *Queen's Proctor intervening.*
- (b) *Identity.*
- (c) *Admissibility under separation deed.*
- (d) *Agent of husband employed to watch wife.*

(O) WITNESS.

(P) ALIMONY.

- (a) *Alimony pendente lite.*
  - (1) *Effect of separation deed.*
  - (2) *Pending appeal by wife.*
  - (3) *Plea to jurisdiction.*
- (b) *Permanent alimony.*
  - (1) *After decree made.*
  - (2) *Increase of alimony.*
  - (3) *Payment of arrears.*
  - (4) *Allowance for children.*

(Q) CUSTODY OF CHILDREN.

(R) ALTERATION OF SETTLEMENT.

(S) PRACTICE.

- (a) *Petition.*
    - (1) *Amendment.*
    - (2) *Withdrawal of petition.*
    - (3) *Answer to petition for alimony.*
  - (b) *Service.*
    - (1) *Personal.*
    - (2) *Substituted.*
  - (c) *Issues.*
  - (d) *Dismissal of respondent from suit.*
  - (e) *Staying proceedings.*
  - (f) *New trial.*
  - (g) *Rehearing.*
  - (h) *Decrees and orders.*
    - (1) *Shewing cause against decree nisi.*
    - (2) *Reversing decree nisi.*
    - (3) *Time for making decree absolute.*
    - (4) *Suspending decree absolute.*
    - (5) *Order for payment of money.*
  - (i) *Damages.*
  - (k) *Appeal: whether stay of proceedings.*
- (T) COSTS.
- (a) *Of wife.*
    - (1) *Intervention of Queen's Proctor.*
    - (2) *Suit for dissolution: failure of charges.*
    - (3) *Judicial separation.*
    - (4) *Restitution of conjugal rights.*
    - (5) *Unsuccessful suit.*
  - (b) *Costs against separate estate of wife.*
  - (c) *Costs against petitioner.*
  - (d) *Claim for damages.*
  - (e) *Costs after decree absolute.*
  - (f) *Security for costs.*
  - (g) *Proctor's or attorney's lien.*

(A) JURISDICTION.

(a) *Domicil.*

1.—The Court has not jurisdiction to entertain a suit for judicial separation when the petitioner is domiciled abroad, and is not *bonâ fide* resident in England. *Manning v. Manning*, 40 Law J. Rep. (N.S.) P. & M. 15; Law Rep. 2 P. & D. 223.  
 Quære—whether the *bonâ fide* residence in

England of a petitioner who is domiciled abroad is sufficient to give the Court jurisdiction. *Ibid.*

*Jurisdiction: domicil: Scotch marriage.*  
 [See DOMICIL, 1.]

(b) *Power to make rules.*

2.—The Judge Ordinary has power to make rules and orders for regulating the practice and procedure of the Court of Divorce. *Wilson v. Wilson*, 41 Law J. Rep. (N.S.) P. & M. 1; Law Rep. 2 P. & D. 341.

As a preliminary objection, the question of jurisdiction can only be raised in the manner prescribed by rule 22, viz., by the respondent appearing under protest and filing an act on petition. A respondent, however, although he has appeared absolutely, may raise the question of jurisdiction as a bar to the suit in his answer, either with or without any other defence he may have on the merits; but in the latter case it must be clear on the face of the answer that the absence of jurisdiction is the only defence on the merits which he intends to set up. *Ibid.*

3.—The Judge Ordinary alone has power to make and alter rules of practice and procedure. *Wilson v. Wilson*, 40 Law J. Rep. (N.S.) P. & M. 77; Law Rep. 2 P. & D. 341.

(B) LEGITIMACY DECLARATION ACT.

[See that title.]

(C) NULLITY OF MARRIAGE.

(a) *Defect in the contract.*

[See MARRIAGE.]

(b) *Defect in the parties.*

[23 & 24 Vict. c. 144, s. 7, and 29 & 30 Vict. c. 32, s. 3, extended to suits for nullity of marriage. 36 & 37 Vict. c. 31.]

4.—A marriage is void if consummation is practically impossible, although there be no malformation or structural defect rendering consummation physically impossible. *G. v. G.*, 40 Law J. Rep. (N.S.) P. & M. 83; Law Rep. 2 P. & D. 287.

5.—Decree of nullity nisi granted, in a case where the wife refused to submit to inspection, on evidence by the husband that during three years he had never been able to consummate the marriage, as his attempts to do so had produced hysteria on the part of the wife. *H. v. P.*, falsely called *H.*, Law Rep. 3 P. & M. 126.

(c) *Suit barred by delay.*

6.—The marriage took place in 1863. In 1868 the wife became aware of her husband's impotency, but continued to live with him until 1870, when, serious disagreements having occurred between them, a deed of separation was executed. In 1871 the wife for the first time heard of the remedy that was open to her, and thereupon instituted her suit for nullity, but failed to prove that the marriage had remained unconsummated by reason of

the impotency of the husband. The Court dismissed the petition and condemned the petitioner, who had a separate income, in the costs of the suit. It at the same time intimated that it could not discover in her own conduct that impatience under a sense of wrong, and reasonable activity in complaint and redress, which should be expected from one in her position, and that consequently, if she had succeeded on the issue of fact, her delay in instituting the suit would have constituted an impediment to the relief which she claimed. *M. v. C.*, 41 Law J. Rep. (n.s.) P. & M. 37; Law Rep. 2 P. & D. 414.

7.—Although delay is no bar to a proceeding for declaration of nullity where impotency is clearly proved, the judgment on such a proceeding will be considerably influenced by delay where the evidence is not absolutely clear. *Mansfield v. Cuno* (H.L.), 42 Law J. Rep. (n.s.) P. & M. 65; Law Rep. 2 Sc. & Div. App. 300.

In 1863 the marriage took place. In 1868 the wife became aware, according to her own evidence, of the husband's impotency, but she continued cohabitation until 1870, when a deed of separation was executed. In 1871, she became aware of her remedy, and she instituted a suit for declaration of nullity. The medical evidence was not conclusive. Her own evidence and that of the husband were conflicting:—Held, that, looking at the evidence and considering the delay, she had failed to make out the charge of impotency. As she had separate property, the suit was dismissed with costs. *Ibid.*

*Time for making decree absolute.* [See *infra* No. 68.]

#### (D) DISSOLUTION OF MARRIAGE.

##### (a) *When suit maintainable.*

###### (1) *Condonation.*

8.—Eighteen months after the marriage the husband, the petitioner, committed adultery on one occasion with a woman by whom he had had a child previously to his marriage. He confessed the fact to his wife who condoned his misconduct. Subsequently the wife herself was guilty of adultery. The Court was of opinion that there was no special circumstance in the case to justify the exercise of its discretion under section 31 of 20 & 21 Vict. c. 85, in favour of the petitioner, and declined to pronounce a decree. *M'Cord v. M'Cord*, 44 Law J. Rep. (n.s.) P. & M. 38; Law Rep. 3 P. & D. 237.

9.—The husband was guilty of incestuous adultery with his wife's sister. The wife, the petitioner, became aware of it, but agreed, in consideration of the respondent retiring from a partnership which then subsisted between him and her father and brother, to institute no proceedings for a divorce. The agreement further provided that the respondent might visit the petitioner under certain circumstances once a week, but it also contained this clause: "The agreement or contract binds me (the wife) only as long as you remain true to me in love and duty." The agreement was signed on the 25th of

November, 1868. The respondent met the petitioner afterwards on several occasions; on the 19th of April, 1869, she refused to see him again, and in the following June the respondent was guilty of adultery:—Held, that the subsequent adultery restored to the wife the right to have the marriage dissolved on the ground of the previous incestuous adultery committed by the respondent. *Newsome v. Newsome*, 40 Law J. Rep. (n.s.) P. & M. 71; Law Rep. 2 P. & D. 306.

Condoned incestuous adultery is revived by subsequent adultery not incestuous. *Ibid.*

##### (2) *Previous judicial separation.*

10.—A decree of judicial separation obtained by a wife on the ground of adultery, is no bar to a suit by her for a divorce on the ground of cruelty committed before the date of the petition for judicial separation, coupled with adultery subsequent to the decree, if the suit is instituted *bonâ fide*. *Green v. Green*, 43 Law J. Rep. (n.s.) P. & M. 6; Law Rep. 3 P. & D. 121.

##### (3) *Delay.*

11.—Where a husband who had delayed taking proceedings for a divorce for nearly fourteen years, was found at the end of that time to be in possession, as a coal-hauler, of stock in trade of the value of 600*l.*, nine horses, and some cottages, the Court refused to accept want of means as an excuse. *Short v. Short*, Law Rep. 3 P. & D. 193.

12.—Where there is unreasonable delay (*e.g.* two years) by a petitioner in presenting her petition, it will be dismissed unless some sufficient reason for the delay is shewn. *Nicholson v. Nicholson*, Law Rep. 3 P. & D. 53.

##### (4) *Insanity of respondent.*

13.—There is nothing in the 20 & 21 Vict. c. 85 to prevent proceedings for the dissolution of a marriage for adultery being instituted or proceeded with, where the party proceeded against has before the institution of the proceedings become incurably lunatic. *Mordaunt v. Moncreiffe* (H.L.), 43 Law J. Rep. (n.s.) P. & M. 49.

Whether proceedings for the dissolution of a marriage can be instituted on behalf of a lunatic husband or wife, *quære*. Reversal of the decision below, 39 Law J. Rep. (n.s.) P. & M. 57.

*Bawden v. Bawden* (2 Sw. & Tr. 417; 31 Law J. Rep. (n.s.) P. & M. & A. 94) disapproved. *Ibid.*

##### (b) *Effect of.*

*Effect of decree of, on wife's separate property.* [See MARRIAGE SETTLEMENT.]

#### (E) JUDICIAL SEPARATION.

##### (a) *Wife's adultery no bar.*

14.—Semble, that the adultery of the wife is not a bar to a suit by her for judicial separation on the ground of cruelty. *Grossi v. Grossi*, 42 Law J. Rep. (n.s.) P. & M. 69; Law Rep. 3 P. & D. 118.

(b) *When granted in suit for dissolution.*

(1) *Suit by husband.*

15.—Husband and wife agreed to separate, and a deed was executed under which an allowance was secured to the wife. Subsequently the husband filed a petition for dissolution of marriage on the ground of the wife's adultery, which was alleged to have taken place after their separation. The wife denied the alleged adultery, charged the petitioner with cruelty, and prayed for a decree of judicial separation. At the trial the jury found in favour of the wife:—Held, that the wife was remitted to her original position by the institution of the suit by the husband, and being the successful party in the suit, that she was entitled to the fullest redress which the law allowed, namely, a decree of judicial separation. *Brown v. Brown*, 43 Law J. Rep. (N.S.) P. & M. 47.

16.—Where in answer to a husband's petition for divorce on the ground of his wife's adultery, the wife denied the adultery and pleaded acts of cruelty committed before the execution of a separation deed, under which she was then living apart from her husband on a sufficient allowance, and the jury found that the husband had been guilty of cruelty, but the wife had not been guilty of adultery,—Held, that the wife was entitled to a judicial separation. *Brown v. Brown and Shelton*, Law Rep. 3 P. & D. 202.

(2) *Suit by wife.*

17.—In a suit for dissolution of marriage promoted by the wife, the jury, after several hours' consultation, intimated that they were prepared to find for the petitioner on the question of cruelty, but that there was no hope of their being able to agree on the questions of adultery. They were then discharged. Subsequently the petitioner moved the Court to accept the verdict of the jury on the question of cruelty, and to order a new trial of the questions of adultery. The Court rejected the application, but offered to grant to the petitioner a rule calling upon the respondent to shew cause why the verdict of the jury on the question of cruelty should not be accepted, and a decree of judicial separation founded thereon. *Godrich v. Godrich*, 41 Law J. Rep. (N.S.) P. & M. 45; Law Rep. 2 P. & D. 392.

18.—In a suit for dissolution of marriage on the ground of cruelty and adultery, if one of the charges only be established, the petitioner has a right to a decree of judicial separation without the consent of the respondent. *Bromfield v. Bromfield*, 41 Law J. Rep. (N.S.) P. & M. 17.

(F) RESTITUTION OF CONJUGAL RIGHTS.

*Suit for, when reheard.* [See infra No. 63.]  
*Wife's costs in suit for.* [See infra No. 78.]

(G) CRUELTY.

[See supra Nos. 10, 15—18, and infra Nos. 26, 27.]

19.—A husband constantly abused and swore at his wife, and refused to provide delicacies ordered by her doctor. He also used threats

towards her, and on several occasions wantonly beat her child in her presence:—Held, that such conduct did not constitute legal cruelty, it not appearing that the wife had suffered in health in consequence of it, or been apprehensive for her personal safety. *Birch v. Birch*, 42 Law J. Rep. (N.S.) P. & M. 23.

Semble—the wanton ill-treatment of a child in the mother's presence and for the purpose of giving her pain, would, if carried to such an extent as to affect the mother's health, constitute legal cruelty. *Ibid.*

(H) DESERTION.

20.—The parties were married in December, 1868. In May, 1869, the petitioner separated from the respondent, she being, as he alleged, either incapable or unwilling to consummate the marriage. Three years afterwards the respondent formed an adulterous connection with the co-respondent, and gave birth to a child. At the hearing she was called as a witness in her own behalf, and attributed the fault of the non-consummation of the marriage to the petitioner. The Court, being satisfied that the petitioner had separated from the respondent in consequence of the *bona fide* belief that the incapacity lay with her, held that he had not been guilty of such desertion or wilful separation without reasonable excuse, as should disentitle him to a decree for dissolution of his marriage. *Ousey v. Ousey*, 43 Law J. Rep. (N.S.) P. & M. 35; Law Rep. 3 P. & D. 223.

21.—The husband, who had been guilty of several thefts, withdrew from his home in November, 1866, with the knowledge and consent of the wife, for the purpose of concealment. He was shortly afterwards arrested, tried and convicted, and sentenced to a term of imprisonment. On his release, in April, 1867, he begged his wife to return to him. She refused to do so until he was in a position to support her, but occasionally visited him. In June, 1867, he was again convicted of larceny and sentenced to two years' imprisonment, which terminated in June, 1869. He wrote to her in July, and in the following October he went to her parents' house with the view of inducing her to resume cohabitation with him, but she refused to see him, and conveyed to him through her mother her determination not to live with him. He was a third time convicted of larceny in June, 1871, and sentenced to seven years' penal servitude:—Held, that he had not been guilty of desertion; the original separation having been with the wife's consent, and he having been prevented from rejoining her either by his imprisonment or by her refusal to resume cohabitation. *Townsend v. Townsend*, 42 Law J. Rep. (N.S.) P. & M. 71; Law Rep. 3 P. & D. 129.

The husband, who had committed several thefts, was convicted of larceny and sentenced to a term of imprisonment. On his release, the wife refused to rejoin him:—Held, that the refusal of the wife to resume cohabitation, though morally justifiable, not being founded on any matrimonial misconduct of the husband, rendered the separation which resulted involuntary on his part. *Ibid.*

**22.**—The husband withdrew from cohabitation, and refused to return and live with his wife, unless she wrote a letter exonerating a certain lady of whom she had reason to be jealous. The wife, having grounds for believing that her suspicions were well founded, refused to comply with the condition, but was desirous to live with her husband, and pressed him to return to cohabitation. The husband occasionally met and corresponded with her, but persisted in his refusal to live with her:—Held, that the denial of *consortium* by the husband amounted to desertion, and that the desertion was without reasonable excuse. *Dallas v. Dallas*, 43 Law J. Rep. (n.s.) P. & M. 87.

#### (I) CONNIVANCE AND COLLUSION.

**23.**—The husband, who was separated from his wife, employed an agent to watch her, in order to obtain evidence of her adultery. By the inducement of the agent the wife committed adultery:—Held, that the husband could not claim relief on the ground of such adultery, and petition dismissed. *Gower v. Gower*, 41 Law J. Rep. (n.s.) P. & M. 49; Law Rep. 2 P. & D. 428.

*Sugg v. Sugg and Moore* (31 Law J. Rep. (n.s.) P. & M. 41) distinguished. *Ibid.*

*Picken v. Picken* (34 Law J. Rep. (n.s.) P. & M. 22) affirmed. *Ibid.*

#### (K) PARTIES.

*Lunacy of respondent.* [See supra No. 13.]

*Service.* [See infra Nos. 55, 56.]

#### (L) PLEADING.

##### (a) *To jurisdiction.*

**24.**—A respondent in a suit for dissolution of marriage, who has entered an absolute appearance, cannot file an answer raising the question of jurisdiction solely, but may in an answer pleading to the merits also allege facts raising the question of jurisdiction. *Wilson v. Wilson*, 40 Law J. Rep. (n.s.) P. & M. 77; Law Rep. 2 P. & D. 341.  
[And see No. 39 infra.]

##### (b) *Adultery after filing of petition.*

**25.**—If it be sought in a matrimonial suit to charge the respondent with an act of adultery committed after the filing of the petition in the suit, the proper course is to file a supplemental petition charging such adultery, and then to move the Court to consolidate the two suits. *Borham v. Borham*, 40 Law J. Rep. (n.s.) P. & M. 6; Law Rep. 2 P. & D. 193.

##### (c) *Particulars of cruelty.*

**26.**—Where a respondent filed as particulars of cruelty alleged in her answer allegations of cruelty which did not correspond with the charge in the answer but were fresh charges, the Court ordered them to be struck out. *Sanderson v. Sanderson*, 41 Law J. Rep. (n.s.) P. & M. 24.

#### (M) AMENDMENT OF PETITION.

**27.**—Cruelty being a fact which must be in the knowledge of a petitioner at the commencement of

the suit, the Court will generally refuse to allow fresh charges of cruelty to be added to a petition. *Austin v. Austin*, 41 Law J. Rep. (n.s.) P. & M. 8.

**28.**—At the date of filing his petition the only evidence which the petitioner had was the confession of the respondent. He subsequently obtained independent evidence of her alleged adultery with the co-respondent, and he then applied to amend his petition by adding a claim for damages. The Court allowed the amendment. *Henslow v. Henslow*, 40 Law J. Rep. (n.s.) P. & M. 31.

#### (N) EVIDENCE.

##### (a) *Queen's Proctor intervening.*

**29.**—The intervention of the Queen's Proctor being the discharge of a public duty, he is not bound to give such strict proof of adultery as would be requisite to found a decree of dissolution of marriage. *Prima facie* evidence of such adultery, if uncontradicted, is sufficient. *Hulse v. Hulse, the Queen's Proctor intervening*, 41 Law J. Rep. (n.s.) P. & M. 19; Law Rep. 2 P. & D. 357.

##### (b) *Identity.*

**30.**—In support of a charge of adultery made by the Queen's Proctor against a petitioner, the only evidence was, that a man, calling himself by the name, and using the card, of the petitioner, had committed fornication. Full particulars of the charge having been given, and the petitioner at the hearing not coming forward to deny it, the Court held that there was sufficient proof of identity. *Hulse v. Hulse*, 41 Law J. Rep. (n.s.) P. & M. 19; Law Rep. 2 P. & D. 357.

##### (c) *Admissibility under separation deed.*

**31.**—The petitioner and respondent executed a deed of separation, which provided, that "in case either party shall hereafter commence or prosecute any proceedings against the other in respect of any cause of complaint which may hereafter arise, no offence or misconduct which has been committed or permitted before the execution of these presents, and no act, deed, neglect, or default of either in relation to any such offence or misconduct, shall be pleaded or alleged by either party, or be admissible in evidence." The respondent was subsequently guilty of adultery with the co-respondent, and the petitioner instituted a suit for dissolution of marriage by reason of such adultery:—Held, that evidence of familiarities between the respondent and co-respondent prior to the separation was admissible within the terms of the deed. *Harris v. Harris*, 41 Law J. Rep. (n.s.) P. & M. 61.

##### (d) *Agent of husband employed to watch wife.*

**32.**—The husband, who was separated from his wife, employed an agent to watch her, in order to obtain evidence of her adultery. By the inducement of the agent the wife committed adultery:—Held, that the husband could not claim relief on the ground of such adultery, and petition dismissed. *Gower v. Gower*, 41 Law J. Rep. (n.s.) P. & M. 49; Law Rep. 2 P. & D. 428.

(O) WITNESS.

**33.**—The husband obtained a decree *nisi* for dissolution of his marriage, on the ground of his wife's adultery. Before the decree was made absolute, the Queen's Proctor intervened, and alleged that the petitioner had been guilty of specific acts of adultery, and also of adultery with divers women whose names were unknown. Particulars of the general charge of adultery were ordered, but none were furnished by the Queen's Proctor. The petitioner was called as a witness in his own behalf, and denied the specific charges of adultery. On cross-examination a question was put to him, tending to shew that he had been guilty of adultery as alleged in the general charge:—Held, that having tendered himself as a witness to disprove his alleged adultery, he was liable to cross-examination upon all the charges contained in the Queen's Proctor's allegations, and was therefore bound to answer the question. *Brown v. Brown*, 43 Law J. Rep. (n.s.) P. & M. 33; Law Rep. 3 P. & D. 198.

**34.**—In a suit by a wife for judicial separation on the ground of desertion, the Court having allowed substituted service of the petition, and petition for alimony *pendente lite*, and the husband not having appeared, the Court, under rule 89, allowed the wife to examine witnesses in support of her petition for alimony, without giving the usual four days' notice. *Robinson v. Robinson*, 41 Law J. Rep. (n.s.) P. & M. 40.

**35.**—No witness is liable to answer in cross-examination any question tending to shew that he has been guilty of adultery, unless he has in the same proceedings given evidence in disproof of the alleged adultery. *Babbage v. Babbage and Manning*, Law Rep. 2 P. & D. 222.

(P) ALIMONY.

(a) *Alimony pendente lite*.

(1) *Effect of separation deed*.

**36.**—The wife, the respondent in a suit, promoted by the husband for dissolution of marriage on the ground of her adultery, prayed for an allotment of alimony *pendente lite*. She was in the receipt, under a deed of separation, of an allowance of 40*l.* a year, and had made no effort to have it increased, notwithstanding that after the execution of the deed the husband came into the possession of very considerable property. The Court, under these circumstances, refused to allot alimony *pendente lite*. *Powell v. Powell*, 42 Law J. Rep. (n.s.) P. & M. 44; Law Rep. 3 P. & D. 186.

**37.**—An allowance under a deed of separation is no bar to a wife's petition for alimony *pendente lite*. *Powell v. Powell*, 43 Law J. Rep. (n.s.) P. & M. 9; Law Rep. 3 P. & D. 186.

As a rule, alimony *pendente lite* is allotted in the proportion of one-fifth of the joint income, but the allotment and amount are in all cases in the discretion of the Court. *Ibid*.

An allowance of 40*l.* a year was secured to the wife, under a deed of separation which was executed in 1862. The income of the husband was

at the time about 210*l.* a year, but in 1867 he came into the possession of property which brought him in an income of 1,700*l.* a year. The wife continued to receive the allowance of 40*l.* a year, and did not allege in her petition for alimony *pendente lite*, that her status had been in any way changed by the suit which her husband had instituted against her. The Judge Ordinary, under these circumstances, refused to make any order on her petition, and on appeal, the decision was affirmed by the full Court, who, in dismissing the appeal, refused to make any order as to her costs. *Ibid*.

(2) *Pending appeal by wife*.

**38.**—A wife who has appealed against a decree is generally entitled to alimony *pendente lite* during the appeal. *Jones v. Jones*, 41 Law J. Rep. (n.s.) P. & M. 53.

Semble—that if the appeal is vexatious or the wife has been guilty of laches, she will not be entitled to such alimony. *Ibid*.

(3) *Plea to jurisdiction*.

**39.**—Alimony *pendente lite* allowed notwithstanding a plea to the jurisdiction raising a substantial question of domicile. *Ronalds v. Ronalds*, Law Rep. 3 P. & D. 259.

(b) *Permanent alimony*.

(1) *After decree made*.

**40.**—It is not necessary, in suits for judicial separation, that the wife should obtain an order for alimony *pendente lite* to enable the Court to allot her permanent alimony after the final decree has been pronounced. *Covell v. Covell*, 41 Law J. Rep. (n.s.) P. & M. 81; Law Rep. 2 P. & D. 411.

The wife obtained a decree of judicial separation by reason of the adultery of the husband. No application was made for alimony pending the suit, but after the final decree had been pronounced, she filed a petition for permanent alimony. The husband appeared under protest:—Held, that the Court had power to entertain the petition, and that the husband was bound to answer to the merits. *Ibid*.

(2) *Increase of alimony*.

**41.**—Notice of an application for an increase of permanent alimony should be given to the husband. Notice to the attorney who conducted the suit for him is insufficient. *Louis v. Louis*, 41 Law J. Rep. (n.s.) P. & M. 18.

(3) *Payment of arrears*.

**42.**—The Court, contrary to the usual practice, made an order for the payment of arrears of alimony, specifying the amount, where it appeared probable that the husband, who was an officer serving in India, would be compelled by the India Office to obey such an order. *Louis v. Louis*, 41 Law J. Rep. (n.s.) P. & M. 19.

## (4) Allowance for children.

**43.**—The wife had an income from property settled on her by the husband of 196*l.* a year. The husband had an income of 367*l.* a year. There were three children of the marriage who were in the custody of the wife. The Court in allotting permanent alimony, ordered that in addition to the 196*l.* a year which the wife enjoyed under the settlement, the husband should allow her 30*l.* a year each for the maintenance of the children. *Todd v. Todd*, 42 Law J. Rep. (n.s.) P. & M. 62.

## (Q) CUSTODY OF CHILDREN.

**44.**—Under section 9 of 24 & 25 Vict. c. 86, the Court has a wide discretion as to the custody of the children, and no general rule can be laid down. Under special circumstances, after a judicial separation on the ground of the husband's adultery, but where there was no continuance of immorality on his part the custody of the sons was given to the father and that of the daughters to the mother. *Symington v. Symington*, Law Rep. 2 Sc. App. 415.

**45.**—The Court, in exercising the power given to it by 22 & 23 Vict. c. 61, s. 4, with respect to the custody of children, will allow, in the interest of the children, the intervention of a third person after the final decree in a suit for judicial separation as in a suit for dissolution of marriage. *Godrich v. Godrich*, 43 Law J. Rep. (n.s.) P. & M. 2; Law Rep. 3 P. & D. 134.

**46.**—In exercising its discretion in the matter of access to children by their parents pending a suit, the Court is mainly influenced by considerations for the interests of the children. Therefore, where it was satisfied that the visits of the mother to the child, who was in a very sickly state, might retard the child's recovery, it refused the mother an order for access pending the suit, though there was reason to apprehend that the separation of the mother from the child would exercise a prejudicial effect on the mother's health. *Philip v. Philip*, 41 Law J. Rep. (n.s.) P. & M. 89.

## (R) ALTERATION OF SETTLEMENT.

**47.**—The wife, on account of whose adultery the marriage was dissolved, derived considerable property from the will of her father. The property was devised and bequeathed to trustees, upon trust, to pay the annual income to the respondent for her separate use, as a strictly personal and inalienable provision during her life, "unless or until she, for the time being discover, should do or suffer any act or thing, or any event should happen, whereby the said income, or any part thereof, should either voluntarily or involuntarily be aliened or encumbered, or be receivable otherwise than by the respondent herself personally;" in which event, the will provided that the trust should be void, and that the income should then be applied in favour or for the benefit of the respondent or her children, as the trustees should think proper:—Held, assuming the substituted trust created by the will to arise, that the funds

which the trustees might in their discretion apply to the use of the respondent could not be regarded as property to which she was "entitled in reversion," and that the Court had, therefore, no power to make any order in respect of them. *Milne v. Milne*, 40 Law J. Rep. (n.s.) P. & M. 67; Law Rep. 2 P. & D. 295.

**48.**—The parties were married in 1850. By a post-nuptial settlement, executed in 1861, certain property belonging to the respondent was assigned to trustees in trust, amongst other things, to pay the interest and annual proceeds thereof to her for her separate use. Subsequently, in 1869, a deed of separation was entered into between the parties with the same trustees as those of the post-nuptial settlement, and by this deed the petitioner covenanted to pay the respondent an annuity for her life. The marriage was dissolved in 1871, by reason of the adultery of the respondent, and the petitioner afterwards applied to the Court to vary the deed of separation, so as to relieve him from the payment of the annuity under the deed of separation. The Court ordered that whenever any money should be payable to the respondent under the deed of separation the trustees should, out of the moneys in their hands payable to the respondent under the post-nuptial settlement, pay and apply a sum equal in amount upon such and the same trusts as would be applicable thereto in case the respondent were dead, and had died in the lifetime of the petitioner. *Bullock v. Bullock*, 41 Law J. Rep. (n.s.) P. & M. 83; Law Rep. 2 P. & D. 389.

**49.**—Under a post-nuptial settlement a power was given to the wife (the respondent in the suit) to appoint a life interest in the real and personal estate comprised in the settlement in favour of any future husband. There was one child, issue of the marriage, which was dissolved by reason of the wife's adultery:—Held, that the Court had power under 22 & 23 Vict. c. 61, s. 5, to deal with the power of appointment possessed by the wife, and to postpone the interests of the second husband to those of the child of the first marriage under the settlement. *Evered v. Evered*, 43 Law J. Rep. (n.s.) P. & M. 86.

**50.**—After a decree of dissolution of marriage, the parties concurred in asking for an order under 22 & 23 Vict. c. 61, s. 5, which would extinguish the interest of an infant, the issue of the marriage, under a settlement, proposing in lieu thereof that a sum of money should be invested in such a manner as would give the child an interest probably equal to that taken under the settlement. The Court refused to make the order. *Crisp v. Crisp*, 42 Law J. Rep. (n.s.) P. & M. 13; Law Rep. 2 P. & D. 426.

**51.**—The powers conferred on the Court by 22 & 23 Vict. c. 61, s. 5, do not include the power of interfering with a right reserved to the wife by the marriage settlement of joining in the appointment of new trustees. *Hope v. Hope*, 44 Law J. Rep. (n.s.) P. & M. 31; Law Rep. 3 P. & D. 226.

**52.**—The Court refused to alter a settlement for the purpose of compelling the respondent in a

divorce suit, who was in contempt for removing her child under cover of an order for access to restore the child to the petitioner. *Symonds v. Symonds and Harrison*, Law Rep. 2 P. & D. 447.

(S) PRACTICE.

(a) Petition.

(1) Amendment.

[See *supra*, Nos. 27, 28.]

(2) Withdrawal of petition.

53.—Where, on a husband's petition for a divorce, the wife pleaded denial of the adultery, and made counter charges, and nine months after the petition was filed, filed a petition for alimony, the husband was allowed to withdraw his petition without answering the petition for alimony, the wife having so long delayed to present her petition. *Twistleton v. Twistleton and Kelly*, Law Rep. 2 P. & D. 339.

(3) Answer to petition for alimony.

54.—The husband, in a matrimonial suit, filed no answer to the wife's petition for alimony. The Court made a peremptory order upon him, under the 84th rule (Rules and Regulations, 1866), to file an answer to the petition within a week. *Snowdon v. Snowdon*, 40 Law J. Rep. (n.s.) P. & M. 29 ; Law Rep. 2 P. & D. 200.

(b) Service.

(1) Personal.

55.—The citation in the suit was personally served upon the respondent, but was lost or destroyed by the clerk to whom it was given to be returned into the registry. The Court allowed a duplicate to be filed with the usual affidavit of service. *Chillcott v. Chillcott*, 43 Law J. Rep. (n.s.) P. & M. 8.

56.—Personal service of a citation and petition in a matrimonial suit dispensed with in a case where every reasonable effort had been made to trace the respondent. *Appleyard v. Appleyard and Smith*, Law Rep. 3 P. & D. 257.

(2) Substituted.

57.—The husband, the respondent in the suit, was a convict in Portland Prison, and could not be served personally with the citation and petition. The Court declined to make an order for substituted service on the governor of the prison, unless it could be shewn that by means of such service the papers would reach the respondent. *Bland v. Bland*, 44 Law J. Rep. (n.s.) P. & M. 14 ; Law Rep. 3 P. & D. 233.

(c) Issues.

58.—The Court will not direct issues in a matrimonial suit to be tried at the assizes against the wish of the husband, if he is liable to pay the wife's costs. *Snowball v. Snowball*, 40 Law J. Rep. (n.s.) P. & M. 56 ; Law Rep. 2 P. & D. 263.

59.—In a matrimonial suit in which two co-respondents were charged, one appeared but filed no answer ; the other appeared and filed an answer denying the adultery alleged against him. The Court, on his application, and on the suggestion that his defence would be prejudiced if the two cases were mixed up together, directed that the issues relating to him should be tried separately and apart from those connected with the other co-respondent, the applicant undertaking to pay the extra costs to which the petitioner might be put by such separate trial. *Cox v. Cox*, 40 Law J. Rep. (n.s.) P. & M. 23 ; Law Rep. 2 P. & D. 201.

(d) Dismissal of respondent from suit.

60.—Suit by the husband for dissolution of marriage. The respondent appeared absolutely. The co-respondent appeared under protest, and filed an act on petition, in which he set out facts raising the question of the jurisdiction of the Court, and prayed that he might be dismissed from the suit. The petitioner, after the pleadings on the act on petition had been concluded and the petition itself set down for hearing, applied to be allowed to withdraw his answer, and that the co-respondent might be dismissed from the suit on payment of his reasonable costs. The co-respondent refused to be dismissed from the suit, holding that he was entitled to have the question of jurisdiction raised by him first determined, and that until that question was determined he was not called upon to answer to the merits of the suit :—The Court, looking to the fact that the course sought to be pursued by the co-respondent would bring the suit to a dead lock, that success in his act on petition would only result in that which the petitioner offered, and that it was doubtful whether, in strictness, he could be considered a party to the suit, he having appeared only for the limited purpose of disputing its jurisdiction, dismissed him from the suit, on payment by the petitioner of his reasonable costs. *Wilson v. Wilson*, 41 Law J. Rep. (n.s.) P. & M. 33 ; Law Rep. 2 P. & D. 353.

(e) Staying proceedings.

[And see *infra* No. 72.]

61.—A petition was presented by a husband for a dissolution of his marriage by reason of the adultery of his wife. On an allegation that the respondent was insane, an issue was directed to try that question, and the jury found that on the day of the service of the citation the respondent was in such a condition of mental disorder as to be unfit and unable to answer the petition and to duly instruct her attorney for her defence, and that she had ever since remained, and then still did remain, so unfit and unable. Thereupon the Judge Ordinary ordered that no further proceedings should be taken in the suit until the respondent recovered her mental capacity, and this order was affirmed on appeal. Two years having elapsed, and there being no prospect that the respondent would ever recover, the Court, on the

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application of the petitioner, dismissed the petition, without prejudice to his right of appeal to the House of Lords upon the whole matter. *Mordaunt v. Mordaunt*, 41 Law J. Rep. (N.S.) P. & M. 42; Law Rep. 2 P. & D. 382.

(f) *New trial.*

62.—The wife petitioned for a dissolution of marriage by reason of the husband's adultery and cruelty. The cruelty charged consisted of divers acts of personal violence, and also the communication of venereal disease, and the charge of adultery rested on the same evidence as the charge of cruelty by infection. The Court found, on the evidence, that the charge of infection was not proved, and that the charge of personal violence was proved. On the application of the husband, a rule for the rehearing of the issue which had been found against him was made absolute, on the ground of surprise; but the hearing was ordered to be confined to the charge of personal violence, and not to extend to the other charge of cruelty. *Lee v. Lee*, 41 Law J. Rep. (N.S.) P. & M. 85; Law Rep. 2 P. & D. 409.

(g) *Rehearing.*

63.—In a suit for restitution by a husband, the respondent appeared but did not file an answer. After due notice to her the cause was set down for hearing. Subsequently, upon the motion of the petitioner, the Court ordered the cause to be heard out of its turn, and a decree was made, the respondent having received no notice of the motion or the order. Upon the application of the respondent, the Court reversed the decree, and ordered the cause to be reheard, giving the respondent, who had a defence on the merits, leave to file an answer. *Keane v. Keane*, 41 Law J. Rep. (N.S.) P. & M. 41.

(h) *Decrees and orders.*

(1) *Shewing cause against decree nisi.*

64.—The power given by 23 & 24 Vict. c. 144, s. 7, to shew cause why a decree should not be made absolute "by reason of material facts not brought before the Court," is not limited to cases in which the facts occurred before the decree *nisi*; and a material fact, such as the adultery of the petitioner, although it occurred after the decree *nisi*, is a ground for refusing to make the decree absolute. *Hulse v. Hulse*, 40 Law J. Rep. (N.S.) P. & M. 51; Law Rep. 2 P. & D. 259.

(2) *Reversing decree nisi.*

65.—The adultery of a petitioner after the date of the decree *nisi*, although ground for reversing the decree, so far as it dissolves the marriage, is not ground for reversing that part of it which condemns the co-respondent in costs. *Hulse v. Hulse*, 41 Law J. Rep. (N.S.) P. & M. 19; Law Rep. 2 P. & D. 357.

66.—A petitioner obtained a decree *nisi* with costs. Damages were also assessed against the co-respondent, but no order was made on him for their payment. On intervention by the Queen's

Proctor, it was proved that the petitioner after his marriage had led a profligate life. The Court reversed the decree *nisi*, including that part of it which condemned the co-respondent in costs, and dismissed the petition. *Ravenscroft v. Ravenscroft*, 41 Law J. Rep. (N.S.) P. & M. 28; Law Rep. 2 P. & D. 376.

With respect to the damages, the Court declined to make an order on the co-respondent for their payment; at the same time expressing the opinion that it was never intended that a petitioner should be entitled to damages where the petition is dismissed, and that even where a decree is made dissolving the marriage, the petitioner has no definite or legal right to the damages, unless an order for their payment to him be made by the Court. *Ibid.*

(3) *Time for making decree absolute.*

67.—The Court has power to shorten the period within which a decree *nisi* may be made absolute, so that the time be not less than three months, and will vary the decree *nisi* for that purpose. *Fitzgerald v. Fitzgerald*, 43 Law J. Rep. (N.S.) P. & M. 13; Law Rep. 3 P. & D. 136.

The wife obtained a decree *nisi* for dissolution of her marriage, on the ground of adultery and desertion, the decree to be made absolute at the expiration of six months. It was the third petition filed by her. The Queen's Proctor intervened on the hearing, and the facts as to the previous suits were fully laid before the Court. Under these circumstances, the Court shortened the period within which the decree *nisi* might be made absolute, and varied the decree itself by substituting "three" for "six" months. *Ibid.*

68.—The Court will not, unless there be peculiar circumstances in the case, abridge the time within which the decree *nisi* may be made absolute in suits for nullity. *M— v. B—*, 43 Law J. Rep. (N.S.) P. & M. 42; Law Rep. 3 P. & D. 200.

In a contested suit for a declaration of nullity of marriage by reason of the impotency of the husband, the wife obtained on the 24th of January, 1874, a decree *nisi*, which was to be made absolute in six months. The Court declined to abridge the time to enable an application to be made, before the long vacation, to the Court of Chancery to cancel the settlements made in consideration of the marriage. *Ibid.*

(4) *Suspending decree absolute.*

69.—The Court refused to suspend the decree absolute until the petitioner paid his costs. *Patterson v. Patterson*, 40 Law J. Rep. (N.S.) P. & M. 4; Law Rep. 2 P. & D. 192.

(5) *Order for payment of money.*

70.—The 52nd section of 20 & 21 Vict. c. 85, does not empower the Court to enforce its decrees or orders for payment of money by making charging orders under 1 & 2 Vict. c. 110, ss. 14 & 18. *Clarke v. Clarke*, 42 Law J. Rep. (N.S.) P. & M. 72; Law Rep. 3 P. & D. 37.



(i) *Damages.*

**71.**—Damages to the amount of 500*l.* were assessed against the co-respondent. Subsequently the co-respondent was adjudicated a bankrupt, and an order was made upon him to pay the damages into the registry unless they were admitted as a debt, payable out of the estate under the bankruptcy. The bankruptcy authorities refused to admit the proof tendered by the petitioner, on the ground that the damages were still in the disposition of the Court, and the damages remained unpaid:—Held, that the damages could not be regarded as “a penalty, or sum in the nature of a penalty,” so as to warrant the issue of an attachment against the co-respondent, but the Court varied its order by directing payment of the damages to the petitioner himself to enable him to prove under the bankruptcy. *Patterson v. Patterson*, 40 Law J. Rep. (n.s.) P. & M. 5; Law Rep. 2 P. & D. 187.

[And see *supra* No. 66.]

(k) *Appeal: whether stay of proceedings.*

**72.**—To a petition for dissolution of marriage the respondent appeared absolutely, the co-respondent under protest. The respondent then filed an answer, in which she merely stated facts to shew that the Court had no jurisdiction to entertain the suit. The Court ordered the answer to be removed from the file, unless within a fortnight the respondent amended it by pleading to the merits as well as to the jurisdiction. The respondent failed to amend her answer within the time allowed her, and appealed to the full Court from the order:—Held, that the appeal did not operate as a stay of proceedings, and directions were given for the mode of trial. *Wilson v. Wilson*, 40 Law J. Rep. (n.s.) P. & M. 58; Law Rep. 2 P. & D. 292.

(T) *Costs.*

(a) *Of wife.*

(1) *Intervention of Queen's Proctor.*

**73.**—The intervention of the Queen's Proctor after a wife has obtained a decree *nisi* does not affect her right to the costs of the suit. *Gladstone v. Gladstone*, 44 Law J. Rep. (n.s.) P. & M. 46; Law Rep. 3 P. & D. 260.

(2) *Suit for dissolution: failure of charges.*

**74.**—The husband having instituted a suit for divorce, the wife, without any ground for suspicion, employed detectives with the object of making out a counter case of adultery. As the result of their enquiries the wife charged the husband with numerous acts of adultery, but failed to establish any of the charges. The Court, under those circumstances, refused to allow her the costs incurred in this portion of her defence. *Wilson v. Wilson*, 41 Law J. Rep. (n.s.) P. & M. 741; Law Rep. 2 P. & D. 435.

(3) *Judicial separation.*

**75.**—Husband and wife agreed to live separate and apart, and a deed was executed by which the

husband covenanted to allow the wife 60*l.* a year for her maintenance. A year afterwards the wife filed a petition for judicial separation on the ground of cruelty, but failed to support the charge, and the petition was dismissed. The Court, being of opinion that the wife's attorney had acted in the belief of the genuineness of her case, allowed the wife's costs up to the amount for which security had been given. *Flower v. Flower*, 42 Law J. Rep. (n.s.) P. & M. 45; Law Rep. 3 P. & D. 132.

**76.**—The 159th rule gives the Court a discretionary power to disallow the wife's costs of the hearing in a suit for judicial separation although security has been given for such costs. And per Lord Penzance, such power is also conferred on the Court by s. 51 of 20 & 21 Vict. c. 85. *Jones v. Jones*, 41 Law J. Rep. (n.s.) P. & M. 53.

The discretion is a judicial one, and the wife's costs ought only to be disallowed in extreme cases, as where her conduct has been vexatious. *Ibid.*

**77.**—In a suit by a wife for judicial separation on the ground of cruelty and incestuous adultery, the Court being of opinion that there was no pretence for the charge, upon dismissing the petition refused to allow the wife her costs of the hearing, although security for them had been given. *Jones v. Jones*, 41 Law J. Rep. (n.s.) P. & M. 21; Law Rep. 2 P. & D. 333.

(4) *Restitution of conjugal rights.*

**78.**—A decree was made in a suit for restitution of conjugal rights promoted by the husband. No notice of the hearing having been served on the wife, the decree was reversed, and a rehearing ordered. Subsequently an order was made on the petitioner for the payment of the respondent's taxed costs amounting to 14*l.* 9*s.* The petitioner failed to comply with this order, and a writ of *fi. fa.* was issued, but without effect, against his goods. In obedience to a further order he gave security for the payment of 65*l.*, the estimated costs of the respondent on the re-hearing. The Court ordered a stay of proceedings until the petitioner had complied with the order for the payment of the respondent's taxed costs, but declined to include in the taxation the costs of the writ of *fi. fa.* issued for the recovery thereof. *Keane v. Keane*, 42 Law J. Rep. (n.s.) P. & M. 12; Law Rep. 3 P. & D. 52.

(5) *Unsuccessful suit.*

**79.**—Although the Court has power to disallow the costs of an unsuccessful suit by a wife out of the fund deposited by the husband as security, it will not do so unless there has been misconduct on the part of the wife's attorney, or knowledge by him that there was no reasonable ground for the suit. *Flower v. Flower*, Law Rep. 3 P. & D. 132.

(b) *Costs against separate estate of wife.*

**80.**—The law presumes that by the contract of marriage all the property passes to the husband. The wife is in consequence a privileged suitor in the Court with regard to costs; but where she has separate property, she is liable, like any other unsuccessful suitor, to be condemned in costs.

*Milne v. Milne*, 40 Law J. Rep. (n.s.) P. & M. 13; Law Rep. 2 P. & D. 202.

In a matrimonial suit the alleged adultery against the respondent and co-respondent was fully established. The petitioner was without blame. There was no excuse for the misconduct of the respondent, and it appeared that she was possessed of large separate estate. The Court, under these circumstances, condemned her, as well as the co-respondent, in costs. *Ibid*.

(c) *Costs against petitioner.*

**81.**—On the trial of an issue of adultery raised by the husband's answer to the wife's petition, the alleged adulterer was called as a witness and simply denied the charge. The jury were unable to agree upon a verdict, and the issue was tried a second time. On the second trial the alleged adulterer, who was now the co-respondent in a suit instituted by the husband, entered into a full explanation of his conduct, and the jury found that he was not guilty of the charge. The Court refused to condemn the petitioner in costs, on the ground that by his silence on the first, he had contributed to the necessity of the second trial. *West v. West*, 40 Law J. Rep. (n.s.) P. & M. 11; Law Rep. 2 P. & D. 196.

(d) *Claim for damages.*

**82.**—Section 33 of 20 & 21 Vict. c. 85, enacts that a claim for damages against a co-respondent "shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in Courts of Common Law;" but the Court is not thereby deprived of the general discretion as to costs given to it by section 51 of the Act. And on such a petition, as in the case of a petition where no damages are claimed, the Court may make such order as to costs as to it may seem just. *West v. West*, 40 Law J. Rep. (n.s.) P. & M. 11; Law Rep. 2 P. & D. 196.

(e) *Costs after decree absolute.*

**83.**—The Court has no power to make any order as to costs which are for the first time asked for after the decree absolute. *Wait v. Wait*, 40 Law J. Rep. (n.s.) P. & M. 30; Law Rep. 2 P. & D. 228.

(f) *Security for costs.*

**84.**—Where an appeal is entered against a decision of the Judge Ordinary dismissing the wife's petition, and refusing to allow her the costs of the hearing, the Court will not, pending the appeal, order the cancellation of a bond given by the husband to secure those costs. *Jones v. Jones*, 41 Law J. Rep. (n.s.) P. & M. 43.

A wife appealing against a decision of the Judge Ordinary is entitled to security for her costs of the appeal. *Ibid*.

**85.**—Semble, the Court will order a wife (petitioner), who is out of the jurisdiction and has separate property, to give security for costs. *De B. v. De B.*, 44 Law J. Rep. (n.s.) P. & M. 41.

(g) *Proctor's or attorney's lien.*

**86.**—The wife filed a petition for dissolution of marriage. The husband appeared and answered. The petitioner returned to cohabitation, and the respondent, with her consent, applied to have the petition dismissed. The petitioner's costs were unpaid. The Court refused, at the instance of the petitioner's attorney, to dismiss the petition forthwith, and granted an order for the taxation of her costs. *Dixon v. Dixon*, 40 Law J. Rep. (n.s.) P. & M. 38; Law Rep. 2 P. & D. 253.

**87.**—The petitioner in a matrimonial suit obtained a decree *nisi*. The co-respondent, who was condemned in costs, subsequently became bankrupt; proof of the costs as a debt was admitted under the bankruptcy, and a dividend of 5s. was declared payable in respect of them out of the co-respondent's estate. The petitioner refused to allow his proctor to receive the dividend, and remained indebted to him for the costs of the suit:—Held, that the Court had no power to suspend the decree absolute until the costs of the petitioner were paid. *Patterson v. Patterson*, 40 Law J. Rep. (n.s.) P. & M. 4; Law Rep. 2 P. & D. 192.

DOCK.

*Rateability.* [See RATE, 13.]

*Deductions in rating.* [See RATE, 29, 30.]

DOMICIL.

(A) ACQUISITION OR CHANGE OF.

(B) LAW OF COUNTRY OF DOMICIL WHEN APPLICABLE.

(A) ACQUISITION OR CHANGE OF.

**1.**—A., a domiciled Scotchman, married in Scotland and cohabited with his wife in Scotland. On discovering her infidelity he broke up his establishment in Scotland, and took up his residence in the neighbourhood of London. He remained a sleeping partner in a firm whose business was carried on in Scotland; he continued his subscription to a club at Glasgow, and retained possession of a shooting lodge in Scotland, of which he held a lease. He engaged in no pursuit in England, and he acquired no residence in his own right in England. Six years after leaving Scotland he instituted a suit in this country for dissolution of marriage on the ground of his wife's adultery in Scotland. At the trial, he stated that he had come to England with the intention of making it his permanent home, and that he had no idea of returning to Scotland:—Held, that although the fact of his residence in this country, and the way in which it arose, would not be enough to enable the Court to come to the conclusion that he had made England his domicile, yet in the absence of circumstances tending to discredit his oath, the Court was bound to accept his statement as to the intention with which he had

left Scotland and come to England; that he had, therefore, acquired an English domicile, and that the Court had jurisdiction to entertain the suit. *Wilson v. Wilson*, 41 Law J. Rep. (N.S.) P. & M. 74; Law Rep. 2 P. & D. 435.

2.—For many purposes a domicile of origin requires more to change it than a domicile of acquisition, and in order to prove that the domicile of an adult of sound mind has been changed, an intention on his part must be shewn. That is to say, such an intention must be proved to have actually existed in the mind of the party, or it must appear that it was reasonably certain it would have existed, if the question had arisen in a form requiring a deliberate and solemn determination. *Douglas v. Douglas*, 41 Law J. Rep. (N.S.) Chanc. 74; Law Rep. 12 Eq. 617.

A child of Scotch parents for some time resident in England, who was born there, and was for many years himself a resident with his wife and children there, and who died and was buried in England, was, under all the circumstances of the case, held not to have lost his Scotch domicile of origin. *Ibid.*

3.—A French subject, who had set up in business in England, and resided there more than thirty years, but who refused to take out letters of naturalisation in England on the ground that he might return to France, and did not wish to give up his status as a French citizen:—Held, nevertheless, to have acquired an English domicile, and to have lost his original domicile. *Brunel v. Brunel*, Law Rep. 12 Eq. 298.

4.—In 1858 M. left Canada, which was his domicile of origin, sold his house and burial-ground there, and came to Paris to educate his children. He lived in Paris ten years, but went over several times to Montreal, and amongst other things made his will there, describing himself as of Montreal. In 1868 he came to England and took a lease of a house in London. His daughter married and settled in London, and he purchased for his son a share in a business in London. M. died in 1871:—Held, that M. had acquired and shewn an intention to retain an English domicile. *Stevenson v. Masson*, 43 Law J. Rep. (N.S.) Chanc. 134; Law Rep. 17 Eq. 78.

#### (B) LAW OF COUNTRY OF DOMICIL WHEN APPLICABLE.

[See CONFLICT OF LAWS, 2, 3, 4, 6.]

5.—The validity of a testamentary gift of leaseholds is governed by the *lex loci*, and not the *lex domicilii*. *Freke v. Lord Carbery*, Law Rep. 16 Eq. 461.

*As to succession duty payable under the will of a testator domiciled abroad.* [See LEGACY AND SUCCESSION DUTY, 4-6.]

*Jurisdiction of Court of Divorce.* [See DIVORCE, 1.]

*In suit for nullity of marriage.* [See LEGITIMACY DECLARATION ACT, 2.]

*Administration of real estate in Scotland.* [See ADMINISTRATION, 25.]

### DONATIO MORTIS CAUSÂ.

1.—The plaintiff (who was her husband's executrix) claimed railway certificates and a deposit note, either as having been given to her by her husband in his lifetime, or on the ground that he had constituted himself a trustee of them for her, or as *donationes mortis causâ*:—Held, following *Ward v. Turner* (2 Ves. sen. 431), that railway certificates could not be made the subject of a *donatio mortis causâ*; and held, on the facts, that she was not entitled to the railway certificates, but was entitled to the deposit note as a *donatio mortis causâ*. *Moore v. Moore*, 43 Law J. Rep. (N.S.) Chanc. 617; Law Rep. 18 Eq. 474.

2.—An uncle upon his death-bed delivered to his nephew a cheque for 4,000*l.*, and with it his banker's pass-book. The cheque was not presented until after the donor's death:—Held, that the intended gift failed. *In re Beak's Estate*, *Beak v. Beak*, 41 Law J. Rep. (N.S.) Chanc. 470; Law Rep. 13 Eq. 489.

### DOWER.

1.—A. being the owner of leaseholds for a term of ninety-nine years, mortgaged the property to B. for the term less five days, and also to G. and R. for the term less three days. He also demised to M. for the term less ten days on trust for G. and R. He then acquired the fee subject to the mortgages. B.'s mortgage was paid off to his executors, who assigned the term upon which it was secured to a trustee for G. and R. Then A. became bankrupt, and he and his assignees, in consideration of a release by G. and R. of their mortgage debt, by a deed to which A.'s wife was named a party, but which she refused to execute, granted the fee of the premises to them. They sold the estate, and A. died. A.'s widow then filed her bill against the purchaser, to enforce her right to dower out of the premises:—Held, on demurrer, that upon the release by G. and R. of the mortgage debt, the mortgage terms became satisfied, and were extinguished by the Satisfied Terms Act (stat. 8 & 9 Vict. c. 112), and thereby the inchoate right of A.'s widow to dower was let in, and she was entitled to sustain her bill. *Anderson v. Pignet*, 40 Law J. Rep. (N.S.) Chanc. 199; Law Rep. 11 Eq. 329.

2.—A general devise of real estate is a bar to the widow's dower, under section 4 of the Dower Act; and a devise in trust for sale and conversion, with a direction to pay an annuity out of the proceeds to the widow during her life, is a like bar under section 9 of the Act. *Lacey v. Hill*; *Leney v. Hill*, 44 Law J. Rep. (N.S.) Chanc. 215; Law Rep. 19 Eq. 346.

Remarks on *Rowland v. Cuthbertson* (Law Rep. 8 Eq. 466). *Ibid.*

Freebench can now be barred by a mere devise without a surrender to the use of the will. *Ibid.*

[And see BARON AND FEME, 30, 31.]

## DRAINAGE AND IMPROVEMENT OF LANDS.

[See LAND DRAINAGE ACT.]

[Amendment of law as to drainage and improvement in Ireland. 35 & 36 Vict. c. 31, and 37 & 38 Vict. c. 32.]

## DRAMATIC COPYRIGHT.

[See COPYRIGHT, 7-9.]

## DUPLEX QUERELA.

[See CHURCH, 3.]

## EASEMENT.

- (A) CONSTRUCTION OF GRANT OF EASEMENTS: REASONABLE USER.
- (B) IMPLIED GRANT.
- (C) ACQUISITION OF EASEMENTS BY PRESCRIPTION.
- (D) EXTINGUISHMENT: ALTERATION OF DOMINANT TENEMENT.
- (E) PARTICULAR EASEMENTS.
- (F) OBSTRUCTION OF EASEMENTS.

### (A) CONSTRUCTION OF GRANT: REASONABLE USER.

1.—In construing the grant of an easement contained in a lease, and subsequently embodied in a conveyance in fee of the reversion of the demised premises, the Court will look to the "reasonable user" of the property when the lease was granted; and in order to decide upon that, will examine all the provisions in the lease; and will not enlarge the easement so as to enable the purchaser to extend the rights conferred by it beyond their legitimate objects. *Wood v. Saunders*, 44 Law J. Rep. (N.S.) Chanc. 514: affirmed, on appeal, Law Rep. 10 Chanc. 582.

2.—When a private way is granted over a piece of land of stipulated dimensions, the grantee is not entitled to the use of every square inch of the surface of the land; all that the grant confers upon him is a reasonable enjoyment of the land as a road. *Clifford v. Hoare*, 43 Law J. Rep. (N.S.) C. P. 225; Law Rep. 9 C. P. 362.

By an indenture, dated the 17th of May, 1872, to which the defendant was a party, A. bought a plot of ground for the purpose of building a house, and power was given to A. to erect as part thereof a portico projecting into a private road upon the west side thereof. By an indenture, dated the 2nd of August, 1872, to which also the defendant was a party, another plot of ground was conveyed to the plaintiff with a right of way over the private road before mentioned, which was to be

forty feet wide; and the defendant covenanted with the plaintiff that he had not "been party or privy to anything," whereby the premises granted by him were or might be "impeached, affected, or incumbered in title, estate, or otherwise howsoever." A. erected a house upon the plot of ground bought by her, and built out a portico upon the west side thereof; the columns of the portico stood in the carriage-way of the private road; the bases of the columns were five feet in width and two feet in depth:—Held, that by the indenture of the 2nd of August, 1872, the plaintiff was entitled only to the reasonable enjoyment of a right of way over the private road, and not to the use of every square inch of the surface of a road forty feet wide; that the portico did not interfere with the reasonable enjoyment of the road by the plaintiff, that the defendant's covenant had not been infringed, and that he was not liable for breach thereof in an action at the suit of the plaintiff. *Ibid*.

Semble—that the plaintiff's enjoyment of the right of way over the private road had been interfered with by the portico, the defendant would have been, within the meaning of his covenant, party and privy to a thing, which impeached, affected, and incumbered the grant of the right of way to the plaintiff, who might therefore have maintained an action against the defendant. *Ibid*.

### (B) IMPLIED GRANT.

3.—Upon a severance of tenements, easements as of necessity or in their nature continuous will pass by implication of law without any words of grant. *Watts v. Kelson*, 40 Law J. Rep. (N.S.) Chanc. 126; Law Rep. 6 Chanc. 166.

The owner of two adjoining properties, Blackacre and Whiteacre, conveyed Blackacre to the plaintiff by deed, "together with all waters, watercourses, &c., used and enjoyed therewith." There was a small natural watercourse, which passed through Whiteacre to Blackacre. At the date of the conveyance an artificial pipe existed in this watercourse, which passed the water through Whiteacre down to some cattle sheds in Blackacre. After the severance the plaintiff pulled down the cattle sheds and erected cottages in their place:—Held, that the right to the water-flow through the artificial pipe was an easement as of necessity and in its nature continuous, and as such passed by implication of law to the plaintiff; that, if it was not necessary, the general words in the conveyance were sufficient to pass it, and that the change in the mode of user by the plaintiff had not taken away his right to have the water flow in the accustomed manner through the defendant's premises.

Judgment of Erle, C.J., in *Polden v. Bastard* (35 Law J. Rep. (N.S.) Q. B. 92; s. c. Law Rep. 1 Q. B. 156, 161) approved of. *Ibid*.

4.—In a lease the demised premises were described as "all that plot of land bounded on the east and north by newly-made streets, a plan whereof is endorsed on these presents," and the lessee covenanted to kerb the causeways adjoining the said lands. The site of the new streets was

marked as such in the plan indorsed:—Held, that this amounted to a grant of a right of way along the proposed new streets to the land demised. *Espley v. Wilkes*, 41 Law J. Rep. (N.S.) Exch. 241; Law Rep. 7 Exch. 298.

#### (C) ACQUISITION OF EASEMENTS BY PRESCRIPTION.

5.—An easement over land cannot co-exist with the possession of the land, and therefore a right to the user of light and air cannot be acquired by means of lapse of time, under the Prescription Act, by the owner of a house while he is in occupation of the land over which the right would extend. *Ladyman v. Grave*, Law Rep. 6 Chanc. 763.

6.—Where there has been an interruption to the enjoyment of a prescriptive right under 2 & 3 Will. 4. c. 71, it is a question of fact for the jury whether such interruption has been submitted to or acquiesced in by the party whose enjoyment has been interrupted; and if in fact it has not been submitted to or acquiesced in by such party for one year after notice thereof, it is not an interruption which will defeat the prescriptive right from being acquired by an actual enjoyment for twenty years without interruption within the meaning of section 3 of that Act. *Glover v. Coleman*, 44 Law J. Rep. (N.S.) C. P. 66; Law Rep. 10 C. P. 108.

On trial of an action for obstructing the access of light to the plaintiff's window, in which the plaintiff proved the enjoyment of such light to the window for more than twenty years, but for an interruption during the last thirteen months immediately preceding such action caused by the defendant erecting a shed opposite such window, there was evidence that during those thirteen months the plaintiff had more than once complained to the defendant of such interruption, and had protested to the defendant against the shed being there:—Held, that this was evidence on which a jury might find that the interruption had not been submitted to or acquiesced in by plaintiff. *Ibid*.

#### (D) EXTINGUISHMENT: ALTERATION OF DOMINANT TENEMENT.

7.—The plaintiff, who had a right to project the eaves of his house over the land of the defendant, raised the eaves about thirteen or fifteen inches without changing the extent of their projection over the defendant's land:—Held, in an action for interfering with such right, that the easement was not destroyed by such raising of the eaves, in the absence of evidence that any additional burthen had been cast upon the defendant's land. *Harvey v. Walters*, 42 Law J. Rep. (N.S.) C. P. 105; Law Rep. 8 C. P. 162.

Semle—that the fresh projection over the land of the defendant which was made when the eaves were raised, was not a new trespass, but only a mere user of the space taken possession of by the trespass occasioned by the original projection. *Ibid*.

#### (E) PARTICULAR EASEMENTS.

[See COMMON; WAY; WATERCOURSE; LIGHT.]

#### (F) OBSTRUCTION OF EASEMENTS.

[See INJUNCTION.]

#### EAST INDIA COMPANY.

A petition of right claimed from the Queen payment of debts, which were incurred by the ruler of Oude as part of the public debt of that state before it was annexed by the East India Company:—Held, assuming the liability to pay the debts to have been transferred to the East India Company by the annexation, that such liability was transferred by the 21 & 22 Vict. c. 106, ss. 65–68, from the East India Company to the Secretary of State in Council of India; that the remedy, if any, was by action against him; and that the petition of right therefore could not be maintained. *Firth v. The Queen*, 41 Law J. Rep. (N.S.) Exch. 171; Law Rep. 7 Exch. 365.

#### EJECTMENT.

In ejectment by lessor for breach of covenant by the lessee the plaintiff delivered as particulars of breaches, first, the non-payment of three years' rent from 1867 to 1870; secondly, the permitting a sale by public auction on the premises in 1867, contrary to the covenants in the lease. The defendant then took out a summons for relief under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 212, and obtained an order that upon payment of the amount found to be due for rent, &c., proceedings should be stayed with reference to the breach for non-payment of rent. The defendant afterwards paid into Court the amount found to be due to the plaintiff:—Held, that the fact that the plaintiff had in his particulars asserted his right to rent due after the first forfeiture, and that the defendant had paid this rent into Court, did not constitute a waiver of this forfeiture, as the plaintiff was no party to the payment into Court, and had merely stated in his particulars that if he failed on one ground of forfeiture, he should rely upon another. *Tolerman v. Portbury*, 40 Law J. Rep. (N.S.) Q. B. 125; Law Rep. 6 Q. B. 245.

*Judgment by consent: costs.* [See COSTS AT LAW, 10.]

*Interrogatories in action for.* [See PRACTICE AT LAW, 19.]

#### ELECTION.

(A) WHERE IT ARISES.

(B) PROOF OF ELECTION BY CONDUCT.

(C) SUIT TO ASCERTAIN VALUE.

## (A) WHERE IT ARISES.

1.—A will, made in the lifetime of R., affected to give to A. personalty which in truth belonged to R., and it also gave legacies to R.'s children, and by a codicil thereto, made after R.'s death, additional benefits were given to R.'s children:—Held, that R.'s right to the above-mentioned personalty having devolved on his children as his next-of-kin, they must elect between on the one hand making satisfaction to A. out of their father's personalty, and on the other hand abandoning all the benefits which they took as well under the will made in R.'s lifetime as by the codicil made after his death. *Cooper v. Cooper* (H. L.), 44 Law J. Rep. (n.s.) Chanc. 6; Law Rep. 7 E. & I. App. 53: affirming the decision of the Court of Appeal in Chancery, 40 Law J. Rep. (n.s.) Chanc. 5; Law Rep. 6 Chanc. 15.

Next-of-kin (unlike creditors) are not merely interested in the balance in the hands of the administrator after sale of the intestate's effects and payment of his debts, &c.; they take a substantial proprietorship in every one of the intestate's chattels, the Statute of Distributions being in the nature of a will for all persons who die intestate. Therefore for the purpose of election, the next-of-kin of an intestate who would have been put to his election are under the same obligation. *Ibid.*

In estimating the amount of compensation to be paid by such persons, they are entitled to deduct from the value of their property so derived and so erroneously given away from them a rateable proportion of the debts, having regard to the whole of the intestate's assets. *Ibid.*

Where a person who is put to election is a married woman, an infant or under disability, an inquiry should be directed whether it would be for her benefit to take under the instrument or to stand by her right without it. *Ibid.*

2.—Settlement on the marriage in 1850 of a lady under twenty-one, by which bank shares on the part of her father, and stock on the part of the intended husband, were brought into settlement, and there was an attempted assignment of a reversionary interest of the wife in a certain fund, the trusts being for the benefit of the husband, wife, and children of the marriage. The marriage having been dissolved by a decree of the Divorce Court, and the fund to which the wife was entitled in reversion having fallen into possession,—Held, that she was bound to elect between her right to receive this fund free from the settlement and the interest provided for her by the settlement, and that if she elected to take against the settlement she must account for all income received by her under it since the order nisi for dissolution. *Codrington v. Lindsay*, 42 Law J. Rep. (n.s.) Chanc. 526; Law Rep. 8 Chanc. 578: affirmed, on appeal to the House of Lords, Law Rep. 7 E. & I. App. 54, *nom. Codrington v. Codrington*.

3.—Where a testatrix, having lent 900*l.* to M. on an assignment by him of a covenant by F. to transfer 1,000*l.* stock to him, by a codicil to her

will directed that her executors should not call on F.'s representatives for a transfer of the 1,000*l.* stock, nor on M. for payment of the 900*l.*; and it appeared by reading the codicil and will together that the testatrix intended to provide for the debt due from F. to M.:—Held, that M. could not enforce the covenant to transfer the stock against F.'s estate. *Synge v. Synge* (Law Rep. 15 Eq. 389) affirmed, on appeal, but varied by holding that M. was at liberty to enforce the covenant against F.'s estate to the extent of the difference between the 900*l.* and the value of the 1,000*l.* stock. *Synge v. Synge*, Law Rep. 9 Chanc. 128.

4.—The testatrix after devising "all and singular the estate and mines of A." upon certain trusts, bequeathed to T. 10,000*l.* in satisfaction of any sum of money in which she might be indebted to T. The will also contained the usual devise of trust and mortgage estates to the trustees. The testatrix was in fact entitled to only one moiety of the A. estates for her own benefit, and was mortgagee in possession of the other moiety for a sum of 100,000*l.* and upwards which her predecessor in title had by deed settled on T. and four other persons in equal shares. She was ignorant of these facts and of the existence of the deed of trust:—Held, that the testatrix intended to devise the entirety of the A. estates, and therefore that T. must elect between his interest under the trust-deed and the legacy given him by her will, and that, although the bequest was made in satisfaction of a debt. Dictum of Lord Hardwicke in *East v. Cook* (2 Ves. sen. 30) not followed. *Wilkinson v. Dent*, 40 Law J. Rep. (n.s.) Chanc. 253; Law Rep. 6 Chanc. 339.

5.—The testator, by his will, appointed his widow one of the guardians of his children, bequeathed her an immediate legacy of 200*l.*, the consumable stores at his mansion house, an annuity of 700*l.* a year, charged on a specifically-devised portion of his real estate, in exoneration of all his other property; directed that his widow should (on certain terms) occupy his mansion, gave several powers to his trustees, and among others, powers of leasing and management of his estates, and added to his will four schedules, comprising freeholds, leaseholds, copyholds, and customary lands. The evidence shewed that the widow was entitled, though not in each case to the same extent, to freebench in the customary lands:—Held, that the widow was bound to elect. *Thompson v. Burra*, 42 Law J. Rep. (n.s.) Chanc. 827; Law Rep. 16 Eq. 592.

6.—The testator gave benefits to his heir. His residuary devise of "all the residue of my real estate situate in any part of the United Kingdom or elsewhere," was upon trust for sale. He had some real estate in Scotland:—Held, that the heir-at-law was put to his election, and could not take both the Scotch lands by descent and the gifts in the will. *Orrell v. Orrell*, 40 Law J. Rep. (n.s.) Chanc. 539; Law Rep. 6 Chanc. 302.

## (B) PROOF OF ELECTION BY CONDUCT.

7.—In order to establish election by conduct it is necessary to prove that the party put to his

election had full knowledge of his rights, and intended to elect. *Wilson v. Thornbury*, 44 Law J. Rep. (N.S.) Chanc. 242; Law Rep. 10 Chanc. 239.

(C) SUIT TO ASCERTAIN VALUE.

8.—Consideration of the circumstances under which a person, who is put to election, may file a bill to ascertain the value of the property, *Burtrick v. Broadhurst* (1 Ves. 171), and note in *Dillon v. Parker* (1 Sw. 381 n.) considered. *Douglas v. Douglas*; *Douglas v. Webster*, 41 Law J. Rep. (N.S.) Chanc. 74; Law Rep. 12 Eq. 617.

*Election to treat agent as debtor.* [See PRINCIPAL AND AGENT, 6.]

ELEMENTARY EDUCATION ACT.

[Alteration of date in paragraph 3, schedule 2, of the above Act. 34 & 35 Vict. c. 94.]

[The above Act amended and in part repealed. 18 & 19 Vict. c. 34 repealed and other provisions substituted. 36 & 37 Vict. c. 86.]

1.—Though it is not necessary that the person employed as returning officer at the first election of a school board should be a solicitor, nevertheless if he is so, the board, who are directed to pay his expenses, may have his bill taxed in the usual way. *In re Jones*, 41 Law J. Rep. (N.S.) Chanc. 367; Law Rep. 13 Eq. 336.

2.—The sections of the Lands Clauses Consolidation Act, 1845, relating to the purchase of lands, are incorporated in the Elementary Education Act, 1870, for all purposes, and their application is not confined to cases where the relation of vendor and purchaser exists. Therefore the remedy of a person whose lands are injuriously affected by the works of the School Board, but no part of whose land is taken, is by proceeding for compensation under section 68 of the Lands Clauses Act, and not by bill for an injunction. *Macey v. The Metropolitan Board of Works* (33 Law J. Rep. (N.S.) Chanc. 377; 10 Jur. (N.S.) 333) approved of and followed. *Clark v. The School Board for London*, 43 Law J. Rep. (N.S.) Chanc. 421; Law Rep. 9 Chanc. 120.

3.—The trust deed of a school supported by "The National Society for Promoting the Education of the Poor in the Principles of the Established Church throughout England and Wales," provided that the school should "always be in union with and conducted according to the principles, and in furtherance of the ends and designs of the Society." The deed contained no power of alienation. The managers of the school having, under section 23 of the Elementary Education Act, 1870, entered into arrangements for the transfer of the school to a School Board, the Society appeared before the Education Department under the provisions of that section, and objected to the transfer on the ground that if it were effected, the children, under section 14 of the Act, could not be educated in the principles of the Society. The Department, however, overruled the objection, and the transfer was executed. Upon a bill filed

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by the Society to set aside the transfer,—Held, that the Act did not require the consent of the Society to the transfer, and that having appeared before the Education Department and urged their objections to the transfer, the Society had no further power of opposing it. *The National Society v. The School Board for London*; and *The Attorney-General v. English*, 44 Law J. Rep. (N.S.) Chanc. 229; Law Rep. 18 Eq. 608.

EMBEZZLEMENT.

- (A) INDICTMENT: THREE DISTINCT ACTS.  
(B) CLERK OR SERVANT.

(A) INDICTMENT: THREE DISTINCT ACTS.

1.—It was the duty of an agent of a coal society to collect and receive from persons who bought coals from the society, for which they were to pay by weekly instalments, such weekly payments, and to send in a weekly account on the Tuesday of every week, and to pay the gross amount received by him in the course of the week on such Tuesday, into a bank to the credit of the society. An indictment for embezzlement against the agent, containing three counts, charged in the first count the act of embezzling a sum of 1*l.* 1*s.*, and evidence was given on that count that during a certain week, payments amounting in the whole to this amount had been paid to the prisoner by ten different persons in small sums, and that the prisoner omitted to account at the end of the week or at any time for those several sums, or for any specific amount of 1*l.* 1*s.* In the other two counts, sums were charged, being aggregate sums similarly composed and received weekly, but not accounted for weekly in a similar manner, and thirty-one small sums in all were thus shewn not to have been accounted for at three weekly accountings:—Held, that the evidence was properly received, and that the indictment did not charge more than three distinct acts of embezzlement, each act of embezzlement being the omission to account weekly for the aggregate sum composed of the several sums received during the week. *The Queen v. Balls*, 40 Law J. Rep. (N.S.) M. C. 148; Law Rep. 1 C. C. R. 328.

(B) CLERK OR SERVANT.

2.—The son of a man who kept an office and held various appointments, amongst which was that of clerk to a local board, which son living at home assisted his father in his office, conducting the business of the board, but without being paid any salary, may be convicted of embezzling moneys received by him on business of the local board as the clerk or servant, or as being employed in the capacity of a clerk or servant of his father, and the moneys may be alleged in the indictment to be the moneys of the father. *The Queen v. Foulkes*, 44 Law J. Rep. (N.S.) M. C. 65; Law Rep. 2 C. C. R. 150.

3.—The prisoner was employed to solicit orders

for the prosecutors, and was to be paid by a commission on the sums received through, his means. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than the prosecutors. The Judge at the trial directed the jury that the prisoner was a clerk or servant within the meaning of 24 & 25 Vict. c. 96, s. 68:—Held, upon the above facts, that he was not a clerk or servant within the meaning of 24 & 25 Vict. c. 96, s. 68, and therefore that the direction was wrong, but that, generally speaking, whether a person under such an employment and paid by commission is a clerk or servant is a question of fact for the jury. *The Queen v. Negus*, 42 Law J. Rep. (N.S.) M.C. 62; Law Rep. 2 C.C.R. 34.

4.—Embezzlement of money by a servant under 24 & 25 Vict. c. 96, s. 68 must be in respect of money delivered to or received, or taken into possession by the servant for or in the name of or on the account of his master. And where a servant,—whose duty it was to take a barge belonging to his master with cargo from A. to B. and receive back such return cargo, and from such persons as his master should direct, and such only, contrary to the express orders of his master, which were to return empty from B. to C., part of the return voyage to A,—took, nevertheless, a return cargo from B. to C., and received the freight from the owner of the cargo (who knew only the prisoner in the transaction) and did not account to his master for the freight, and denied having carried such return cargo:—Held, that the money was not received by him for or in the name of or on the account of his master, and that he was not guilty of embezzlement. *The Queen v. Cullum*, 42 Law J. Rep. (N.S.) M.C. 64; Law Rep. 2 C.C.R. 28.

#### ENDOWED SCHOOLS ACTS.

[The time for presenting an address by Parliament against any scheme extended to forty days. 36 & 37 Vict. c. 37. 32 & 33 Vict. c. 56 amended and in part repealed, and Elementary Schools excepted therefrom. 36 & 37 Vict. c. 87.]

[The above Acts in part repealed. The powers of the Endowed Schools Commissioners transferred to the Charity Commissioners. 37 & 38 Vict. c. 87.]

[The Endowed Schools Act, 1868, continued. 38 & 39 Vict. c. 29.]

1.—Wales is a district of England within the Endowed Schools Act, 1869; and if a college holds a fund in trust for exhibitors to be selected from a particular district of England, and whose exhibitions are tenable at the university, such college must give the Endowed Schools Commissioners any information they may require as to the fund. So held by the full Court of Appeal. *In re the Meyricke Fund*, 42 Law J. Rep. (N.S.) Chanc. 553; Law Rep. 7 Chanc. 500: affirming the deci-

sion of Wickens, V.C., 41 Law J. Rep. (N.S.) Chanc. 187; Law Rep. 13 Eq. 269.

2.—Where an order of the Master of the Rolls or a Vice-Chancellor, made upon an application under section 28 of the Charitable Trusts Act, 1853, relates to several charities, the aggregate income of which exceeds 100*l.*, it is subject to appeal, notwithstanding the income of each charity is under that amount. Where an application has been made under section 28 of the Charitable Trusts Act, 1853, for a scheme for the management of a charity, the object of which has become obsolete, the fact that such charity is one of those enumerated in the 30th section of the Endowed Schools Act, 1869, and that a scheme had been submitted to the Commissioners under that Act, is no ground for the Court's refusal to deal with the application under the first-mentioned Act. Decision of Bacon, V.C., affirmed. *In re Charitable Gifts for Prisoners; Ex parte the Governors of Christ's Hospital*, 42 Law J. Rep. (N.S.) Chanc. 391; Law Rep. 8 Chanc. 199.

#### ENTAIL.

[See FINES AND RECOVERIES; SCOTCH LAW, 17-21.]

#### EPPING FORESTS ACT.

*Disobedience to order of Epping Forest Commissioners.* [See MISDEMEANOUR.]

#### EQUITABLE ASSIGNMENT.

[See BILL OF EXCHANGE, 2; BILL OF SALE, 1, 2.]

#### EQUITABLE SET-OFF.

[See SET-OFF.]

#### ERROR.

*Writ of.* [See WRIT OF ERROR.]  
*Jurisdiction of Court of Error.* [See JURISDICTION AT LAW, 1, 2.]  
*What decisions are subjects of proceedings in error.* [See PRACTICE AT LAW, 43.]

#### ESCROW.

[See DEED, 1.]



## ESTOPPEL.

- (A) BY MATTER OF RECORD AND QUASI OF RECORD.  
 (B) BY DEED.  
 (C) IN PARS.  
     (a) *By acceptance of estate.*  
     (b) *By acceptance of bill of exchange.*  
     (c) *By conduct and representation.*

—  
 (A) BY MATTER OF RECORD AND QUASI OF RECORD.

1.—A record works an estoppel only as to those matters capable of being controverted between the parties at the time of the proceedings in the action; and therefore although a deed may have been proved to be valid in one action, yet it may be shewn in a subsequent suit to have become invalid, if the circumstances avoiding it have happened after the determination of the earlier action. *Hall v. Levy*, 44 Law J. Rep. (N.S.) C.P. 89; Law Rep. 10 C.P. 154.

To a declaration upon a bill of exchange the defendant pleaded by way of estoppel that the plaintiff had sued the defendant in a former action upon the bill of exchange now declared upon; that in the former action the defendant had pleaded to its further maintenance a composition deed under the Bankruptcy Act, 1861, by which the defendant's creditors had agreed to release him from their debts in consideration of his agreement to pay one shilling in the pound by instalments of sixpence each, with a proviso that on default of payment of the composition the release was to become void; that the plaintiff had replied to the plea in the former action the non-payment of the first instalment under the deed; that the defendant had rejoined upon equitable grounds a mistake in non-payment on the proper day; that thereupon the plaintiff struck out the replication, confessed the plea and taxed his costs which were paid. The plaintiff replied that after the confession, taxation and payment of the costs in the former action as alleged in the plea, and before the commencement of the present action another instalment under the deed had become payable, that the defendant had made default in its payment, and that thereby the release had become void:—Held, upon demurrer, that the replication was good on the ground that although the confession in the former action was final as to everything which had been, or might have been, controverted therein, yet in the present suit the replication relied on a default which did not exist at the time of the former action, and therefore which could not have been controverted therein. *Ibid*.

2.—The plaintiff (creditor of the testator) having recovered judgment for his debt in an action against the executor after issue found for the plaintiff on a plea of plene administravit, sued the executor in an action on such judgment, suggesting a devastavit:—Held, that the defendant could not shew that the acts of waste complained of were committed by him before such judgment with the concurrence of the plaintiff, as that

would amount to no assets as between the plaintiff and the defendant, and would therefore negative the judgment, which the defendant was estopped from doing. *Jewesbury v. Mummary*, 42 Law J. Rep. (N.S.) C.P. 22; Law Rep. 8 C.P. 56.

3.—Though it is a rule that a final decision of a competent Court estops the litigant parties and those claiming under them from re-opening the question in another Court, yet this does not apply to persons whose interest is almost identical with the parties, but who do not actually claim through them. *Spencer and Spencer v. Williams*, 40 Law J. Rep. (N.S.) P. & M. 45; Law Rep. 2 P. & M. 230.

4.—Semble, by Lord Cairns, a creditor who has as between himself and the debtor, successfully contested in a Court of law the validity of a creditor's or composition deed executed by his debtor, is not thereby precluded from afterwards coming in under the deed, and obtaining the benefits he would only be entitled to on the footing that the deed was valid. *Latter v. White* (H.L.), 41 Law J. Rep. (N.S.) Q. B. 342; Law Rep. 5 E. & I. App. 578.

5.—The judgment of a Court of competent jurisdiction is, as evidence, conclusive as to the matters at issue, whenever the same matters shall be afterwards in question between the same parties in another Court. *Flitters v. Alfrey*, 44 Law J. Rep. (N.S.) C.P. 73; Law Rep. 10 C.P. 29.

The judgment of a County Court as to matters within its jurisdiction is, by virtue of 9 & 10 Vict. c. 95, s. 89, of equal validity for the purposes of evidence with the judgment of a Superior Court although the County Court may not shew upon what issues or upon what grounds the decision was given. *Ibid*.

F. was tenant to A. of a cottage. A. treated F. as a weekly tenant, and gave him one week's notice to quit. As F. remained in the cottage, A. obtained a warrant of justices under 1 & 2 Vict. c. 74, and evicted F. from the cottage. Afterwards A. sued F. in a County Court for rent of the cottage, claimed to be due upon the weekly tenancy. F. alleged that his tenancy was from year to year, and that at the time of his eviction a year of his holding had not expired, and no rent was due. The Judge held that the tenancy was from year to year, and gave judgment for F. Thereupon F. sued A. in the Superior Court for trespass in wrongfully evicting him from the cottage by the warrant of the justices, and he again contended that as he was tenant from year to year his tenancy had never been lawfully determined. The jury found that F.'s tenancy was from week to week:—Held, that despite of the finding of the jury F. was entitled to have the verdict entered for him; for the judgment of the County Court was, as evidence, conclusive between F. and A. as to the tenancy, in this Court; that the tenancy must be assumed to have been from year to year, and that the eviction of F. from the cottage must be taken to have been unlawful. *Ibid*.

*Action: release with condition subsequent: confession of plea an estoppel to fresh action.* [See ACTION, 8.]

## (B) By DEED.

6.—The owner of the equity of redemption in a mortgaged estate, demised the estate to a trustee for a term, upon certain trusts, and afterwards devised the same estate in fee. The devisees having contracted to sell the estate to a purchaser, paid off the mortgage, took a reconveyance to the uses of the will, and conveyed the estate to the purchaser, who had no notice of the term. A bill filed by the cestuique trust under the demise against the trustee of the term and the purchaser for administration of the trust, was dismissed by one of the Vice-Chancellors, on the ground that there was no term by estoppel in the trustee, and on appeal the Lord Chancellor affirmed the decision, but without prejudice to any question that might be raised at law, being of opinion that the question of estoppel was a question for a Court of law, and that there was no equity against the purchaser if the legal estate was in him. *Clemow v. Geach*, 40 Law J. Rep. (N.S.) Chanc. 44; Law Rep. 6 Chanc. 147.

7.—A mortgagor with the privity of one of his joint mortgagees, who were trustees, but without the knowledge of the other, sold part of the mortgaged property to a purchaser suppressing the mortgage. The first-mentioned trustee received the money and gave a receipt on behalf of self and co-trustee, and afterwards appropriated it. The mortgagor, on the occasion of a subsequent sale of other part of the property, knowing the facts, joined with the defaulting trustee in procuring a reconveyance from him and his innocent co-trustee of the part already sold as well as the part then sold. The defaulting trustee afterwards absconded:—Held, 1, that the innocent trustee was entitled to have the reconveyance cancelled; 2, that the reconveyance did not operate to perfect by estoppel the defective title of the purchasers from the mortgagor. *Hatch v. Crealock*, 44 Law J. Rep. (N.S.) Chanc. 157; Law Rep. 10 Chanc. 22.

## (C) IN PAIS.

## (a) By acceptance of estate.

8.—R. A., a tenant by the curtesy of an estate of freehold of inheritance, died in 1820, after making a will by which he devised the freehold to trustees in trust for his daughter Rebecca, for life, and after her decease to his grandson, W. B. Certain annuities were payable under the will, and were paid by Rebecca. The testator died in the year 1855, and at and after his death, Rebecca remained in possession. In 1849 the plaintiff bought of W. B., the remainderman, all his interest in the freehold. In 1863 Rebecca sold the freehold to the defendant, and in 1872 she died, whereupon the plaintiff demanded possession and brought an action of ejectment against the defendant to recover possession:—Held, that Rebecca having taken under the will, and having acted under it, would have been estopped from asserting that it was invalid and that by reason of her possession for twenty years she was entitled to the fee; that the defendant, who claimed through her, was estopped in like manner, and that consequently the

plaintiff who had purchased from W. B., the remainderman, was entitled to recover from the defendant. *Board v. Board*, 43 Law J. Rep. (N.S.) Q. B. 4; Law Rep. 9 Q. B. 48.

## (b) By acceptance of bill of exchange.

9.—The acceptance of a bill of exchange payable to order of a firm, drawn in the name of a firm by one of its members, without the authority of the other, does not estop the acceptor from disputing the endorsement on the ground of want of authority from such other member. *Garland v. Jacomb*, Law Rep. 8 Exch. 221.

## (c) By conduct and representation.

10.—One recognised proposition as to estoppel in pais is, that if a person by words or conduct wilfully endeavours to cause another to believe in a certain state of things which such person knows to be false, and if the other believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not, in fact, exist. *Carr v. The London and North-Western Railway Company*, 44 Law J. Rep. (N.S.) C. P. 109; Law Rep. 10 C. P. 307.

Another recognised proposition as to estoppel in pais is, that if a person either in express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way in the belief of the existence of such a state of facts to the damage of him who so believes and acts, such person is estopped from denying the existence of such a state of facts. *Ibid*.

A third recognised proposition as to estoppel in pais is, that if a person, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that he was intended to act upon it in a particular way, and if he with such belief does act in that way to his damage, such person is estopped from denying that the facts were as represented. *Ibid*.

A fourth recognised proposition as to estoppel in pais is, that if in the transaction itself which is in dispute, A. has led B. into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led B. to act by mistake upon such belief to his prejudice, A. cannot be heard afterwards as against B. to shew that the state of facts referred to did not exist. *Ibid*.

The plaintiff entered into a contract with A. for the purchase of bleaching powder, and immediately afterwards into a contract for the sale thereof to other persons. Owing to a mistake of the plaintiff's vendor the defendants, a railway company, were induced without culpable negligence on their part to advise the plaintiff that they had received fifteen casks of bleaching powder, marked and numbered in a particular manner, and that they held the same to his orders

as warehousemen. The defendants never had received the casks in question, and afterwards informed the plaintiff of the error; at a subsequent time, owing to another mistake, the plaintiff paid the defendants a sum of money as warehouse rent for the fifteen casks supposed to have been received by them. The mistake having been subsequently made known to all parties, the plaintiff's vendees bought in fifteen casks of bleaching powder at a loss to him:—Held, that the above facts did not create an estoppel in pais within any of the four propositions above mentioned, that the defendants were not estopped from shewing that the fifteen casks had never been received by them, and that the defendants were not liable to the plaintiff in trover or any other form of action. *Ibid.*

Semble (per Denman, J.), that an action of trover cannot be maintained upon an estoppel in pais, where the defendant never had the goods alleged to be converted. *Ibid.*

11.—Estoppel by representations applies only where the representation is as to a fact in existence at the time, not where it is as to something yet to come or as to a matter of future intention. *The Citizens' Bank of Louisiana v. The First National Bank of New Orleans* (H.L.), 43 Law J. Rep. (N.S.) Chanc. 263; Law Rep. 6 E. & I. App. 352.

A representation or assurance given by the drawer of a bill, that the bill was drawn "specially" or "expressly" against funds already remitted by him more than sufficient to meet the bill on maturity, does not amount to a specific appropriation or equitable assignment of the funds so remitted, although it be given to one who is induced thereby to purchase the bill, unless it is also represented, or the fact is, that there was a trust already constituted, by which the payer of the bill would hold funds in trust for the payment of the particular bill, or of bills of that particular class or description. *Ibid.*

12.—Where an amalgamation of the Bank of China with the Bank of Hindustan had been set aside by the Court of Chancery as being *ultra vires*, it was held, in an action to recover calls, and balance of premium, that a shareholder in the former bank was not estopped from denying that he had become a shareholder in the latter bank, by the fact that he had applied for shares, paid a deposit, and received notice of calls without objecting; inasmuch as he had so acted on a mistaken representation of the facts on the part of the plaintiffs. *The Bank of Hindustan, China and Japan v. Alison* (Exch. Ch.), 40 Law J. Rep. (N.S.) C.P. 117; Law Rep. 6 C.P. 117.

13.—An executor of a will entered a caveat to a will of earlier date, but withdrew the caveat before it was warned, and allowed letters of administration, with the earlier will annexed, to be granted to one of the residuary legatees named therein:—Held, that he was not estopped by the withdrawal of the caveat under the circumstances from calling in the letters of administration (with the earlier will annexed) and propounding the alleged later will. *Goddard v. Smith*, 42 Law J. Rep. (N.S.) P. & M. 14; Law Rep. 3 P. & D. 7.

14.—Where a declaration shews a contract and tender, in compliance, and sets out an alternative case of tender, not in compliance, the plaintiff is not thereby estopped from contending for the true interpretation of the contract. *McConnell v. Murphy*, Law Rep. 5 P. C. 203.

*Sale of goods: recognition by vendor of sale to second vendee.* [See SALE, 25.]

## EVIDENCE.

### (A) ADMISSIBILITY.

- (a) *Parol evidence to vary or explain written document.*
  - (1) *To explain will.*
  - (2) *To vary promissory note.*
  - (3) *Of collateral verbal agreement.*
- (b) *Of usage of trade.*
- (c) *Of right of common.*
- (d) *Res inter alios acta: receipt.*
- (e) *Certified copy of record.*
- (f) *Certified copy of register of births.*
- (g) *Judge's notes.*
- (h) *Statement by witness contradictory of his evidence.*
- (i) *Lunatic witness.*

### (B) SUFFICIENCY AND EFFECT.

- (a) *Admissions.*
- (b) *Receipt.*
- (c) *Of foreign law.*
- (d) *Obscure written documents.*
- (e) *Of execution of deed.*
- (f) *Of negligence.*
- (g) *Of legitimacy.*
- (h) *Of posting of letters.*

### (C) SECONDARY EVIDENCE OF LOST DOCUMENT.

- (D) ONUS OF PROOF.
- (E) PRESUMPTIVE EVIDENCE.
- (F) EVIDENCE DISCLOSING FELONY.
- (G) IN CRIMINAL CASES.

- (a) *Confession.*
- (b) *Evidence of co-defendant.*
- (c) *Evidence of prisoner's wife.*
- (d) *Of trader in liquidation on indictment under Debtors Act.*
- (e) *In support of particular indictments.*
- (f) *Depositions.*

[Declaration to be taken by persons objecting or incompetent to take oaths in civil or criminal proceedings. 33 & 34 Vict. c. 49.]

### (A) ADMISSIBILITY.

- (a) *Parol evidence to vary or explain written contract.*
  - (1) *To explain will.*

1.—In construing a will, nothing contained in a letter from a solicitor to the testator, written about the time of the execution of the will, is admissible as evidence of the construction of the will. *Wilson v. O'Leary*, 41 Law J. Rep. (N.S.) Chanc. 342; Law Rep. 7 Chanc. 448.

2.—Evidence that testator had in his possession his first codicil at the time he made his second was admitted, so far as it went to prove the position of the testator, but rejected, so far as it suggested any motive for his making the second codicil. *Wilson v. O'Leary*, 40 Law J. Rep. (n.s.) Chanc. 709; Law Rep. 12 Eq. 525.

[And see LEGACY, 1; WILL, Construction, G 6, 8-10, H 20.]

(2) *To vary promissory note.*

3.—Parol evidence is inadmissible to prove a note expressed to be a security for 500*l.* and interest, to have been intended to secure the interest only. *Hill v. Wilson*, 42 Law J. Rep. (n.s.) Chanc. 817; Law Rep. 8 Chanc. 888.

(3) *Of collateral verbal agreement.*

4.—A tenant entered on lands on the understanding that a lease should be signed at a future time. When the lease was presented to him for signature he refused to sign unless the landlord would undertake to destroy the rabbits. This the landlord by word of mouth promised to do, and the tenant thereupon signed. The lease contained a clause by which the tenant agreed not to shoot, hunt, or sport on the demised land, or destroy any game, but to use his best endeavours for the preservation of the same, and to allow his landlord or friends at any time to hunt, shoot, and sport on the land. In an action by the tenant against the landlord, for breach of agreement in not destroying the rabbits:—Held, that this agreement was collateral to, and did not alter or vary the written contract, and that therefore evidence of such agreement was admissible. *Morgan v. Griffiths*, 40 Law J. Rep. (n.s.) Exch. 46; Law Rep. 6 Exch. 70.

*Evidence of verbal promise collateral to written agreement.* [See CONTRACT, 35, 36.]

*Admissibility of extrinsic evidence of consideration.* [See RAILWAY, 13.]

*Parol evidence of alterations in written contract.* [See SALE, 1.]

*Parol evidence of liability of agent on written contract.* [See PRINCIPAL AND AGENT, 4.]

*Evidence of extent of agent's authority.* [See PRINCIPAL AND AGENT, 15.]

(b) *Of usage of trade.*

5.—If a mercantile document is insensible when read according to the ordinary sense of the words used therein, it is a question for the jury whether the language thereof has not acquired a definite meaning by mercantile usage. *Ashworth v. Redford*, 43 Law J. Rep. (n.s.) C. P. 57; Law Rep. 9 C. P. 20, *nom.* *Ashforth v. Redford*.

The plaintiff sold to the defendants certain goods; the invoice was dated the 1st of May, and at the foot of it were written the words, "Terms—Net cash, to be paid within six to eight weeks from date hereof." The goods not having been

paid for, the plaintiff issued a writ to recover the price thereof on the 18th of June, scarcely seven weeks from the 1st of May. At the trial the Judge left to the jury the question whether the credit had expired on the 18th of June according to mercantile usage; the jury having found that the action was not brought too soon.—Held, per Keating, J., and Brett, J. (Grove, J., doubting), that the direction to the jury was proper, and that the plaintiff was entitled to the verdict. *Ibid.*

[And see PRINCIPAL AND AGENT, 1-3; CONTRACT, 35, 36.]

(c) *Of right of common.*

[See COMMON, 5, 6.]

(d) *Res inter alios acta: receipt.*

6.—The defendants being bound to repay the plaintiffs what the plaintiffs paid F. for certain work, the plaintiffs in order to prove what they had so paid, &c., proved that having received F.'s bill for doing such work amounting to a certain sum, they sent a cheque by post to F., and F. proved that he received the cheque, and sent in return a receipt, which the plaintiffs produced, and the Judge at the trial allowed it to be put in evidence:—Held (*Bovill, C.J., dissentiente*), that the receipt was admissible as one of the facts connected with the payment, though it would not have been admissible by itself to have proved the payment. *The Carmarthen and Cardigan Railway Company v. The Manchester and Milford Railway Company*, 42 Law J. Rep. (n.s.) C. P. 262; Law Rep. 8 C. P. 685.

(e) *Certified copy of record.*

7.—An action in a superior Court is a "proceeding" in which a certified copy of a record is admissible as evidence of the record under 14 & 15 Vict. c. 99, s. 13. *Richardson v. Willis*, 42 Law J. Rep. (n.s.) Exch. 15; Law Rep. 8 Exch. 69.

(f) *Certified copy of register of births.*

8.—A copy of an entry in the register book of births in a registrar's district within a superintendent registrar's larger district, certified to be a true copy under the hand of the deputy superintendent registrar, who also certified under his hand that the register book was in his lawful custody, was held to be admissible evidence of the entry in the register book upon the mere production of such copy. *The Queen v. Weaver*, 43 Law J. Rep. (n.s.) M. C. 13; Law Rep. 2 C. C. R. 85.

Upon an indictment for carnally knowing a girl, being above the age of ten years and under the age of twelve years, such a certified copy of an entry shewing that the child was of the age of eleven years and eight months was held sufficient proof of the age, there being independent evidence of the identity of the child with the name of the child entered in the book. *Ibid.*

(g) *Judge's notes.*

[See BANKRUPTCY, N 17.]

(h) *Statement by witness contradictory of his evidence.*

9.—The solicitor for the defendant stated in an affidavit that a witness for the plaintiff had stated to him facts which were put in writing signed by the witness, and he made the writing an exhibit. The statements in the writing were contradictory to the evidence of the witness as given in the suit:—Held, that the writing was not admissible in evidence in the way in which it was put in, the witness having had no opportunity of explaining it. *Hemming v. Maddick*, 41 Law J. Rep. (N.S.) Chanc. 522; Law Rep. 7 Chanc. 395.

(i) *Lunatic witness.*

10.—The jurat of an affidavit sworn by a person suffering from monomania, and confined in a lunatic asylum, should state the fact that it was sworn in an asylum, otherwise the affidavit is irregular, and will be taken off the file. *Spittle v. Walton*, 40 Law J. Rep. (N.S.) Chanc. 368; Law Rep. 11 Eq. 420.

Before the evidence of a lunatic, subject to insane hallucinations, can be received, there must be an enquiry as to his mental condition. *Ibid.*

(B) SUFFICIENCY AND EFFECT.

(a) *Admissions.*

11.—Recitals in a deed tendered but not executed were held admissions by the parties on whose behalf the deed was prepared but capable of being rebutted. *Bulley v. Bulley*, 44 Law J. Rep. (N.S.) Chanc. 79; Law Rep. 9 Chanc. 739.

The plaintiff sold a fifth share, to which she was believed to be entitled under a certain will, in a freehold farm, and conveyed her fifth part or share and all other her estates, parts, shares, and interests in the farm to the purchaser, who was believed to be entitled to two other fifths, and who thereupon mortgaged the three-fifths. An unenrolled disentailing deed, dated six-and-twenty years before, was afterwards discovered, and led to the belief that the plaintiff was really tenant in tail of the whole, and thereupon a disentailing deed containing recitals admitting the fact was sent to her for execution. The plaintiff refused to execute this, and filed a bill to set aside the purchase deed altogether:—Held, that the mortgagees were entitled to hold any legal estate they might have, and the Vice-Chancellor having dismissed the bill as against them without costs, the decree was varied by giving them their costs. That as against the purchaser of the fifth, as the plaintiff might be embarrassed at law by the form of the conveyance, the Court would entertain the suit as an equitable ejectment, treating the conveyance as effecting one-fifth only. That the admissions were evidence, but that the Court must judge of their weight; that such admissions not being of facts within the knowledge of the person making them, but only inferences, of which the grounds were fully disclosed, the Court would consider how far such inferences were well founded. And, further, that the discovered disentailing deed only shewing an intention to bar the estate tail in any part of

the land that might be entailed, the plaintiff was thrown back to shew strictly that a testator was seized in 1746; that it was not sufficient to shew that he was then seized of copyhold parts of the same farm, and that the whole were held together in 1833, and that in the absence of further evidence, the bill must be dismissed as against the purchaser as well as the mortgagees, but, under the circumstances of the case, without costs. *Ibid.*

(b) *Receipt.*

12.—A receipt is merely evidence of satisfaction at law, and liable to be rebutted by contrary evidence. Therefore, where a passenger injured in a railway accident, claimed 691*l.* for compensation, but accepted 400*l.*, and gave a receipt acknowledging it to be in full discharge of his claim, and afterwards commenced an action against the company for further satisfaction, in which they pleaded payment of the 400*l.* in full satisfaction and discharge; a bill by the plaintiff in such action to restrain the company from relying on the plea, not charging fraud, but on the ground that the plaintiff had expressly stipulated that the receipt was not to exclude him from further compensation if his injuries turned out more serious than supposed, was dismissed, inasmuch as the whole case could be tried at law. *Lee v. The Lancashire and Yorkshire Railway Company*, Law Rep. 6 Chanc. 527.

(c) *Of foreign law.*

13.—An opinion of a Scotch advocate was in evidence. The Judge considering that there was implied therein an opinion on a question of Scotch law raised in the suit, decided the question on that evidence. *Macdonald v. Macdonald*, 41 Law J. Rep. (N.S.) Chanc. 566; Law Rep. 14 Eq. 60.

(d) *Obscure written documents.*

14.—In a case of obscurity in written documents the Court adopted the construction upon which the parties long acted, in the absence of better evidence. *Forbes v. Watt*, Law Rep. 2 Sc. App. 214.

(e) *Of execution of deed.*

*Of sealing of deed.* [See DEED, 2.]

(f) *Of negligence.*

*Evidence of negligence by servant: blow by omnibus driver.* [See MASTER AND SERVANT, 9.]

*Of negligence in carriage of live stock.* [See CARRIER, 35.]

*In action against carriers for loss of goods by felony of servants.* [See CARRIER, 26–28.]

(g) *Of legitimacy.*

[See LEGITIMACY DECLARATION ACT, 4; PROBATE, 52.]

## (h) Posting letters.

15.—Proof of the posting of several letters at successive dates is not conclusive evidence of any of them having been received at the address to which they were directed. *In re the Constantinople and Alexandria Hotels Company; Reidpath's case*, 40 Law J. Rep. (N.S.) Chanc. 39; Law Rep. 11 Eq. 86.

[And see COMPANY, G 15, 16.]

## (C) SECONDARY EVIDENCE OF LOST DOCUMENT.

16.—Although upon the presumption *omnia rite esse acta*, if secondary evidence is tendered to prove the contents of an instrument which is either lost, or retained by the opposite party after notice to produce it, the Court will presume that the original was duly stamped unless some evidence to the contrary be given; yet where there is evidence that an instrument, unstamped at its execution, continued for a considerable time after its execution unstamped, the *onus* is shifted, and unless evidence is produced to lead to the belief that it was stamped at some time subsequently the conclusion is that it remained unstamped. *The Marine Investment Company v. Haviside* (H.L.), 42 Law J. Rep. (N.S.) Chanc. 173; Law Rep. 5 E. & I. App. 624.

17.—Where, in answer to the plaintiff's affidavit for the production of a document, setting out its terms, the defendant made an affidavit stating that it was destroyed, but not objecting to the terms set out,—Held, that the affidavits were not admissible as secondary evidence of the contents of the document. *Rainy v. Bravo*, Law Rep. 4 P. C. 287.

*Evidence of execution of lost will.* [See PROBATE, 53.]

## (D) ONUS OF PROOF.

18.—Judgment was recovered by a creditor of the testator in an action at law against the testator's executors. In a creditor's suit by the plaintiff at law against the executors, the devisee in trust of the real estate and beneficial owner of the real estate, it was held, that the judgment at law was *prima facie* evidence of the debt against the devisees of, and persons interested in the real estate, so far that the burden of proof was shifted to them from the applicant; but that they must have liberty to adduce evidence to disprove it. *Harvey v. Wilde*, 41 Law J. Rep. (N.S.) Chanc. 698; Law Rep. 14 Eq. 438.

19.—He upon whom the burden of proving an issue lies is not bound to prove every fact or conclusion of fact upon which the issue depends. From every fact that is proved, legitimate and reasonable inferences may be drawn; and hence, in discussing whether there is, in any case, evidence to go to the jury, what the Court has to consider is whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue.

*Parfitt v. Lawless*, 41 Law J. Rep. (N.S.) P. & M. 68; Law Rep. 2 P. & D. 462; and see *Ashwell v. Lomi*, Law Rep. 2 P. & D. 477.

[And see PRESUMPTION; UNDUE INFLUENCE.]

## (E) PRESUMPTIVE EVIDENCE.

[See PRESUMPTION.]

## (F) EVIDENCE DISCLOSING FELONY.

20.—Where, at a trial for a civil injury, the plaintiff's evidence discloses facts which may amount to a felony, it is not the duty of the Judge to nonsuit the plaintiff or to direct the jury that if they find that a felony has been committed by the defendant they must find against the plaintiff. The duty of the Judge simply is to try the issues on the record. *Wells v. Abrahams*, 41 Law J. Rep. (N.S.) Q. B. 306; Law Rep. 7 Q. B. 554.

## (G) IN CRIMINAL CASES.

## (a) Confession.

21.—The mother of a little boy in custody on a charge of attempting to obstruct a railway train said to him and another little boy in custody also on the same charge, in the presence of the mother of the latter and of the policeman, "You had better, as good boys, tell the truth," whereupon both boys confessed:—Held, that the confession was clearly admissible. *The Queen v. Reeve*, 41 Law J. Rep. (N.S.) M. C. 92; Law Rep. 1 C. C. R. 362.

## (b) Evidence of co-defendant.

22.—In any criminal proceeding the defendants jointly indicted for or charged with the commission of any offence, and on their trial, cannot be called as witnesses for or against themselves or each other, notwithstanding anything contained in the 14 & 15 Vict. c. 99, ss. 2 and 3. *The Queen v. Payne*, 41 Law J. Rep. (N.S.) M. C. 65; Law Rep. 1 C. C. R. 349.

Four prisoners were jointly indicted for night poaching, and during the trial and at the close of the case for the prosecution, it was proposed to call one of the prisoners to prove an *alibi* for another of them. The proposed witness had been examined before the justices on the committal of the other three prisoners, and had given evidence of an *alibi*, and had been bound over, by recognisance, by the Justices to give evidence on the trial under 30 & 31 Vict. c. 35. s. 3, but had been afterwards taken into custody, and committed, and was indicted jointly with the others. No *nolle prosequi* was entered for him, nor did he plead guilty, and no application had been made for a separate trial. The evidence was rejected:—Held, that the evidence was properly rejected, and that the conviction was right. *Ibid.*

## (c) Evidence of prisoner's wife.

23.—The wife of one of several prisoners on their trial at the same time on a joint indictment cannot be called as a witness for or against any of the prisoners notwithstanding that the indictment

contains more counts than one respectively charging distinct offences. *The Queen v. Thompson*, 41 Law J. Rep. (n.s.) M. C. 112; Law Rep. 1 C. C. R. 377.

(d) *Of trader in liquidation on indictment under Debtors Act.*

**24.**—On an indictment of a trader for obtaining property on credit, under the false pretence of dealing in the ordinary way of his trade, within four months before his liquidation contrary to the 11th section of the Debtors Act, 1869, an examination of the trader in liquidation taken under the 97th section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), was admitted in evidence against him. The summons to bring up the trader for examination was issued before the certificate of the appointment of the trustee was given by the registrar. The trader attended, was examined, and the examination was taken after the giving of the certificate of appointment:—Held, that whether the summons was regularly issued or not, the trader by appearing and submitting to be examined, waived the irregularity, if any, and the examination was properly taken and was admissible in evidence against the prisoner on the trial of the indictment. *The Queen v. Scott* (25 Law J. Rep. (n.s.) M. C. 128; D. & B. 47) followed. *The Queen v. Widdop*, 42 Law J. Rep. (n.s.) M. C. 9; Law Rep. 2 C. C. R. 3.

(e) *In support of particular indictment.*

**25.**—On an indictment for an indecent assault, as in cases of rape, or attempt to commit rape, the answer of the prosecutrix to questions put to her on cross-examination as to particular acts of connection with persons named to her, other than the prisoner, is final, and the party questioning is bound thereby, and if her answer be a denial the persons named cannot be called to contradict her. *The Queen v. Holmes*, 41 Law J. Rep. (n.s.) M. C. 12; Law Rep. 1 C. C. R. 334.

Semle—that the question may be put to her on cross-examination, but that she is not bound to answer it. *Ibid*.

**26.**—The respondent was indicted for arson; and at the trial the deposition of the respondent taken on oath upon an inquiry into the cause of the fire, was admitted as evidence in support of the indictment:—Held, that the evidence was admissible. *The Queen v. Coote*, 42 Law J. Rep. (n.s.) P. C. 45; Law Rep. 4 P. C. 599.

*False pretences: evidence of false pretences on prior distinct occasions.* [See FALSE PRETENCE, 3.]

*Indecent assault: evidence as to acts of connection with third parties.* [See ASSAULT, 2.]

*Larceny: indictment: evidence to support allegation of stealing nineteen shillings in money.* [See LARCENY, 5.]

*Scienter: Contagious Diseases Act.* [See CONTAGIOUS DISEASES ACT.]

DIGEST, 1870-1875.

(f) *Depositions.*

**27.**—By 11 & 12 Vict. c. 42, s. 17, the deposition of a witness examined on the preliminary examination before the Justices may be read at the trial, if it be proved that the person whose deposition shall have been taken in the manner directed by and under the circumstances mentioned in the section is so ill as not to be able to travel. A witness whose depositions were duly taken, under the 11 & 12 Vict. c. 42, s. 17, before Justices, was absent from the trial of the prisoner charged. It was proved by her doctor that she was seventy-four years of age and very nervous, that she was liable to faint with nervousness at the idea of coming into a public Court and being examined, and that it might be dangerous to her, but that she was capable of going to London to see her doctor without danger or difficulty. She was living at the time of the trial in the assize town and not far from the assize Court:—Held, that the depositions of the witness were improperly received at the trial, and the conviction was quashed. *The Queen v. Farrell*, 43 Law J. Rep. (n.s.) M. C. 94; Law Rep. 2 C. C. R. 116.

EXECISE.

The duty imposed by 32 & 33 Vict. c. 14, s. 18, is payable on carriages belonging to the proprietor of an equestrian circus and used by him for the conveyance of the performers, their instruments and materials, on their journeys from place to place and in their processions through the towns they visit; since they are not within the exception made by section 19, sub-section 6, in favour of vehicles "used solely for the conveyance of any goods or burden in the course of trade or husbandry." *Speak v. Powell*, 43 Law J. Rep. (n.s.) M. C. 19; Law Rep. 9 Exch. 25.

EXECUTOR AND ADMINISTRATOR.

(A) APPOINTMENT OF EXECUTOR.

- (a) *Executor according to the tenor.*
- (b) *Executor for property not named in the will.*

(B) POWERS, RIGHTS, AND DUTIES.

- (a) *Retainer of debt.*
- (b) *Sale of leaseholds.*
- (c) *Power to charge and mortgage.*
- (d) *Carrying on testator's business.*
- (e) *Right to sue in representative capacity.*
- (f) *Right to interest.*
- (g) *Executor of executor: right to costs.*
- (h) *Right of, to surplus.*
- (i) *Right to be refunded as against legatees.*
- (k) *Executor durante minore ætate.*
- (l) *Legacy to executor.*

(C) LIABILITIES.

- (a) *Rights of creditors.*
- (b) *Liability as partners.*
- (c) *Husband of residuary legatee.*

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- (d) *Involuntary losses.*
  - (e) *Calls on shares.*
  - (f) *Devastavit.*
  - (g) *Garnishee order against executor.*
  - (h) *Executor de son tort.*
    - (1) *Extent of liability.*
    - (2) *Relief in suit against.*
  - (i) *Purchase from legatee.*
  - (k) *Advertisement for claims.*
- (D) RENUNCIATION.

#### (A) APPOINTMENT OF EXECUTOR.

##### (a) *Executor according to the tenor.*

1.—The essential duties of an executor are to collect the assets of the testator, to pay his funeral expenses and debts, and discharge the legacies; and where it appears that a testator intended any person to perform these duties, such person is executor according to the tenor. *In the goods of Adamson*, Law Rep. 3 P. & D. 253.

2.—Whether when a person is by will appointed a trustee, and there is nothing for him to do in the character of a trustee, he is not constituted an executor. *In the goods of Coles*, 41 Law J. Rep. (N.S.) P. & M. 21; Law Rep. 2 P. & D. 362.

3.—Testatrix, a married woman, made her will in exercise of a power. The will commenced, "I direct the trustees under my marriage settlement to pay," &c. It then set out several legacies, and disposed of the residue of the trust fund, and concluded thus: "And I give the said trustees all necessary powers of sale, and power to mortgage all or any part of my said property, the more effectually to carry this my will into execution:"—Held, that the trustees were not executors according to the tenor. *In the goods of Fraser*, 40 Law J. Rep. (N.S.) P. & M. 9; Law Rep. 2 P. & D. 183.

4.—A will contained this clause: "I wish P. A. C. to act as trustee to the estate." Nothing was conveyed to him as trustee, and no duty whatever was cast upon him:—Held, that he was not executor according to the tenor. *In the goods of Punchard*, 41 Law J. Rep. (N.S.) P. & M. 25; Law Rep. 2 P. & D. 369.

5.—A will contained this clause: "I appoint E. H. my sole trustee, and he is to be paid as an attorney, the same as if he were not a trustee to this my last will and testament." There were debts to be paid, but the only duties created by the will were those which would devolve upon a trustee:—Held, that E. H. was not executor according to the tenor of the will. *In the goods of Lowry*, 43 Law J. Rep. (N.S.) P. & M. 34; Law Rep. 3 P. & D. 157.

6.—Testatrix bequeathed all her property, charged with the payment of her debts, to A., her daughter, whom she appointed her sole executrix. A. was a child eight years of age, and the will contained the clause—"I also appoint C. and D. as trustees for A. till she is of age." The next-of-kin of A. were in Australia, and not likely to return to this country. The Court held that C.

and D. were not executors according to the tenor, but granted to them, under the 73rd section, administration, with the will annexed, until A. should attain her majority. *In the goods of Stewart*, 44 Law J. Rep. (N.S.) P. & M. 37; Law Rep. 3 P. & D. 245.

##### (b) *Executor for property not named in the will.*

[See PROBATE, 5.]

#### (B) POWERS, RIGHTS, AND DUTIES.

##### (a) *Retainer of debt.*

7.—A debtor devised his real estate to his creditor, in trust for sale and payment of debts, and appointed the creditor his executor. The executor retained part of his debt out of the legal assets come to his hands; and then claimed a further payment in respect of it, out of the equitable assets, conjointly with the other creditors:—Held, that they must be placed on an equality with him, out of those assets before he could be allowed anything further thereout. Held, also, notwithstanding *Lovegrove v. Cooper* (2 Sm. & G. 271), that proceeds of real estate ordered to be sold for payment of debts, and paid into Court, are equitable and not legal assets. Held, also, that the union of the two characters of trustee for sale and executor in the creditor did not give him rights analogous to those he would have as executor, which he had not as trustee. *Hall v. Macdonald* (14 Sim. 1) observed upon. *Bain v. Sadler*, 40 Law J. Rep. (N.S.) Chanc. 791; Law Rep. 12 Eq. 570.

8.—The right of an executor to retain assets for the payment of his own specialty debts, extends to a debt in which the executor is beneficially interested as *cestui que trust*, but not to a mortgage debt for the payment of which the executor has become surety by a mortgage of his own property, but which he has not paid before bill filed. *Ferguson v. Gibson*, 41 Law J. Rep. (N.S.) Chanc. 640; Law Rep. 14 Eq. 379.

9.—An executor or administrator has, as against the general creditors of the estate, not only the right of retaining, out of the assets of his testator or intestate, debts due to himself as an individual or as a *cestui que trust*, but also has and is bound to exercise the right to retain, out of such assets, debts due to him in the character of trustee for others. *Sander v. Heathfield*, 44 Law J. Rep. (N.S.) Chanc. 113; Law Rep. 19 Eq. 21.

10.—An executor's right to retain his testator's assets for his own debts extends as well to a debt which can only be ascertained by taking accounts in a Court of Equity as to a debt which is ascertainable at law. *In re Morris's Estate; Morris v. Morris*, 44 Law J. Rep. (N.S.) Chanc. 178; Law Rep. 19 Eq. 21.

A testator carried on business in partnership under two firms, both composed of the same individuals, and died, having appointed one of the surviving partners his executor. In a suit for administration of his estate the Chief Clerk found that the executor had in his hands a balance of 1,675*l.*, including a sum of 964*l.* due to the estate from one of the firms, that no account of the



dealings and transactions between the partners in either business was ever taken, and it would not answer any useful purpose that the accounts should be taken; but it was alleged that the other of the businesses was carried on at a loss, and that there was due from the testator's estate in respect of the liabilities of the firm carrying on that business 3,105*l.*, and there was due to his estate in respect of his share as a partner in the other firm 964*l.*—Held, affirming the decision of Hall, V.C., that the executor was entitled as surviving partner in the creditor firm to retain out of the 1,675*l.* the amount of 964*l.* due from the one firm to the estate, by way of set-off against the amount due to the other firm, and as executor to retain the balance of the 1,675*l.*, in part satisfaction of the same debt. *Ibid.*

(b) *Sale of leaseholds.*

11.—A testator bequeathed his leaseholds to executors and trustees upon trust for his nephews and nieces, with a power of sale. All the trustees who survived the testator renounced the probate, and refused to accept the trusts. Administration with the will annexed was granted to another person, who paid all the debts and assented to the bequests. By the decree in a suit for the administration of the testator's estate, a sale of the leaseholds was ordered:—Held, that the administrator alone, without the beneficiaries, could make a title to the leaseholds, and had the same power to sell them as if he had been a trustee of the will. *Wyman v. Carter*, 40 Law J. Rep. (N.S.) Chanc. 559; Law Rep. 12 Eq. 309.

(c) *Power to charge and mortgage.*

12.—An executor or administrator borrowing money in that character does not give the lender any claim against the testator's or intestate's estate. The contract simply creates a personal liability on the part of the executor or administrator. *Farhall v. Farhall*, 41 Law J. Rep. (N.S.) Chanc. 146; Law Rep. 7 Chanc. 123.

The decision of Bacon, V.C., reversed. *Ashby v. Ashby* (7 B. & C. 444) explained. *Ibid.*

13.—An executor mortgaged three small leasehold houses to a building society. The deed, which was in the usual form of a building society's mortgage, recited the will and probate, and that the money was wanted for executorship purposes. It incorporated by reference the rules and bye-laws of the society, and made the mortgage a security not only for the moneys advanced, but for any moneys at any time due by the executor in respect of any shares held by him in the society. The deed contained also personal covenants by the executor for payment of the mortgage money, &c.:—Held, that the mortgage was a good one, and that a title derived under it might be forced on a purchaser. *Cruickshank v. Duffin*, 41 Law J. Rep. (N.S.) Chanc. 317; Law Rep. 13 Eq. 555.

An executor may create a mortgage of his testator's property, with power of sale. *Sanders v. Richards* (2 Coll. 568) is no longer law. *Ibid.*

(d) *Carrying on testator's business.*

14.—In a suit instituted for the administration of the estate of an intestate trader by beneficiaries, where there are infants interested, the Court has no jurisdiction to authorise the administrator to carry on the trade of the intestate. *Land v. Land*, 43 Law J. Rep. (N.S.) Chanc. 311.

15.—D. by his will gave directions that his executors should, after his death, carry on his business of a baker. They did so, employing the widow of D. as their agent:—Held, that they might, in their representative capacity, bring an action against the defendant in respect of bread and flour supplied to him while the business was being so carried on. *Abbott v. Parfitt*, 40 Law J. Rep. (N.S.) Q. B. 115; Law Rep. 6 Q. B. 216.

(e) *Right to sue in representative capacity.*

16.—In an action for work done and materials provided by the plaintiff as administratrix of H., it appeared that H. was a coach-builder, and that upon his death his widow took out administration, and caused carriages to be repaired for the defendant, the materials used being part of H.'s estate, with the exception of one shaft. After this work had been done, the widow died, and the plaintiff took out administration *de bonis non*:—Held, that the cause of action was part of the estate of the intestate and not of the widow, and therefore passed to the plaintiff as administratrix *de bonis non*. Secondly, that the case was one in which the declaration might be amended at *Nisi Prius* by stating that the plaintiff sued, not as administratrix of the deceased, but as administratrix *de bonis non*. *Moseley v. Rendell*, 40 Law J. Rep. (N.S.) Q. B. 111; Law Rep. 6 Q. B. 338.

*Action by executor for injury to personal estate of his testator by breach of contract, causing bodily harm to the testator.* [See ACTION, 1.]

(f) *Right to interest.*

17.—An executor who expended money of his own for the benefit of the estate was allowed simple interest at 4*l.* per cent. *Finch v. Prescott*, 43 Law J. Rep. (N.S.) Chanc. 728; Law Rep. 17 Eq. 554.

(g) *Executor of executor: right to costs.*

18.—An executor died insolvent, having misapplied the assets. An administration suit having been instituted against his executors, who had received part of the testator's estate, they duly accounted for what they had received:—Held, that they were entitled to the costs of accounts against themselves, nor to costs of accounts against the estate of the insolvent executor, and that as to other costs of suit, being parties in both capacities, they should have half the costs. *Palmer v. Jones*, 43 Law J. Rep. (N.S.) Chanc. 349.

(h) *Right of, to surplus.*

19.—Will appointing executors, and devising to them "as such" all the testatrix's property and

effects "in trust as after mentioned." Specific bequests and disposition of residue by a simple direction that the executors should receive and collect, and apply and distribute the same as they should think fit, all circumstances duly considered.—Held, that the executors did not take beneficially. *Neo v. Neo*, Law Rep. 6 P. C. 381.

(i) *Right to be refunded as against legatees.*

**20.**—Distribution of the estate by an executor with notice of a contingent liability does not preclude him from recovering the estate from the legatees in case the contingent liability afterwards ripens into actual loss. *Jervis v. Wolferstan*, 43 Law J. Rep. (N.S.) Chanc. 809; Law Rep. 18 Eq. 18.

An executor who compels a legatee to refund can only require repayment of the capital and not of any intermediate income. *Ibid.*

(k) *Executor durante minore ætate.*

**21.**—An executor *durante minore ætate* can exercise a power given to "the executor for the time being." *Monsell v. Armstrong*, 41 Law J. Rep. (N.S.) Chanc. 715; Law Rep. 14 Eq. 423.

(l) *Legacy to executor.*

[See LEGACY, 4.]

(C) LIABILITIES.

(a) *Rights of creditors.*

*Retainer by mortgagee of balance of proceeds of security to secure a simple contract debt.* [See MORTGAGE, 8.]

[And see ADMINISTRATION.]

(b) *Liability as partners.*

*Liability, as partners, of executors of deceased partner.* [See PARTNERSHIP, 17, 18.]

(c) *Husband of residuary legatee.*

**22.**—If a testator bequeaths his property to a married woman, and makes her husband his executor, and he acts, he is primarily responsible to the estate; and if largely indebted to it, his wife has no equity to a settlement out of any part of it till her husband's liabilities to it are discharged. *Knight v. Knight*, 43 Law J. Rep. (N.S.) Chanc. 611; Law Rep. 18 Eq. 487.

(d) *Involuntary losses.*

**23.**—An administrator who had deposited trust moneys in a private bank on a separate account current, using ordinary prudence, was held not to be liable for the loss of the moneys through the failure of the bank, although the moneys had been suffered to remain so deposited for three and a half years after the death of the intestate, and for nearly a year and a half after the administrator had carried into chambers, in the suit, his accounts shewing a large balance against himself. *In re Marcon's Estate*; *Finch v. Marcon*, 40 Law J. Rep. (N.S.) Chanc. 537.

**24.**—Where one of three executors employed

the solicitor of the testatrix to compromise two debts due from the estate, and on the solicitor falsely stating that the debts had been compromised, handed him a cheque for the money, in order that he might pay the parties, which money the solicitor misappropriated.—Held, that the executor had discharged his duty, and was not liable. *In re Bird*; *The Oriental Commercial Bank v. Savin*, Law Rep. 16 Eq. 203.

(e) *Calls on shares.*

**25.**—Where an administratrix had distributed the whole of the intestate's assets without making provision for calls on shares,—Held, that there ought to be a decree for payment, and in default for administration. *Price v. Mayo*, 43 Law J. Rep. (N.S.) Chanc. 402.

(f) *Devastavit.*

*Devastavit: employment of testator's separate assets, in carrying on business: proof by receiver in suit to administer testator's estate against executor's estate in liquidation.* [See BANKRUPTCY, E 18.]

(g) *Garnishee order against executor.*

**26.**—A garnishee order made against executors will not affect money paid into Court by them in an administration suit, and carried to a separate account to meet a debt due to the judgment debtor. *Stevens v. Phelps*, 44 Law J. Rep. (N.S.) Chanc. 689; Law Rep. 10 Chanc. 417.

(h) *Executor de son tort.*

(1) *Extent of liability.*

**27.**—The plaintiffs, being assignees of the reversion upon a lease, sued the defendant for breach of the covenants therein. The lease had been granted to H. G., who held the demised premises thereunder until his death. His widow, A. G., administered to his personal estate. At her death H. received the rents of the demised premises, which were let to under-tenants, and upon his death the defendant received the rents. The covenants in the lease granted to H. G. had been broken:—Held, that the defendant was liable as executor *de son tort* upon the covenants. *Williams v. Heales*, 43 Law J. Rep. (N.S.) C. P. 80; Law Rep. 9 C. P. 177.

**28.**—An executor of an executor *de son tort* is not liable for breach of contract committed by the original testator, although the executor *de son tort* has actually possessed himself of the particular property or effects of the testator in respect of which the contract was entered into. *Wilson v. Hodgson*, 41 Law J. Rep. (N.S.) Exch. 49; Law Rep. 7 Exch. 84.

(2) *Relief in suit against.*

**29.**—Bill stating a will and codicils giving the plaintiff an annuity, and appointing the defendant executor, that the defendant had proved the will and also previously meddled with the assets, and praying administration. Plea, that the defendant

had not proved the will:—Held, that the plea was good, since the only relief that could be given against an executor *de son tort* in the absence of the proper executor, is the appointment of a receiver. *Rayner v. Koehler* (41 Law J. Rep. (N.S.) Chanc. 697; Law Rep. 14 Eq. 262) disapproved of. *Cary v. Hills*, 42 Law J. Rep. (N.S.) Chanc. 100; Law Rep. 15 Eq. 79.

**30.**—The plaintiff, a creditor of an intestate, filed a plaint in the County Court against the widow and two other persons for administration of the estate, and for an account against the defendants as executors *de son tort*. On the plaint coming on for hearing, the defendants demurred to it *ore tenus*, on the ground that the legal personal representative was not before the Court. The hearing was then adjourned, and shortly afterwards the plaintiff took out administration. On the case subsequently coming on for hearing, the County Court Judge dismissed the plaint, so far as it sought relief against the defendants, but made a common administration decree, giving the plaintiff leave to amend the plaint by stating the grant of administration. On appeal by the plaintiff,—Held, that a bill for an account against an executor *de son tort* was sustainable, notwithstanding the absence of the legal personal representative. Decree of the Court below accordingly reversed, and the defendants ordered to pay the costs of appeal, but under the peculiar circumstances of the case to have them allowed out of the estate if solvent. *Rayner v. Koehler* (41 Law J. Rep. (N.S.) Chanc. 697) followed; *Cary v. Hills* (42 Law J. Rep. (N.S.) Chanc. 100) disapproved of. *Coote v. Whittington*, 42 Law J. Rep. (N.S.) Chanc. 846; Law Rep. 16 Eq. 534.

**31.**—A bill for administration of the estate, or execution of the trusts of the will, of a deceased testator, cannot be sustained against the executor *de son tort* without the legal personal representative. *Rayner v. Koehler* (41 Law J. Rep. (N.S.) Chanc. 697; Law Rep. 14 Eq. 262), and *Coote v. Whittington* (42 Law J. Rep. (N.S.) Chanc. 846; Law Rep. 16 Eq. 534), dissented from. *Rowell v. Morris*, 43 Law J. Rep. (N.S.) Chanc. 97; Law Rep. 17 Eq. 20.

Where it appears on the bill that the suit is defective for want of parties, a defendant who takes the objection at the hearing is entitled to the costs of the day, though he has not taken the objection by his answer. *Ibid.*

(i) *Purchase from legatee.*

**32.**—If a legatee agrees to sell to the executor of the will his legacy for an annuity, the burden will lie on the executor to shew that there was no unfairness in the transaction. *Gray v. Warner*, 42 Law J. Rep. (N.S.) Chanc. 556; Law Rep. 16 Eq. 577.

(k) *Advertisement for claims.*

**33.**—Executors who had not advertised for claims in the "London Gazette," but only in local newspapers in the neighbourhood where the testator resided,—Held not relieved from liability

under the above section. *Wood v. Weightman*, Law Rep. 13 Eq. 434.

(D) RENUNCIATION.

[See supra No. 11.]

EXECUTION.

[See JUDGMENT.]

EXPLOSIVE SUBSTANCES.

[Repeal of previous Acts and new provisions substituted. 38 & 39 Vict. c. 17.]

EXTRADITION.

[33 & 34 Vict. c. 52 amended. 36 & 37 Vict. c. 60.]

**1.**—By Ordinance No. 2, 1850, of Hong Kong it was enacted "that if any complaint, &c., be made or forwarded to any magistrate or Court, desiring the arrest of any person being a Chinese subject, and then within the said colony of Hong Kong, and alleging that such person has committed, or is charged with having committed any crime or offence against the laws of China, &c., it shall and may be lawful for such magistrate to issue a summons or warrant for the appearance or apprehension of such person:—Held, that the words "crimes and offences against the laws of China" mean those ordinary crimes and offences which are punishable by the laws of all nations, and which are not peculiar to the laws of China, and that piracy is within the meaning of the Ordinance. *The Attorney-General of Hong Kong v. Kuok-a-Sing*, 42 Law J. Rep. (N.S.) P. C. 64; Law Rep. 5 P. C. 179.

The respondent, a Chinese coolie, was charged before a magistrate at Hong Kong with murder and piracy on board a French ship, in which he was a passenger, on the high seas:—Held, that murder and piracy under the above circumstances were not offences against the laws of China within the meaning of the Ordinance. *Ibid.*

**2.**—Under the Extradition Act, 1870, 33 & 34 Vict. c. 52, foreign depositions (if duly authenticated) may be received in evidence in proceedings under the Act, although taken in the absence of the person accused, and without his having had an opportunity of cross-examining the witnesses. *Ex parte Couchaye*, 42 Law J. Rep. (N.S.) Q. B. 217; Law Rep. 8 Q. B. 410.

In the list of "extradition crimes" in the schedule to the Act are included "crimes by bankrupts against the bankruptcy law:—Held, that a married woman charged with complicity in the fraudulent bankruptcy of her husband is not a person charged with a crime within the meaning of the above description, as it is limited to crimes committed by bankrupts only. *Ibid.*

By treaty between this country and Belgium, a requisition for the surrender to Belgium of a fugitive criminal shall be made to the Foreign Secretary, accompanied by a warrant of arrest or other equivalent judicial document issued by a Judge or magistrate, duly authorised, &c., together with duly authenticated depositions taken on oath before such Judge or magistrate, which documents are to be transmitted to the Home Secretary, who, if there be due cause, shall require a magistrate to apprehend the fugitive:—Held, that the Secretary may waive the fulfilment of these conditions, and that such documents may be received in evidence before the police magistrate before whom the fugitive is brought, although the warrant is not issued and the depositions taken before the same Judge. *Ibid.*

Quere—whether the Extradition Act, 1870, applies to criminals who have taken refuge in this country before the date of the Act. (But see 36 & 37 Vict. c. 60, s. 2.) *Ibid.*

3.—B. was arrested in the island of Jersey, under a warrant issued pursuant to the Extradition Act, 1870, and was sent to prison, there to remain for fifteen days, after which he was to be surrendered to the French authorities. He had been condemned by a French Court, upon a judgment for three separate offences, one of which, *abus de confiance*, was not within the existing extradition treaty between this country and France, nor within the Extradition Act, 1870, which repeals the 6 & 7 Vict. c. 75, passed for giving effect to the said treaty. By section 3 sub-section 2 of the Extradition Act, 1870, “a fugitive criminal shall not be surrendered to a foreign state, unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning, to her Majesty’s dominions, be detained or tried in that foreign state for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded:”—Held, that under the existing law of France such a provision is made, and therefore that B. was not entitled to be discharged. *In re Bouvier*, 42 Law J. Rep. (N.S.) Q. B. 17.

Semble—that the 27th section of the Extradition Act, 1870, has the effect of keeping in full force the said treaty, though it repeals the Act passed to give it effect. *Ibid.*

## FACTOR.

(A) AGENT ENTRUSTED WITH THE POSSESSION OF GOODS.

(B) TRANSACTIONS PROTECTED BY FACTORS ACT.

(A) AGENT ENTRUSTED WITH THE POSSESSION OF GOODS.

1.—A person who carries on the business of a warehouseman, and in that character receives goods solely for the purpose of warehousing them,

is not an agent within the Factors Act, 5 & 6 Vict. c. 39, although he also carries on the business of a broker; and therefore a pledge of the goods by such person without the authority in fact of his principal either to pledge or sell them is not protected by section 1 of that Act. *Cole v. the North-Western Bank*, 44 Law J. Rep. (N.S.) C. P. 233; Law Rep. 10 C. P. 354.

Decision of the Court of Common Pleas (43 Law J. Rep. (N.S.) C. P. 194; Law Rep. 9 C. P. 470) affirmed. *Ibid.*

(B) TRANSACTIONS PROTECTED BY FACTORS ACT.

2.—A wool broker gave to a bank, to secure an advance, a letter of hypothecation on certain wools, promising to lodge warehouse warrants for them next day. The bank made repeated application for the warrants, but did not obtain them. After a few days, the bankrupt having left his house, they by pressure obtained the keys of his warehouse, where the wool was stored, and took possession. It appeared that part of the wool (the subject of the present application) had belonged to a customer of the broker, but he was under advance and made no claim:—Held, that the bank acquired a valid charge on the wool in question under the provisions of the Factors Act. *Ex parte the North-Western Bank; In re Slee* (No. 2), 42 Law J. Rep. (N.S.) Bankr. 6; Law Rep. 15 Eq. 69.

In leaving his house, the bankrupt was, as it turned out, absconding:—Held, on the facts, that the bank had no notice of this. *Ibid.*

The Bills of Sale Act does not apply to ordinary mercantile transactions. *Ibid.*

3.—A merchant, who has enabled his factor to raise money fraudulently, can claim no redress against the party who has *bonâ fide* made the advances. The goods or symbols of property entrusted to the factor may be regarded by unsuspecting third parties as his own, and be dealt with accordingly, under the Factors Act, 5 & 6 Vict. c. 39. *Vickers v. Hertz*, Law Rep. 2 H.L. Sc. App. 113.

## FACTORY.

[The Acts relating to workshops (7 & 8 Vict. c. 15, 11 & 12 Vict. c. 43, and 27 & 28 Vict. c. 48) amended and in part repealed. 34 & 35 Vict. c. 104.]

[The Factory Acts amended. 37 & 38 Vict. c. 44.]

Premises consisting of about ten acres of land, and connected by railroad with chalk pits, were used by the respondents for the manufacture of cement. The premises were open to the surrounding country, and contained mills, kilns, sheds, &c., for the preparation of the cement from chalk or mud, but no large roofed building. About two hundred men were employed in the work:—Held, that the process of manufacturing the cement being practically carried on in the open air, the works were not “premises” within the meaning

of the Factory Acts Extension Act, 1867, 30 & 31 Vict. c. 103, s. 3, sub-s. 7. *Redgrave v. Lee*, 43 Law J. Rep. (n.s.) M. C. 105; Law Rep. 9 Q. B. 363.

### FALSE IMPRISONMENT.

The plaintiff travelled by the defendants' railway with a ticket which entitled him to leave the train at N. Before the train arrived at N. it stopped at E. whereupon plaintiff got out of the carriage, and, upon being asked for his ticket, handed it to the collector. He was told by the collector that it was not available, and that he must pay the sum of 2*d.* excess fare. He refused to do so, unless a receipt was given to him, and was given into custody by the inspector of the station at E., and charged with having, on arriving at the station at E., refused to deliver up his ticket or pay his legal fare, and thereby defrauding the company of 2*d.* The charge was preferred before a magistrate, and dismissed. The plaintiff brought an action against the defendants for false imprisonment, but was nonsuited, upon the ground that there was no evidence that the inspector had any authority either express or implied from the defendants to give the plaintiff in charge:—Held, in accordance with *Goff v. The Great Northern Railway Company* (30 Law J. Rep. (n.s.) Q. B. 148), that the question was one for the jury, and that the nonsuit was wrong. *Moore v. The Metropolitan Railway Company*, 42 Law J. Rep. (n.s.) Q. B. 23; Law Rep. 8 Q. B. 36.

*Railway company: liability for acts of servant.* [See MASTER AND SERVANT, 11.]

### FALSE PERSONATION.

[Personation with intent to deprive any person of real estate or other property rendered felony. 37 & 38 Vict. c. 36.]

### FALSE PRETENCE.

- (A) WHAT CONSTITUTES THE OFFENCE.  
(B) EVIDENCE.

#### (A) WHAT CONSTITUTES THE OFFENCE.

1.—A man who makes and gives a cheque for the amount of goods purchased in a ready money transaction, saying that he wishes to pay ready money, makes a representation that the cheque is a good and valid order for the amount inserted in it; and if such person has only a colourable account at the bank on which the cheque is drawn without available assets to meet it, and has no authority to overdraw, and knows that the cheque will be dishonoured on presentation, and intends to defraud, he may be convicted of obtaining such goods by a false pretence. *The Queen v. Hazelton*,

44 Law J. Rep. (n.s.) M. C. 11; Law Rep. 2 C. C. R. 134.

2.—A prisoner was convicted upon an indictment which charged that he obtained money from one W. by falsely pretending to W. that a certain albert chain, which prisoner asked W. to buy of him, was of 15-carat gold, and that he was a draper, and that the chain was expressly made for him. The evidence as to the quality of the chain was that the prisoner said "it is 15-carat fine gold, and you will see it stamped on every link." W. examined the chain, and gave 6*l.* for it, but did so relying on the prisoner's statement. The chain was in fact marked as 15-carat, which was a Hall mark used to denote that quality of gold in some towns in England. The chain was of a quality little better than 6-carat gold. The jury found specifically that the prisoner knew that he was falsely representing the value of the chain:—Held, that the conviction was right. *The Queen v. Bryan* (Dears. & B. C. C. 265) distinguished. *The Queen v. Ardley*, 40 Law J. Rep. (n.s.) M. C. 85; Law Rep. 1 C. C. R. 301.

#### (B) EVIDENCE.

3.—On an indictment for attempting to obtain money by falsely pretending that a ring was composed of diamonds, which in fact was composed of crystals, evidence is admissible of a false pretence on a prior occasion to another person that a chain was gold, whilst it was plated, and on another distinct occasion that a ring was of diamonds, which it was not. And it was held no objection that the diamond ring spoken to on the prior occasion was not produced in Court. *The Queen v. Francis*, 43 Law J. Rep. (n.s.) M. C. 97; Law Rep. 2 C. C. R. 128.

### FALSE REPRESENTATION.

The defendant caused to be inserted in a public newspaper an advertisement for the letting by tender with immediate possession "all that farm," &c. (describing it). The plaintiff, believing in the *bona fides* of such advertisement, and desiring to become tenant of a place of the description advertised, was induced to take and did take trouble and incurred expense in going to and inspecting the property, and in the employment of persons to inspect and value it for him, with a view of his becoming tenant thereof. The defendant knew at the time he caused the advertisement to be published that he had not power to let the farm, and in fact the farm was not to be let, and the defendant caused the advertisement to be issued to serve some purpose of his own other than that appearing by the advertisement. Upon the above facts, disclosed by the particulars in a plaint in a County Court, the Judge directed a nonsuit, holding that no cause of action was disclosed:—Held, upon appeal, that the Judge was wrong, and that he ought to have heard the evidence. *Richardson v. Sylvester*, 43 Law J. Rep. (n.s.) Q. B. 1; Law Rep. 9 Q. B. 34.

*Action to recover money paid.* [See ACTION, 5.]

## FALSIFICATION OF ACCOUNTS.

[24 & 25 Vict. c. 96 to be construed together with this Act. 38 & 39 Vict. c. 24.]

## FEES.

*Burial.* [See BURIAL, 4.]

*Counsel's.* [See COSTS IN EQUITY, 69-73;  
COSTS AT LAW, 21-23.]

## FELONY.

An agreement to withdraw from a prosecution for felony, provided the person accused will promise to bring no action for trespass and false imprisonment or malicious prosecution, is void, and cannot be enforced; and if the person accused subsequently sues the prosecutor the action will not be stayed upon the ground that it is brought against good faith. *Rawlings v. The Coal Consumers Association (Lim.)*, 43 Law J. Rep. (N.S.) M. C. 111.

*Forfeiture for felony.* [See FORFEITURE, 9.]

## FINES AND RECOVERIES.

*Protector of settlement.*

1.—Where protectors of the settlement are appointed under section 32 of the Fines and Recoveries Act, the protectorship is not determined by the death of one of them, but vests in the survivor or survivors. *Bell v. Holtby*, 42 Law J. Rep. (N.S.) Chanc. 266; Law Rep. 15 Eq. 178.

2.—A., B., C. and D. were joint tenants of freeholds for life with remainder to A., B., C., D. and E., as tenants in common in tail with cross remainders. A., without the consent of B., C. or D., executed a disentailing assurance. Subsequently E. died without issue, and without having barred his estate tail:—Held, that A. was protector of the same share of which he was tenant in tail, and that, therefore, he had effectually barred his estate tail as well as the one-fourth of E.'s fifth share, to which he was entitled in remainder on E.'s estate tail, as in his original one-fifth share. *Tuffnell v. Borrell*, 44 Law J. Rep. (N.S.) Chanc. 756; Law Rep. 20 Eq. 194.

*Acknowledgment of deed by married woman.*  
[See ACKNOWLEDGMENT.]

## FIRE ENGINE.

*Expenses of use of.* [See TOWNS POLICE ACT, 2.]

## FISHERY.

Eels held to be included in the general words "every kind of fish known as river fish" contained in a bye-law made by river conservators. *Woodhouse v. Etheridge*, Law Rep. 6 C. P. 570.

## FIXTURES.

(A) TRADE FIXTURES: REGISTRATION OF DEED.

- (a) *Mortgage in fee.*
- (b) *Mortgage of leaseholds.*

(A) TRADE FIXTURES: REGISTRATION OF DEED.

(a) *Mortgage in fee.*

1.—Trade fixtures pass by a mortgage of the freehold or of a freeholder's interest in the property to which they are attached, whether such mortgage be effected by a regularly executed deed, or by deposit with memorandum, and such mortgage will be effectual, though not registered, as against any subsequent unregistered bill of sale. Trade fixtures added subsequently to the mortgage are subject to this rule as much as those attached before the mortgage. *Richard v. James* (36 Law J. Rep. (N.S.) Q. B. 116), and *Begbie v. Fenwick* (Law Rep. 8 Chanc. 1075 n), commented on. *Meux v. Jacob* (H.L.), 44 Law J. Rep. (N.S.) Chanc. 481; Law Rep. 7 E. & I. App. 481.

2.—Where the occupier, who is also owner in fee, of a mill containing looms nailed to the floor, mortgages the mill and fixtures in fee and afterwards assigns all his effects to a trustee for the benefit of his creditors, the mortgagee is, as against the trustee, entitled to the looms as part of the mill. *Longbottom v. Berry* (39 Law J. Rep. (N.S.) Q. B. 37; Law Rep. 5 Q. B. 123) affirmed. *Holland v. Hodgson* (Exch. Ch.), 41 Law J. Rep. (N.S.) C. P. 146; Law Rep. 7 C. P. 328.

3.—A mortgage by a leaseholder of his tenant's fixtures with his lease, in whatever form, requires registration under the Bills of Sale Act, 1854, as a bill of sale of fixtures. *Ex parte Daglish*; *In re Wilde*, 42 Law J. Rep. (N.S.) Bankr. 102; Law Rep. 8 Chanc. 1072.

Such a mortgage is quite different from a mortgage by a freeholder of fixtures with the freehold. There the title to the land and fixtures is identical, for the fixtures belong to the landlord simply as part of the land, and it is for this reason that a mortgage does not require registration. *Ibid.*

*Boyd v. Shorrocks* (37 Law J. Rep. (N.S.) Chanc. 144; Law Rep. 5 Eq. 72) dissented from. *Ibid.*

A lease contained covenants by the lessee to erect certain machinery in the buildings demised, and to keep the buildings and machinery in repair during the term; and a covenant to deliver up the buildings at the end of the term, not mentioning the machinery:—Held, nevertheless, that the machinery was made landlord's fixtures, as, practically, the tenant could never remove it. *Ibid.*

(b) *Mortgage of leaseholds.*

4.—An indenture of lease for a term, of which about sixteen years were to run, was assigned in the year 1868 to H., and by the indenture of assignment the trade fixtures upon the premises were absolutely assigned to him. By an indenture of mortgage, dated the 20th of March, 1872, H. demised the premises to the plaintiffs for the residue of the said term except the last two days, and he also assigned to the plaintiffs the trade fixtures, subject to redemption on payment of the amount of mortgage debt and interest. The indenture of mortgage was not registered under the Bills of Sale Act. A judgment having been obtained against H., the sheriff, on 14th April, 1872, by virtue of a *fi. fa.* seized the said trade fixtures, as well as the moveable and unfixed machinery and effects, all of which were at the time of the seizure in the apparent possession of H. The plaintiffs thereupon claimed the trade fixtures as being their property:—Held, upon an interpleader issue, that the indenture of mortgage of 20th March, 1872, ought to have been registered under 17 & 18 Vict. c. 36, and that the plaintiffs were not entitled to claim the trade fixtures which had been assigned to him. *Hawtrey v. Butlin*, 42 Law J. Rep. (n.s.) Q. B. 163; Law Rep. 8 Q. B. 290.

5.—The lessee of a public-house who under a covenant in the lease was bound to deliver up to the lessor all the fixtures on the premises, tenant's fixtures put up for the lease excepted, demised by way of mortgage the leasehold premises (including tenant's fixtures) to a mortgagee for the residue of the term less three days.

The mortgage deed contained a power of sale by which it was provided that in case of default the mortgagee might sell the demised premises, or any part thereof, either for the term thereby granted, or for the whole term granted by the original lease, and either together or in parcels, with a proviso that after any sale the mortgagor should stand possessed of the last three days of the original term, in trust for the purchaser:—Held, that the mortgage deed did not empower the mortgagee to take the fixtures and sell them separately from the public-house, and that consequently it was not requisite that the deed should be registered under the Bills of Sale Act. *Ex parte Barclay; In re Joyce*, 43 Law J. Rep. (n.s.) Bankr. 137; Law Rep. 9 Chanc. 576.

The test whether the Act applies in such a case is, whether the mortgage deed gives power to the mortgagee to sever the fixtures and sell them separately from the house. *Ibid.*

*Ex parte Dagleish; In re Wilde* (42 Law J. Rep. (n.s.) Bankr. 102; Law Rep. 8 Chanc. 1072) considered and distinguished. *Ibid.*

*Surrender of lease by a trustee in bankruptcy who had sold the fixtures, held not to affect the purchaser's right to the fixtures.* [See LEASE, 33.]

FOREIGN ATTACHMENT.

[See ATTACHMENT, 9, 10; DEBTORS ACT, 12.]  
DIGEST, 1870—1875.

FOREIGN ENLISTMENT ACT.

1.—The employment of an English steam-tug for the purpose of towing a prize to the captor's waters, is a despatching a ship from the United Kingdom for the purpose of being employed in the naval service of a foreign state, within the meaning of section 8 of the Foreign Enlistment Act, 1870. *The Queen v. Elliott, The Gauntlet* (P. C.), 41 Law J. Rep. (n.s.) Adm. 65.

2.—The L. B., a German merchant vessel, was captured by a French man-of-war, a prize crew was put on board, she was brought into the Downs within three miles of the English coast. A steam-tug called the G. afterwards came into the Downs, and was hired by the French consul to tow the L. B. to Dunkirk for the ordinary amount, which she accordingly did:—Held, that the towage did not constitute a breach of the Foreign Enlistment Act, 1870, so as to entitle the Crown to a forfeiture; and the G. was released with costs. *The Gauntlet*, 40 Law J. Rep. (n.s.) Adm. 34; Law Rep. 3 Adm. & Ecc. 319, 381.

3.—By the 8th section of the Foreign Enlistment Act, 1870, if any person within Her Majesty's dominions, without Her Majesty's license despatches any ship with intent that the same shall be employed in the military or naval service of any foreign state at war with any friendly state, the ship in respect of which any such offence is committed and her equipment shall be forfeited to Her Majesty:—Held, that a vessel despatched to furnish and lay a submarine telegraph cable along certain parts of the French coast between Cherbourg and Verdun was not despatched to be employed in the military service of France. *The International*, 40 Law J. Rep. (n.s.) Adm. 1; Law Rep. 3 Adm. & Ecc. 321.

Application to release such a vessel granted, but without costs and damages. *Ibid.*

FOREIGN COURT: JURISDICTION.

The Supreme Consular Court of Constantinople has jurisdiction to order the sale of lands in Turkey held by British subjects in the name of a Turkish subject. *Abbott v. Abbott*, Law Rep. 6 P. C. 220.

FOREIGN JUDGMENT.

1.—In an action on the judgment of a foreign tribunal having jurisdiction over the defendant and the cause, the fact that the judgment proceeded on a mistake as to English law is no more a defence to the action than a mistake as to the law of some third country incidentally involved, or as to any other question of fact; and it can make no difference as to the binding effect of the judgment whether the mistake appears on the face of the proceedings or not. *Godard v. Gray*, 40 Law J. Rep. (n.s.) Q. B. 62; Law Rep. 6 Q. B. 139.

2.—In an action upon the judgment of a French  
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Court, given against the defendants for default of appearance, it appeared that the plaintiffs were Danes resident in France, and that the defendants were Danes resident in London, carrying on business there, and having no property in France, and that the contract in respect of which the judgment was obtained was not made in France. By the law of France a French subject may sue a foreigner though not resident in France, and for this purpose an alien, if resident in France, is considered by the French law as a French subject. The mode of citation in such a case is by serving the summons on the Procureur Impérial. If the foreign defendant thus cited does not within one month appear, judgment may be given against him, but he may still at any time within two months after judgment appear and be heard on the merits. After that time the judgment becomes final. The practice of the Imperial Government in such a case is to forward the summons thus served to the consulate of the country where the defendant is resident, with directions to intimate the summons, if practicable, to the defendant; but this is not required by the law, and only done from a regard to fair dealing. It was admitted that the French consulate in London had served the defendants with a copy of the citation, but that the defendants had in no way interfered in the proceedings in France:—Held, that the true principle on which foreign judgments are enforced in England is, that there is a duty or obligation to submit to the decree of a Court of competent jurisdiction, and anything which negatives that duty is a defence to the action. In the present case the defendants, not being at the commencement of the suit French subjects, or owing temporary allegiance to France, or having been there when the obligation was contracted, or in any way interfered in the proceedings, were not subject to the jurisdiction of the French Courts. They were, therefore, under no obligation to submit to a jurisdiction which these Courts assumed to exercise over absent foreigners, and consequently the judgment could not be enforced in this country. *Schibsky v. Westinholz*, 40 Law J. Rep. (n.s.) Q. B. 73; Law Rep. 6 Q. B. 155.

3.—The law of a foreign country being that shareholders of a company there established are subject to the provisions in the articles of association—by taking shares in such a company, the articles of association of which provide that all disputes shall be submitted to the jurisdiction of a tribunal in such country, and that a shareholder shall, in certain events, elect a domicile within the jurisdiction whereat process shall be served, or, in default, that such election shall be made for him, an English subject, neither resident, nor domiciled in the foreign country, becomes bound by legal proceedings there in a suit against him for calls, if process has been duly served at a domicile elected for him under the provision aforesaid, although he may have had no notice or knowledge of such proceedings; for he has contracted to be bound thereby, and an action may be maintained in this country upon a judgment recovered against

him in such suit. *Copin v. Adamson; Same v. Strahan*, 43 Law J. Rep. (n.s.) Exch. 161; Law Rep. 9 Exch. 345: reversed, on appeal, 45 Law J. Rep. (n.s.) C. P. 45; Law Rep. 1 Exch. 17.

But held (Kelly, C.B., *dissentiente*) that his mere membership in the French company does not make him subject to the general law of France so as to be bound by similar provisions for the election of a domicile, contained in that law, and thereby liable to an action here upon a French judgment recovered under the above-mentioned circumstances. *Ibid*.

## FOREIGN LAW.

[See COLONIAL LAW; CONFLICT OF LAWS; DOMICIL.]

*Evidence of.* [See EVIDENCE, 13.]

*Foreign ship.* [See SHIPPING LAW K.]

*Foreign Contract.* [See JURISDICTION IN EQUITY, 14.]

*Suit affecting interest of foreign government.*

[See JURISDICTION IN EQUITY, 15.]

*Specific performance: sale of foreign ship.*

[See SPECIFIC PERFORMANCE, 14.]

## FORESHORE.

In order to establish a possessory title to foreshore as against a trespasser it is not necessary to produce evidence sufficient as against the Crown. Nor may the defendant, the trespasser, prove acts of ownership by the Crown not shewn to have been done with the knowledge of the plaintiffs. A grant of a parcel of land by Queen Elizabeth to a corporation held not *prima facie* to exclude the beach below high-water mark, it appearing that the words descriptive of the land contained in the grant were applied in more modern times to the entire beach, *The Corporation of Hastings v. Ivald*, Law Rep. 19 Eq. 558.

## FOREST OF DEAN.

1.—A gale to work a coal mine is “exhausted” within the meaning of 1 & 2 Vict. c. 43, s. 61, when there is not enough coal left in it to make it worth working. *Ellway v. Davis*, 43 Law J. Rep. (n.s.) Chanc. 75; Law Rep. 16 Eq. 294.

2.—A free miner of the Forest of Dean applied for an unoccupied gale. The gaveller acceded to the application, duly entered it in his book, and gave notice of his intention to make the grant upon a certain day. Conflicting claims being set up, the actual grant of the gale was delayed, and, in the meantime, the free miner died. The devisees under his will then presented their petition of right, praying that the gale might be granted to them in right of their testator. Upon demurrer by the Crown,—Held, that the 38th section of the Act 1 & 2 Vict. c. 43, applied only



to the state of things at the passing of the Act, and that the free miner had acquired a title transmissible by will; and the demurrer was overruled accordingly. *James v. The Queen*, 43 Law J. Rep. (n.s.) Chanc. 754; Law Rep. 17 Eq. 502.

3.—The gaveler of the Forest of Dean granted a gale of a colliery to J. B., a free miner. By the form of the certificate of grant, the gale was granted to the miner, rendering and paying a tonnage rent for coal gotten, and so working as to get a specified amount every year, with a minimum rent of 200*l.*, in case no coal was gotten or the tonnage rent for coal gotten did not reach that amount; the certificate continuing, “and the grant is made upon this further condition,” that the mine should be worked in a particular manner:—Held, that both upon general principles, upon the form of the grant itself, and upon the Acts of Parliament and rules in force with reference to grants of gales, this was a grant upon condition of payment of rent, so as to entitle the Crown to declare the grant forfeited and re-enter upon non-payment. *In re Brain*, 44 Law J. Rep. (n.s.) Chanc. 103; Law Rep. 18 Eq. 389.

The minimum rent being in arrear the gaveler, after a formal demand, took possession of the mine, and gave notice to the galee of his having re-entered. The galee ten months afterwards tendered the rent due and subsequently presented a petition of right to have the forfeiture of the gales set aside on payment of the rent due, with interest, and for an injunction against a re-grant to others:—Held, that after the lapse of time, the galee must be treated as having acquiesced in the re-entry of the Crown, and the petition was dismissed with costs. *Ibid.*

Semble—the galee would not have had, under 4 Geo. 2. c. 28, as against the Crown, any right in equity to redeem on payment of arrears and interest even if he had filed his petition within six months after the day of re-entry. *Ibid.*

## FORFEITURE.

### (A) FORFEITURE ON BANKRUPTCY OR ALIENATION.

- (a) *When the forfeiture takes effect.*
- (b) *Gift over to wife and children.*

- (B) NAME AND ARMS CLAUSE: IGNORANCE NO PROTECTION.
- (C) ON BREACH OF COVENANT.
- (D) CONDITION IN CONTRACT OF SALE OF LAND.
- (E) ON FELONY.

### (A) FORFEITURE ON BANKRUPTCY OR ALIENATION.

- (a) *When the forfeiture takes effect.*

1.—Liquidation by arrangement on a petition by the debtor was held to work a forfeiture under a proviso guarding against voluntary alienation. *In re Amherst's Trusts*, 41 Law J. Rep. (n.s.) Chanc. 222; Law Rep. 13 Eq. 464.

2.—After G. had been adjudged a bankrupt by a Scotch sequestration, and before he obtained his

discharge, his wife, who had taken part in procuring the sequestration, made her will and thereby gave an annuity to him for life, and declared, that if he should become bankrupt, or should assign, &c., the annuity should cease; and she also empowered the trustees of her will in their discretion at any time to refuse or discontinue payment of the annuity to her husband. After the death of the testatrix, and before the first payment of the annuity became due, G. obtained a discharge which did not divest the property from the trustee in the sequestration:—Held, reversing the decision of one of the Vice-Chancellors, that the annuity was forfeited. *Trappes v. Meredith*, 41 Law J. Rep. (n.s.) Chanc. 237; Law Rep. 7 Chanc. 248.

3.—Under a clause of forfeiture of a life interest on a future bankruptcy, a forfeiture will be caused by a past bankruptcy which remains unannulled at the time at which the first payment under the gift for life becomes due, although the bankruptcy is afterwards annulled, before any claim is made by the persons entitled under the gift over. The retention of the money by the trustees is equivalent to payment to another person. *In re Parnham's Trusts*, 41 Law J. Rep. (n.s.) Chanc. 292; Law Rep. 13 Eq. 413.

4.—B., by his will, gave certain moneys to trustees upon trust, to invest the same and pay the income to J. B. for his life, or until he should become bankrupt or insolvent, or make a general assignment for the benefit of his creditors, or otherwise deprive himself or be deprived by law of the beneficial enjoyment thereof; and after his death, or the happening of any of the said events, upon certain trusts for J. B.'s wife, and after his death for his children. J. B. executed a composition deed, with a recital that he was unable to pay his debts in full, though it appeared he was at the time entitled to a reversionary share in the trust fund sufficient to meet all his liabilities:—Held, that J. B. could not dispute the recital, and that his life interest was forfeited. *Billson v. Crofts*, 42 Law J. Rep. (n.s.) Chanc. 531; Law Rep. 15 Eq. 314.

5.—A gift over of leaseholds on insolvency was held to take effect though the insolvency (being in Australia) did not affect the leaseholds. *In re Aylwin's Trusts*, 42 Law J. Rep. (n.s.) Chanc. 745; Law Rep. 16 Eq. 585.

A power given to the insolvent to appoint among his children held to be capable of being exercised after the insolvency. *Ibid.*

6.—The meaning of the word “bankruptcy” was held to be cut down by the particular intention of a testator. *Robins v. Rose*, 43 Law J. Rep. (n.s.) Chanc. 334.

A testator gave the income of property to one of his trustees for life, or till bankruptcy, or till he should do or suffer anything to deprive himself of the enjoyment of the income. He was adjudicated bankrupt, the bankruptcy was annulled, and ultimately his property revested in himself. The trustees managed the property so that there was no income payable to him in the mean time. —Held, that he had not forfeited his life interest. *Ibid.*

(b) *Gift over to wife and children.*

7.—The testator left his property to trustees in trust as to different portions of it for each of his children for life, and after the death of each child for its issue, with a gift over of the share of any child dying without issue to the other children and their issue, and declared that if any of his sons should become bankrupt his life estate should cease as if he were dead, and during the remainder of his life the trustees should apply the income to which, but for such forfeiture, he would have been entitled, for the benefit of the wife and children of such son in such manner as the said trustees should think fit. One of the testator's sons was married at the time of the testator's death; he subsequently became bankrupt; his wife died, leaving him without issue; and he married again and had two children:—Held, that the trust for the wife and children of the bankrupt son revived as soon as there came to be any wife or child to take under it. *Longworth v. Bellamy*, 40 Law J. Rep. (N.S.) Chanc. 513.

## (B) NAME AND ARMS CLAUSE: IGNORANCE NO PROTECTION.

8.—Section 4 of 3 & 4 Will. 4. c. 27, extends to forfeitures which operate to accelerate an estate under a conditional limitation as well as to forfeitures, of which the heir-at-law only can take advantage. *Astley v. The Earl of Essex*, 43 Law J. Rep. (N.S.) Chanc. 817; Law Rep. 18 Eq. 290.

A devise under a conditional limitation is not protected from forfeiture by ignorance of the condition. *Ibid.*

An estate was settled on a tenant for life and remaindermen in tail, with a name and arms clause providing that in case any person should fail to comply with it for twelve calendar months after becoming entitled in possession the estate should go over as if he were dead. T. G. C. entered into possession as tenant in tail, and did not comply with the condition; he remained in possession for more than twenty years after he had forfeited the estate:—Held, that he did not acquire a title by adverse possession, but that under 3 & 4 Will. 4. c. 27, s. 4, the right of the remaindermen to enter commenced on his death. *Ibid.*

At the death of T. G. C. the next remainderman was in India, and was ignorant of the clause until after the twelve months expired:—Held, that his ignorance did not prevent the forfeiture operating as to his interest. *Ibid.*

## (C) ON BREACH OF COVENANT.

*Forfeiture for breach of covenant: waiver of.* [See EJECTMENT.]

## (D) CONDITION IN CONTRACT OF SALE OF LAND.

*Contract for sale of land: power to relieve from penalty: proviso for re-entry on non-payment of balance of purchase-money.* [See PENALTY.]

## (E) ON FELONY.

9.—A gift "to be transferred" to the legatee on his attaining twenty-one, with provisions for

maintenance out of the income meanwhile, and a gift over on death under twenty-one, such gift being afterwards referred to by the testator as a contingent gift,—Held, to be vested before twenty-one so as to be forfeitable on conviction for felony. *In re Bateman's Trusts*, 42 Law J. Rep. (N.S.) Chanc. 553; Law Rep. 15 Eq. 355.

A colonial conviction for felony forfeits the goods of the felon in this country, so as to enable the Crown to take them. *Ibid.*

## FORGERY.

1.—By 24 & 25 Vict. c. 98, s. 20, "whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of or put off, knowing the same to be forged or altered, any deed, or any bond or writing obligatory, &c., shall be guilty of felony." The prisoner altered the name of a person ordained so as to change it to his own, and made other alterations in Letters of Orders signed, sealed and issued under his episcopal seal by the Bishop of Bath and Wells:—Held, that such document was not a deed within the above section of the statute, and therefore the prisoner could not be convicted of felony under that section. *The Queen v. Morton*, 42 Law J. Rep. (N.S.) M. C. 58; Law Rep. 2 C. C. R. 22.

2.—An I O U in this form: "I O U thirty-five pounds—A. C."—given by A. C. the prisoner, to his creditor for the amount of his debt, by which means he obtains further time for payment, and upon which is forged the signature of another person, is an instrument upon which the latter person would be liable if the signature had been genuine, and is therefore an undertaking for the payment of money within the meaning of section 23 of 24 & 25 Vict. c. 98, and the subject matter of forgery within that section. *The Queen v. Chambers*, 41 Law J. Rep. (N.S.) M. C. 15; Law Rep. 1 C. C. R. 341.

## FRAUD AND MISREPRESENTATION.

## (A) LIABILITY TO SUIT OR ACTION.

- (a) *Suppression of mortgage deed.*
- (b) *Fraud by agent of company.*
- (c) *Misrepresentation of law.*
- (d) *In general.*
- (e) *Delay, whether a defence.*

## (B) AS GROUND OF DEFENCE.

## (C) WHAT TRANSACTIONS WILL BE SET ASIDE ON GROUND OF FRAUD OR MISREPRESENTATION.

## (D) JURISDICTION OF COURT OF CHANCERY.

## (E) FRAUD BY AGENT UNDER 24 &amp; 25 VICT. c. 96.

## (A) LIABILITY TO SUIT OR ACTION.

- (a) *Suppression of mortgage deed.*

1.—The plaintiff in the year 1865 entered into a partnership with L., the terms being that L. should bring in as capital the business premises, to

be taken at a valuation, and so much money as might be required to make up 6,000*l.*, and that the plaintiff should bring in 6,000*l.* and pay a certain premium to L. The defendant, J. C., acted as solicitor for L. in this transaction, and furnished the valuer with the particulars of his interest in the business premises. Four years afterwards L. became bankrupt, having drawn all his capital out of the partnership, and being in debt to it at the time; and the defendant, J. C., then informed the plaintiff that he and his brother F. C. held a mortgage on L.'s interest in the business premises for 850*l.*, the sum advanced being trust money. This mortgage had been created before the partnership was agreed upon, and neither J. C. nor L. had ever mentioned it to the plaintiff, nor was it noticed in the particulars furnished to the valuer, and the interest had been paid upon it by L. in cash, or by cheques on his private account:—Held, that J. C. was bound to make good to the plaintiff the amount of the mortgage and any interest he might have to pay on it, and that he must pay the costs of the suit. *Sterry v. Combs*, 40 Law J. Rep. (N.S.) Chanc. 595.

(b) *Fraud by agent of company.*

2.—An action of deceit will lie against an incorporated company for the fraud of their agent if the fraud of the agent is the fraud of the company, and the company is benefited thereby. *Mackay v. The Commercial Bank of New Brunswick*, 43 Law J. Rep. (N.S.) P. C. 31; Law Rep. 5 P. C. 394.

L., a merchant of New Brunswick, consigned goods to the appellants at Liverpool. The appellants accepted L.'s bills, sometimes for goods received and sometimes on the guarantee of the respondents, an incorporated banking company. The appellants telegraphed to L. that certain of these bills would not be accepted unless certain guarantees were remitted. The manager of the bank telegraphed a reply, "Sent last mail, L." This was true, but at this time L. had become insolvent. The appellants accepted the bills, and their acceptances were placed to the credit of the respondents:—Held, that the respondents were liable to make good the amount of the bill so accepted. *Ibid.*

(c) *Misrepresentation of law.*

3.—The doctrine that a person who by a false representation induces another to do an act which results in a loss, is liable to make good his representation, does not apply where the misrepresentation is one of law only. *Beattie v. Ebury*, 41 Law J. Rep. (N.S.) Chanc. 804; Law Rep. 7 Chanc. 777.

Decision of Vice Chancellor Bacon (41 Law J. Rep. (N.S.) Chanc. 393) affirmed.

Where (with the sanction of their Board) three directors of a railway company signed an authority to the company's bankers to honour the company's cheques, and upon the strength of this authority the bank permitted the company to overdraw their account to a very large amount, the directors who signed the authority were held not to be personally

liable for the debt, even if the authority could be considered as a representation (which probably it was not), that the company had power to overdraw their account, which they could not legally do. *Ibid.*

By an arrangement with the manager of the company's bank, preference shares and debentures of the railway company on which nothing was paid were issued to two of the directors of the company, and transferred to the nominees of the bank as security for the above-mentioned advances:—Held, under the circumstances, that the bank knew at the date of the transfer that nothing had been paid on the shares and debentures, and that there was no misrepresentation or fraud in the transaction. *Ibid.*

(d) *In general.*

*Gift of house for life: alteration of conduct of donee in consequence of representation of donor.* [See CONTRACT, 8.]

*Action to recover money paid: misrepresentation: failure of consideration.* [See ACTION, 5.]

*Liability of bank for misrepresentation of manager.* [See BANKER, 1.]

*Liability of directors for misrepresentation in prospectus.* [See COMPANY, D 25, 26.]

(e) *Delay, whether a defence.*

4.—The delay which will constitute a defence to a suit for relief founded on fraud must be delay commencing after the party had knowledge of the circumstances concerning the fraud. *Browne v. McClintock*, Law Rep. 6 E. & I. App. 456.

(B) AS GROUND OF DEFENCE.

5.—Misrepresentation whereby one has been induced to enter into an agreement, may afford a good defence to a suit for specific performance of the agreement, although it be not such a clear and direct misrepresentation as would afford a good ground for a suit to set the agreement aside or for an action for damages upon it. *Lamare v. Dixon* (H. L.), Law Rep. 6 E. & I. App. 414.

If the plaintiff in a suit for specific performance has delayed for a length of time to enforce the agreement, acquiescence in a breach of the agreement, or in a misrepresentation on the faith of which the defendant entered into the agreement, will not be imputed to the defendant by reason of a similar delay on his part in repudiating it, though accompanied by possession. *Ibid.*

(C) WHAT TRANSACTIONS WILL BE SET ASIDE ON GROUND OF FRAUD OR MISREPRESENTATION.

6.—The plaintiff was a single lady, about fifty-three years of age, and the heiress-at-law of her deceased brother. The defendant had been the brother's agent, and managed his property for him till his death, and for the plaintiff afterwards. The plaintiff knew nothing of her brother's affairs. Soon after the brother's death the defendant informed the plaintiff that her brother had left

some land, to which she was entitled as his heiress-at-law, and asked her what she meant to do with it? adding, that her brother often said the defendant and his daughter were to have it, but he never in any way made it over to them. The plaintiff then asked the defendant what was the value of the land, and he answered, "100*l.*, may be a trifle more or less;" and asked her whether she was willing that he should purchase it at that price? On her saying yes, the defendant further added that all his property would come to his daughter, and that he should have it made over to her. The defendant then asked the plaintiff whether she would like to consult any one on the subject, and she replied that she did not want that, because she had perfect confidence in him. The property was really worth about 750*l.* or 800*l.* The plaintiff executed a conveyance of it to the defendant's daughter in fee, for the expressed consideration of 500*l.*; but was paid only 100*l.* on the transaction. The defendant explained the amount of the consideration money by alleging (but not proving) that there were moneys due to him from the plaintiff's brother, which, if taken into account, would have reduced the value of her interest in the property to the 100*l.* The plaintiff, on ascertaining the truth, filed a bill to set aside the sale:—Held, that the transaction was a sale and not a gift; that there was no such fiduciary relationship between the parties as incapacitated them to bargain for the property; but that on the simple ground of the misrepresentation made by the defendant, the sale must be declared void, and the conveyance set aside. *Haygarth v. Wearing*, 40 Law J. Rep. (n.s.) Chanc. 577; Law Rep. 12 Eq. 320.

Semble—if the transaction had been a gift, and not a sale, the result would on that ground have been the same. *Ibid.*

7.—A Court of Equity will, at the suit of the debtor, entertain a bill to open an account settled between a debtor and creditor, although the debtor has registered a composition under the Bankruptcy Act, 1861, and entered the creditor for the amount settled, and the composition has been paid, if it be shewn that the creditor was guilty of overcharges. Decision of the Master of the Rolls (40 Law J. Rep. (n.s.) Chanc. 450; Law Rep. 12 Eq. 64) affirmed. *Pike v. Dickinson*, 41 Law J. Rep. (n.s.) Chanc. 171; Law Rep. 7 Chanc. 61.

*Misdescription, or misrepresentation by person effecting policy of insurance.* [See INSURANCE, 6; MARINE INSURANCE, 6.]

*Innocent misrepresentation: setting aside voluntary settlement.* [See VOLUNTARY SETTLEMENT, 13.]

[And see CONTRACT, 29.]

#### (D) JURISDICTION OF COURT OF CHANCERY.

[See JURISDICTION IN EQUITY, 4, 5.]

#### (E) FRAUD BY AGENT, UNDER 24 & 25 VICT. c. 96.

8.—By 24 & 25 Vict. c. 96, s. 75, whosoever having been entrusted as a broker, &c., or other

agent, with any money or security for the payment of money, with any direction in writing to apply such money or security or the proceeds of such security for any purpose specified in such direction, shall, in violation of good faith and contrary to the terms of such direction, in any wise convert to his own use or benefit such money, security, or proceeds, shall be guilty of a misdemeanour. A broker from time to time gratuitously made investments in shares, bonds, &c., on the Stock Exchange to a considerable amount as agent for the prosecutrix, and was kept in cash advances by cheques in round sums not specifically made against any particular items. On the 12th of November, 1872, by letter, he sent to the prosecutrix a scheme of investment, mentioning as an item two Japanese bonds with an approximate price against them. On the 16th of November the prosecutrix sent by letter a statement of account between them, balanced up to that date, with a cheque for the balance, saying, "When I know the amount of the Japanese I will immediately forward you a cheque for the same." On the 27th of November the broker wrote to the prosecutrix enclosing a contract note for three 100*l.* Japanese bonds at 112*l.* each, saying he was fortunate in securing them for her, and that he had no doubt of her ratifying what he had done. The contract note was signed by the broker in the form of a sold-note from him to the prosecutrix. On the same day the prosecutrix wrote to him, that she had received the contract note for three Japanese bonds and his letter, and that she "enclosed a cheque for 336*l.* in payment," and that she was satisfied that he had purchased the three bonds for her. The cheque was payable to the broker's order, and was endorsed and cashed by him. He wrote on the 29th of November acknowledging the receipt of the cheque for three Japanese bonds which he would forward to her immediately on their being delivered. The broker never paid for the bonds, which, after being carried over from time to time, were sold by his order. He applied the proceeds of her cheque to his own purposes:—Held, that the letter from the prosecutrix of the 27th of November, saying that she "enclosed the cheque for 336*l.* in payment," was a sufficient direction to apply the cheque or its proceeds to take up the Japanese bonds by paying the seller if not delivered, and if delivered by paying himself, the broker, and that a conviction of the broker, under the above section, should be confirmed. *The Queen v. Christian*, 43 Law J. Rep. (n.s.) M. C. 1; Law Rep. 2 C. C. R. 94.

9.—An attorney was employed to raise money on mortgage of property, which money was to be in part applied to pay off an incumbrance on the property, and the rest, after payment of the expenses, to be paid to the mortgagee. There was no direction in writing as to how the money was to be applied. The attorney found a mortgagee, prepared the mortgage deed, got it executed, obtained the money and handed over the deed to the mortgagee. He did not pay off the prior incumbrancer, but paid over a portion of the money to the mortgagor who did not know for some years

how much money he, the attorney, had received; and he received from the mortgagor the interest upon the portion of the mortgage money he had paid over to him, and paid the mortgagee the interest upon the whole mortgage money. He converted to his own use all the money which he received, except the portion which he paid over to the mortgagor:—Held, that as the attorney was not entrusted with the deed or the money for safe custody, and as there was no direction in writing to apply the proceeds of the mortgage deed, and as the mortgage deed could not be said to have been transferred in violation of good faith and contrary to the object or purpose for which it was entrusted to him, he did not come within the 75th or 76th sections of the 24 & 25 Vict. c. 96. *The Queen v. Cooper*, 43 Law J. Rep. (N.S.) M. C. 89; Law Rep. 2 C. C. R. 123.

*Effect of fraud, or suppression as to priorities of mortgagees.* [See MORTGAGE, 10-13.]

*No confirmation of fraud.* [See UNDUE INFLUENCE, 6.]

*Right of set-off.* [See SET-OFF, 4.]

*Production of documents in action for fraudulent representation.* [See PRODUCTION, 7.]

*Conspiracy to defend.* [See CONSPIRACY.]

## FRAUDS, STATUTE OF.

### (A) CONTRACTS REQUIRED TO BE IN WRITING.

(a) *To answer debt or default of another.*

(b) *Interest in land.*

(1) *What is.*

(2) *Collateral verbal agreement.*

(3) *Description of vendor.*

(4) *Contract by letters.*

(5) *Notice to treat.*

(6) *Signature by agent lawfully authorised.*

(c) *Agreement not to be performed within a year.*

(d) *Sale of goods.*

(1) *What memorandum sufficient.*

(2) *Signature by agent.*

### (B) PART PERFORMANCE.

### (C) NON-APPLICATION OF, IN CASES OF FRAUD.

### (A) CONTRACTS REQUIRED TO BE IN WRITING.

(a) *To answer debt or default of another.*

1.—Where one person induces another to enter into an engagement by a promise to indemnify him against liability, such promise is not an agreement within section 4 of the Statute of Frauds, and need not be in writing. Accordingly, where A. joined in a joint promissory note with B. on the faith of a promise by B. to indemnify him from loss, and A. afterwards had to meet the note,—Held, that A., on becoming C.'s executor, was entitled to recoup himself out of C.'s estate to the amount of his loss. *Wildes v. Dudlow*, 44 Law J. Rep. (N.S.) Chanc. 341; Law Rep. 19 Eq. 198.

[And see CONTRACT, 23.]

(b) *Interest in land.*

(1) *What is.*

2.—The plaintiffs agreed in writing with the defendant to let him a public-house from year to year, with an option for him to call on them to grant him a lease for twenty-eight years, and a stipulation, *inter alia*, that if he sold such lease for more than 1,200*l.*, he should give the plaintiffs half the difference. The plaintiffs subsequently granted him a lease differing from that agreed to be granted in the following particulars:—It was for thirty-two years instead of twenty-eight. The rent was 105*l.* instead of 100*l.* The premium was 800*l.* instead of 1,200*l.* There was no covenant, as had been agreed, against assignment without the lessor's consent, nor binding the lessee to take his beer of the plaintiffs. Some other covenants burthensome on the defendant which had been agreed for were omitted. These alterations were arranged by parol only. The defendant sold the lease for 2,500*l.* The plaintiffs sued upon the agreement for half the difference between that sum and 1,200*l.* The jury found that the stipulation as to dividing the surplus remained in force or was renewed:—Held, that the effect of the alteration of the original terms agreed upon between the parties was that the old agreement was dissolved, and a new one made incorporating such parts of the old agreement as the parties did not choose to alter; and that as such new agreement related to land, and was not in writing within the 4th section of the Statute of Frauds, it could not be enforced by action. *Sanderson v. Graves*, 44 Law J. Rep. (N.S.) Exch. 210; Law Rep. 10 Exch. 234.

3.—A municipal corporation, being the owner of a graving-dock, issued regulations for its use (*inter alia*), that the dock would "be let to parties requiring the same for the repair of vessels" at certain rates, that a book would be kept by the borough treasurer for the entering of the names of vessels intended for repair, and that as far as practicable priority would be given to vessels in the order of entry. A sum of three guineas was to be paid to the borough treasurer on entering each vessel, which "entrance money, and the right of turn for the use of the dock," were to be forfeited if the vessel did not take her turn at the specified time; and the corporation were to have a lien for dockage upon the vessel, with a power to detain the vessel for the same. In an action by a shipowner against the corporation for not allowing his vessel, for which the entrance fee had been paid, to enter such dock in her turn, according to these regulations,—Held, that the contract for the use of the dock did not amount to an interest in land within the 4th section of the Statute of Frauds, and further, that it did not require to be under seal. *Wells v. The Mayor, &c., of Kingston-upon-Hull*, 44 Law J. Rep. (N.S.) C. P. 257; Law Rep. 10 C. P. 402.

4.—An undertaking by a lessor to build a water-closet in a demised messuage,—Held, not a contract for an interest in land within the 4th section of the Statute of Frauds, and therefore not

needing to be in writing. *Mann v. Nunn*, 43 Law J. Rep. (N.S.) C. P. 241.

(2) *Collateral verbal agreement.*

5.—A declaration alleged that before the making of the agreement thereafter mentioned, the plaintiff and the defendant had been negotiating for the letting by the defendant to the plaintiff of a messuage and premises, together with the use of the furniture therein; that the plaintiff had objected to becoming tenant on the ground that the messuage and premises were insufficiently furnished. It further alleged that the defendant, in order to induce, as he did in fact thereby induce, the plaintiff to become tenant, without requiring the defendant to send in furniture previously to the commencement of the tenancy, verbally promised the plaintiff that he, the defendant, would, within a reasonable time after such commencement, send in such additional furniture as might be found necessary; and thereupon, in consideration that the plaintiff, at the request of the defendant, had become tenant, without requiring the defendant, previously to the plaintiff so becoming tenant, to send in the furniture, the defendant promised the plaintiff that he would within a reasonable time send in such furniture, &c. Breach, that he did not perform his last-mentioned promise:—Held, upon demurrer, that the declaration was good; that the promise to send in the furniture was collateral to the agreement relating to the tenancy of the house; and that it was not required by the 4th section of the Statute of Frauds to be in writing, as not being an agreement for an interest in land. *Angell v. Duke*, 44 Law J. Rep. (N.S.) Q. B. 78; Law Rep. 10 Q. B. 174.

(3) *Description of vendor.*

6.—On sale of real estate by auction the particulars stated that the property was put up for sale by "the proprietor." No further description of the vendor was given in the particulars or conditions. The auctioneer signed a memorandum in his own name, by which he agreed "that the vendor on his part should in all respects fulfil the conditions of sale mentioned in the said particulars." On bill for specific performance by the purchaser,—Held, that on the particulars and memorandum there was a sufficient description of the vendor within the 4th section of the Statute of Frauds. *Sale v. Lambert*, 43 Law J. Rep. (N.S.) Chanc. 470; Law Rep. 18 Eq. 1.

Part of the property sold was in the occupation of a tenant under a lease, by which the vendor agreed to repair. The repairs not being done, the tenant instituted a suit against both vendor and purchaser. The purchaser sent in an objection and requisition in respect of the repairs not being done:—Held, that such an objection was not an objection to title in respect of which the vendor was entitled to rescind the contract under a condition applying to objections to the abstract. *Ibid.*

7.—To satisfy the 4th section of the Statute of Frauds, both parties must be specified either nominally or by such a description that their identity

cannot be fairly disputed. *Potter v. Duffield*, 43 Law J. Rep. (N.S.) Chanc. 472; Law Rep. 18 Eq. 4.

A memorandum, signed on behalf of the vendor by the auctioneer without further specifying the vendor, is not a good contract within the statute. *Ibid.*

Certain land was purchased at an auction by G. P. The particulars and conditions of sale did not disclose the name of the vendor; they shewed that Messrs. Duffield & Bruty acted as his solicitors, Messrs. Beadels as his auctioneers. The purchaser's agent, in his own name, signed the memorandum of purchase. The memorandum did not contain the name of the vendor, but was signed by the auctioneer "on behalf of the vendor." No abstract was sent to the purchaser, and he was informed by Duffield that the property was mortgaged to several mortgagees, that W. Polley was the owner of the equity of redemption, and the vendor. W. Polley denied that he had authorised the sale, and the purchaser having discovered that Duffield was a puisne mortgagee, filed a bill for specific performance against him. Duffield pleaded the Statute of Frauds, and put in evidence to shew that the property was put up on behalf of Polley:—Held, That the memorandum did not sufficiently specify the vendor to make a binding contract within the Statute of Frauds. That in order to shew who was the vendor it was necessary to have recourse to parol evidence, which was contrary to the statute, and further, that the evidence shewed that the defendant was not the vendor. Bill dismissed with costs. *Ibid.*

8.—A memorandum annexed to particulars and conditions of sale was signed by C. "as agent for the vendors." Neither the memorandum nor particulars nor conditions contained the names of the vendors, but the particulars and conditions shewed that the vendors "were a company in possession of and carrying on mining operations on the property." On bill filed for specific performance, setting out the memorandum, conditions, and particulars, and containing an allegation that the plaintiffs were the company referred to in them, and were in possession of the property,—Held, that though parol evidence could not be admitted to explain the memorandum, and shew who were the principals for whom C. signed as agent the description of the vendors as a company in possession, &c., was a sufficient description to satisfy the Statute of Frauds. *Commins v. Scott*, 44 Law J. Rep. (N.S.) Chanc. 563; Law Rep. 20 Eq. 11.

(4) *Contract by letters.*

9.—The plaintiff in a suit for specific performance of an alleged agreement for a lease, put in as evidence of the agreement two letters written by the defendant, the first of which shewed all the terms of the agreement, except the date at which the term was to commence. The second referred to the former letter as applying to a lease to commence from "Michaelmas next," but added several other terms, to which the plaintiff did not assent. The plaintiff adduced evidence that a complete verbal agreement had been made upon the terms contained in the first letter,

with the additional term of "Michaelmas next," being the date of the commencement of the intended lease. This evidence was not undisputed by the defendant:—Held, affirming the decision of the Master of the Rolls (41 Law J. Rep. (n.s.) Chanc. 173; Law Rep. 13 Eq. 191), that there was no complete agreement within the Statute of Frauds, for that if the plaintiff sought to rely upon the second letter, he must take the whole of it, and then there were imported into the negotiation terms which had never been agreed to. *Nesham v. Selby*, 41 Law J. Rep. (n.s.) Chanc. 551; Law Rep. 7 Chanc. 406.

*Connection between two writings by internal evidence: liability of auctioneer for not making binding contract.* [See AUC-TION, 2.]

(5) *Notice to treat.*

10.—Where a railway company gave notice to treat for certain lands, and the price was subsequently fixed by surveyors and verbally agreed to by the vendor, but no writing made out:—Held, that there was a valid contract notwithstanding the Statute of Frauds which operated as an ademption of a specific devise of the lands in the will of the vendor, who died before completion: but held that the specific devise was entitled, under 1 Vict. c. 26, s. 23, to the rents which accrued between the vendor's death and the completion of the contract. *Watts v. Watts*, 43 Law J. Rep. (n.s.) Chanc. 77; Law Rep. 17 Eq. 217.

(6) *Signature by agent lawfully authorised.*

[See COMPANY, D 6; CONTRACT, 2; and infra Nos. 14, 15.]

(c) *Agreement not to be performed within a year.*

11.—The defendant having had bastard children by the plaintiff, a spinster, promised her verbally that so long as she would at his request maintain and educate the children, he would pay her 300*l.* per annum quarterly. An action having been brought to recover the instalments due in respect of two years and a half, during which she had maintained and educated the children,—Held, that the agreement was not an "agreement that is not to be performed within the space of one year from the making thereof" within the Statute of Frauds, s. 4, and that the plaintiff could recover. *Knowlman v. Bluett*, 43 Law J. Rep. (n.s.) Exch. 29; Law Rep. 9 Exch. 1.

Held also, that the declaration, which claimed only 600*l.* for two years' instalments, could be amended before verdict by increasing the claim to 750*l.*, this being an amendable "defect" within the Common Law Procedure Act, 1852, s. 222. *Ibid.*

And on appeal to the Exchequer Chamber (43 Law J. Rep. (n.s.) Exch. 151; Law Rep. 9 Exch. 307), held, that whether the agreement was within the statute or not, the action lay, being, in substance, for money paid at the defendant's request. *Ibid.*

DIGEST, 1870–1875.

(d) *Sale of goods.*

(1) *What memorandum sufficient.*

12.—A verbal order for goods was given, with a direction that they should be sent by a particular route. The goods were afterwards sent by another route, and a letter written to the purchaser by the vendors stating the original order and the alteration in the mode of transit, and enclosing an invoice which contained the particulars of the goods and the price. The goods did not reach the purchaser, who, on being applied to afterwards for payment, wrote a letter in which he acknowledged the original order, but declined to pay on the ground that the goods were not sent by the route directed. In an action for the price of the goods, the jury found that the defendant, by his conduct, had ratified the alteration in the route:—Held, that the letters and invoice constituted a memorandum in writing of the original contract within the Statute of Frauds, and the alteration of the route having been ratified by the defendant, the plaintiffs were entitled to recover although the ratification was not in writing. *The Leather Cloth Company v. Hieronimus*, 44 Law J. Rep. (n.s.) Q. B. 54; Law Rep. 10 Q. B. 140.

13.—On the 11th of January the plaintiff verbally agreed with the defendant to buy his wool for a price exceeding 10*l.*, and wrote the terms in a letter, which the defendant took away. One of those terms was, "the whole to be cleared in about twenty-one days." In a letter sent to the plaintiff on the 8th of February, and signed by the defendant, he said, "It is now twenty-eight days since you and I had a deal for my wool which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this, therefore I shall consider the deal off, as you have not completed your part of the contract. . . ." On the 9th of February the plaintiff verbally asked the defendant for a copy of the contract which he had given him on the 11th of January, and later on the same day the defendant wrote and signed a letter to the plaintiff: "I beg to enclose a copy of your letter of the 11th of January, 1871." On the same paper and underneath there was, in the defendant's writing, a copy of the letter of the 11th of January. The plaintiff having sued the defendant for not delivering the wool,—Held, affirming the decision below (41 Law J. Rep. (n.s.) Exch. 1; Law Rep. 7 Exch. 1), that rightly interpreted the defendant's two letters admitted the contract, but alleged that the defendant's construction of the contract was the correct one; and that taking the three letters together there was a sufficient memorandum in writing to charge the defendant within section 17 of the Statute of Frauds. *Buxton v. Rust*, 41 Law J. Rep. (n.s.) Exch. 173; Law Rep. 7 Exch. 279.

*Memorandum within sec. 17: contract for sale of goods or delivery of goods sold.*  
[See SALE OF GOODS, 15.]

(2) *Signature by agent.*

14.—The agent to sign the memorandum of a contract, according to section 17 of the Statute of

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Frauds, must be a third person, and not one of the parties to the contract. The plaintiff, a broker carrying on business as S. & Co., was authorised by the defendants to buy for them a quantity of hemp. He sent them the note of a contract as follows:—"Bought for Messrs. B. & H. (the plaintiffs) of our principals, 200 tons of hemp, at 37*l.* a ton. Signed S. & Co. (plaintiff), brokers." He had, in fact, no principal:—Held, that he could not sue on the contract, for being really a contracting party, his signature could not bind the defendants as agent within the meaning of section 17 of the Statute of Frauds. Held also by Kelly, C.B. and Martin, B., that there was no note or memorandum within the statute, for the contract, if any, was between the plaintiff as principal and the defendants, and was therefore misdescribed in the note signed by the plaintiff as broker. *Sharman v. Brandt* (Exch. Ch.), 40 Law J. Rep. (N.S.) Q. B. 312; Law Rep. 6 Q. B. 720.

15.—The plaintiff's traveller called on the defendant, and, receiving from him an order for goods, made out, in his presence, a memorandum of the bargain upon a partially printed form, wrote the defendant's name in a space left for that purpose in the heading of the form, made a copy and gave it to the defendant, who took it without at that time reading it. Goods were sent in pursuance of the order, accompanied by an invoice containing a stipulation that the plaintiff was "not responsible for breakage." The defendant objected to this stipulation, repudiated the contract and rejected the goods:—Held, that there was no evidence that the memorandum was signed by an agent of the defendant thereunto lawfully authorised within the terms of section 17 of the Statute of Frauds. *Murphy v. Böese*, 44 Law J. Rep. (N.S.) Exch. 40; Law Rep. 10 Exch. 26.

*Alteration in written contract after signature.* [See SALE, 1.]

#### (B) PART PERFORMANCE.

16.—Where, at the expiration of a lease, the landlord verbally agrees with the tenant for a new lease, and the tenant remains in possession and does any act referable to the verbal agreement, there is a part performance of the agreement which takes it out of the Statute of Frauds and entitles the tenant to specific performance. *Williams v. Evans*, 44 Law J. Rep. (N.S.) Chanc. 319; Law Rep. 19 Eq. 547.

After the expiration of the lease of a house, A., the lessor, verbally agreed with B., the lessee, who still remained in possession, to grant him a new lease, B. undertaking to rebuild the front of the house, if the consent of the railway company, who owned the adjoining land, could be obtained. B. then verbally agreed with C to grant him an underlease at an increased rent, whereupon C. entered into possession and expended money in erecting a wooden stable, a boiler, laying on water and gas, and converting a lumber-room into a parlour. The railway company having withheld their consent to the proposed alteration of the frontage, A. refused to grant B. a new lease and

served him with notice to quit:—Held, that the expenditure by C. must be regarded as having been made by B., or by his authority, and that such expenditure, coupled with B.'s remaining in possession after the expiration of the former lease, amounted to such a part performance of the verbal agreement with A., as to entitle B. to a decree for specific performance, notwithstanding the circumstance that A.'s agreement was for a lease for thirty years of freehold property belonging to his wife, who was then living. *Ibid.*

*Frame v. Dawson* (14 Ves. 386) observed upon. *Ibid.*

#### (C) NON-APPLICATION OF, IN CASES OF FRAUD.

17.—The Statute of Frauds is not available as a defence to a suit to establish a trust where it would be fraud to deny the trust. *Haigh v. Kaye*, 41 Law J. Rep. (N.S.) Chanc. 567; Law Rep. 7 Chanc. 469.

The defence that the transaction under which the plaintiff claims was illegal, must be pleaded in distinct terms. *Ibid.*

18.—Assignment by the plaintiff of his agreement for a lease to the defendant accompanied with a parol agreement that the defendant should hold part of the premises in trust for the plaintiff:—Held, that, as the Statute of Frauds cannot cover a fraud, the defendant could not rely on that statute to defeat the plaintiff's right. *Booth v. Turle*, Law Rep. 16 Eq. 182.

#### FRAUDULENT CONVEYANCE.

1.—In 1868 C., a trader solvent, but indebted to the plaintiffs, a short time before his death disposed of the whole of his property in favour of his children as follows:—On the 13th of June he gave certain machines to his sons, in consideration of an annuity of 20*l.* a year for his life; on the 7th of November he divided a sum of 300*l.* among his six daughters, and shortly afterwards, by deed, assigned a mortgage debt of 350*l.* to trustees upon trust for his daughters and the child of a deceased daughter. The Court was of opinion on the evidence that all the depositions formed part of one connected transaction and the settlor was weak in mind and body, and that the children, though not the settlor, were aware that the effect of the transaction would be to defeat the plaintiffs' claim:—Held, on bill filed by the plaintiffs, that all the dispositions were void against creditors under the 13 Eliz. c. 5, and that the donees must contribute rateably to pay the plaintiffs' debt and costs. *Cornish v. Clark*, 42 Law J. Rep. (N.S.) Chanc. 14; Law Rep. 14 Eq. 184.

2.—B., a solicitor, having mortgaged an estate to the trustee of his settlement, fraudulently deposited with a creditor the title-deeds which were in his possession as solicitor for the mortgagees, suppressing the fact of the original mortgage. In 1871 he mortgaged certain other lands to H. & T. in fee. He died insolvent in 1872, and shortly after his death a deed of November, 1860, was



found in his safe, by which he had demised to the original mortgagee for the term of 400 years some of the lands comprised in the mortgage of 1871 by way of further security for the amount due on the original mortgage. No consideration was stated in this deed, and the conclusion was that it had never been communicated to the original mortgagee, or been out of B.'s possession:—Held, that the deed of November, 1860, was fraudulent and void, under 27 Eliz. c. 4, as against H. & T. Held also, that the circumstance of B.'s having been solicitor to the original mortgagee did not entitle the latter to claim the benefit of the deed as if it had been actually communicated to him. *In re Barker's Estate*; *Jones v. Bygott*; and *Bygott v. Hellard*, 44 Law J. Rep. (N.S.) Chanc. 487.

### FRAUDULENT DEBTOR.

[See DEBTORS ACT, 19, 20.]

### FRAUDULENT PREFERENCE.

[See BANKRUPTCY, B 1–28.]

### FREIGHT.

[See SHIPPING LAW.]

## FRIENDLY AND OTHER SOCIETIES.

### (A) BENEFIT BUILDING SOCIETIES.

- (a) *Borrowing powers.*
- (b) *Advanced members.*
- (c) *Disputes between members.*
  - (1) *Equity jurisdiction.*
  - (2) *Reference to arbitration.*
- (d) *Winding-up.*

### (B) FRIENDLY SOCIETIES.

#### (A) BENEFIT BUILDING SOCIETIES.

[6 & 7 Will. 4. c. 32, repealed. The laws relating to Benefit Building Societies consolidated and amended. 37 & 38 Vict. c. 42.]

[37 & 38 Vict. c. 42, s. 8, repealed and new provision substituted. 38 & 39 Vict. c. 9.]

#### (a) *Borrowing powers.*

1.—The certified rules of a permanent benefit building society stated that the society's objects were "to raise a fund for the purpose of enabling its members to purchase land; to erect buildings thereon; to provide means for the profitable investment of small savings, and in cases of accidental death to relieve the widows and families of deceased shareholders by adding the interest and estimated profits of the current year on the withdrawal of their

shares at the time of death. The original rules contained no powers of borrowing. Subsequently the rules were altered, so as to empower the directors, "from time to time to borrow for the purposes of the society such sums, and at such rates of interest, and under such terms and conditions, as they might think proper and expedient." This rule was duly certified by the barrister:—Held, that under this power the directors could only borrow for the purposes expressly mentioned in the original rules of the society, and that money lent to the society by way of deposit at interest, and used for an unauthorised purpose, could not be recovered by the depositor. *In re the Durham County Permanent Benefit Building Society*; *Davis's case*; *Wilson's case*, 41 Law J. Rep. (N.S.) Chanc. 124; Law Rep. 12 Eq. 516.

But where the loan had been secured by a deposit of mortgage deeds executed in usual course by the members to the society to secure the advances made to them,—Held, that the official liquidator of the society was not entitled without payment of the loan to deprive the lender of his securities. *Ibid.*

[And see *infra* No. 6.]

#### (b) *Advanced members.*

2.—The Court will not make an order to wind up a benefit building society compulsorily, on the petition of advanced members, contrary to the wishes of the majority of the creditors and contributors, unless a plain injustice will be done to the petitioners by refusing the order. A contributory is not entitled to a winding-up order against an insolvent company *ex debito justitiæ*. *In re the Professional, Commercial, and Industrial Benefit Building Society*, Law Rep. 6 Chanc. 856.

3.—By the rules of a building society every member was to pay for his shares by monthly subscriptions, and every member receiving an advance was to repay the same, with interest at the rate which should be determined by the board, by instalments, and to execute a mortgage to the society. The society's prospectus set forth a scale of the different amounts of monthly instalments by which repayment of advances was to be made, graduated according to the term during which such instalments were to continue payable, and stated that such instalments amounted to five per cent. per annum for the term selected, added to the principal sum borrowed. G. became a member, by taking twelve shares of 50*l.* each in the society, and received an advance of 600*l.*, repayable by equal monthly instalments during a period of seven years. At the time of his advance he received a copy of the prospectus, and executed a mortgage, with a power of sale, to trustees of the society. The mortgage deed provided that out of the moneys to arise by a sale, the trustees should retain all subscriptions, fines, and other sums and payments then due or to become due in respect of the said shares during the remainder of the seven years, it having been agreed that in case any sale should take place, all moneys which would at any

time afterwards become due from G. in respect of his said shares, according to the rules of the society, should be considered "then immediately due and payable." G. having made default, the trustees, before the expiration of three years of the term, sold the property:—Held, that under the above provision in the mortgage deed, when read in connection with the rules, they were entitled to retain only the amount then due from G. for past instalments and fines, together with so much as would represent the portion of future instalments attributable to principal, but not for the portion attributable to interest. *In re Goldsmith; Ex parte Osborn*, 44 Law J. Rep. (N.S.) Bankr. 1; Law Rep. 10 Chanc. 41.

(c) *Disputes between members.*

(1) *Equity jurisdiction.*

4.—The Court has no jurisdiction to determine a question as to the rights of a member of a benefit building society, as such. *Thompson v. The Planet Benefit Building Society*, 42 Law J. Rep. (N.S.) Chanc. 364; Law Rep. 15 Eq. 333: overruling *Doubleday v. Hosking*, Law Rep. 15 Eq. 344 n.

(2) *Reference to arbitration.*

5.—By the rules of a benefit building society, constituted under 10 Geo. 4. c. 56, and 6 & 7 Will. 4. c. 32, it was provided that disputes between the trustees and "any one or more of the members of the society, or any person or persons claiming on account of any member or members," should be referred to arbitration. F., who had been the holder of certain shares in the society, transferred them to P., but the defendants, who were trustees of the society, refused to recognise P. as a member. P. thereupon sued to recover the value of the shares:—Held, that as the defendants denied that P. was a member, the question whether he was entitled to the value of the shares could not be referred to arbitration under the rules of the society, and that the action was maintainable. *Prentice v. London*, 44 Law J. Rep. (N.S.) C. P. 353; Law Rep. 10 C. P. 679.

(d) *Winding-up.*

6.—An order to wind up a benefit building society whose rules do not give it express power to borrow, may be obtained on the petition of a person, who, under the rules of the society, has deposited money therein with a view of becoming a shareholder, but before becoming one, has given proper notice to withdraw the money and been unable to obtain it. But such petition must not be a mere creditor's petition, but must express that the petitioner is a creditor in respect of money advanced by him as a member of the society, which he has given notice to withdraw. *In re the Queen's Benefit Building Society*, 40 Law J. Rep. (N.S.) Chanc. 381; Law Rep. 6 Chanc. 815.

*Distinction between investing members and outside creditors.* [See COMPANY, I 12.]  
*Stamps on drafts by members of benefit building societies.* [See STAMP, 5.]

(B) FRIENDLY SOCIETIES.

[Consolidation and amendment of the law relating to Friendly Societies. 38 & 39 Vict. c. 60.]

7.—By the rules of a friendly society established under 18 & 19 Vict. c. 63, s. 9, a member, under certain conditions, was entitled to receive eight shillings a week during any sickness or accident that might befall him, unless by rioting or drunkenness, &c.:—Held, in the absence of words shewing a different intention, that insanity was a sickness which entitled a member to relief under the above rule. *Burton v. Eyden*, 42 Law J. Rep. (N.S.) M. C. 115; Law Rep. 8 Q. B. 295.

8.—The summary remedy by complaint before the justices, under 18 & 19 Vict. c. 63, s. 24, against an officer of a friendly society who withholds money of such society, is limited to cases in which there has been some fraud by such officer. *Barrett v. Markham*, 41 Law J. Rep. (N.S.) M. C. 118; Law Rep. 7 C. P. 405.

*Statute: construction: benefit of widow, children, or relatives.* [See INSURANCE, 2.]

GAME.

(A) GRANT OR RESERVATION OF RIGHT OF SHOOTING.

(B) PREVENTION OF POACHING ACT.

(A) GRANT OR RESERVATION OF RIGHT OF SHOOTING.

1.—Under an ordinary grant of the exclusive right of shooting over an estate the tenant has no right to prevent the landlord from cutting down trees in the proper course of management of the estate, even though the result of the cutting will be prejudicial to the shooting. *Gearns v. Baker*, 44 Law J. Rep. (N.S.) Chanc. 334; Law Rep. 10 Chanc. 355.

Decision of Hall, V.C., reversed. *Ibid.*

2.—By 1 & 2 Will. 4. c. 32, s. 12, where the exclusive right of killing the game upon any land has been specially reserved by, or granted to, or belongs to the lessor, landlord, or any person other than the occupier of such land, then, if the occupier of such land shall kill or take game upon such land without the authority of the lessor, landlord, or other person having the right, &c., he shall be liable to a penalty. By agreement between C. and B., C. became the tenant to B. of a farm, and he agreed, among other things, that he would not destroy any game, nor keep any hound or other dog destructive thereof, and would at all times, at the request of B., forbid any person or persons hunting and shooting, &c., and would endeavour to the utmost of his power to preserve all game bred and being on the farm. C. having killed game upon the farm, he was convicted before two justices:—Held, by Cockburn, C.J., and Mellor, J. (Lush, J., dissentiente), upon a case raising the question, whether, upon a true construction of the above

agreement, the game was reserved to B., that the conviction was wrong. *Coleman v. Bathurst*, 40 Law J. Rep. (N.S.) M. C. 131; Law Rep. 6 Q. B. 366.

*Grant of right of shooting: right to injunction against sale of land for building purposes.* [See INJUNCTION, 27.]

(B) PREVENTION OF POACHING ACT.

3.—The appellants were arrested by constables on the highway at about nine on a December evening. One of them had then a net used in catching hares in his hand. The net was wet, and the appellants had been heard to whistle to a dog, half lurcher, which was near them when they were taken, and appeared to belong to one of them:—Held, that there was evidence upon which the appellants might be convicted under 25 & 26 Vict. c. 114, s. 2, as it was not necessary to shew that game had actually been killed by them, and it was enough to shew that the net had been used with the object of killing game. *Jenkin v. King*, 41 Law J. Rep. (N.S.) M. C. 145; Law Rep. 7 Q. B. 478.

4.—In order to justify a conviction for poaching under 25 & 26 Vict. c. 114, s. 2, the game, &c., in the possession of the suspected person must be seized by the constable on the highway. *Turner v. Morgan*, 44 Law J. Rep. (N.S.) M. C. 161; Law Rep. 10 C. P. 587.

The appellant, whilst going in a cart along a highway, was required to stop by the respondent, a constable. The appellant drove off without obeying the order to stop, and shortly afterwards delivered to G. several rabbits, of which the respondent subsequently took possession:—Held, that as the rabbits were not seized whilst they were in the appellant's possession upon the highway he could not be convicted under 25 & 26 Vict. c. 114, s. 2. *Ibid.*

GAMING.

(A) SUPPRESSION OF BETTING-HOUSES.

(B) VAGRANT ACT AMENDMENT ACT.

(A) SUPPRESSION OF BETTING-HOUSES.

1.—To an action for money paid for the use of the defendant, there was a plea that the money was paid after 16 & 17 Vict. c. 119 (the Betting Houses Act), and was knowingly paid by the plaintiff to, and received by the owner, occupier, or keeper of a certain house, office, room, or place opened, kept and used for the purpose of betting with persons resorting thereto. At the trial the evidence was that the plaintiff, a betting agent, was a member of a club consisting of about 1,400 persons, in which there was a room wherein the members betted with one another, and that the plaintiff, at the request of the defendant, who was not a member of the club, made bets there with members on certain horseraces, which bets, having

been afterwards lost, the plaintiff paid:—Held, that the plea was not proved by the above evidence, and that the transaction not being illegal, the plaintiff was entitled to recover the money he had so paid. *Oldham v. Ramsden*, 44 Law J. Rep. (N.S.) C. P. 309.

2.—The defendant had a stool on a racecourse during the races, over which was kept up open a large umbrella, about seven or eight feet high, capable of covering several persons, the stick of which was fastened in the ground with a spike. The defendant's name, with the addition "Victoria Club, Leeds," was painted in large letters on the umbrella, and there was a card with the words, "We pay all bets first past the post." The defendant stood on the stool, offering to make and making bets, the money being deposited with him at the time, for which he gave a ticket:—Held, that the stool and umbrella constituted a "place" within 16 & 17 Vict. c. 119, the Act for the Suppression of Betting-houses. *Bows v. Fenwick*, 43 Law J. Rep. (N.S.) M. C. 107; Law Rep. 9 C. P. 339.

3.—Police constables entered, at about half-past two in the afternoon, an enclosed place called Borough Park Ground, occupied by the appellant. People were admitted to this ground after paying money and receiving tickets. Amongst those present inside the grounds were two men, with books in their hands. These two men were shouting out "Twenty to two on the match!" The match about to take place was a pigeon shooting match for 10l. a side. Two men came up to one of the bookmakers, and one of them gave to one of the men with the book a sovereign. As this man was getting some change back the other man said, "Hold on; that will do for both of us." The bookmaker took a ticket out of his book, gave it to one of the men, and said, "That's on Wooler" (one of the parties to the match). Soon after this Wooler was going to shoot at a pigeon, when another man shouts out, "Four to one he kills!" This bet was taken, and the man said, "Three to one he kills!" The appellant could hear what the bookmakers and other persons said:—Held, that there was evidence: first, that the ground in question was a "place" within the meaning of the Act; secondly, that although used for pigeon shooting it was also used for the purposes of betting, and that the magistrates were therefore justified in convicting the appellant. *Eastwood v. Millar*, 43 Law J. Rep. (N.S.) M. C. 139; Law Rep. 9 Q. B. 440.

4.—By "The Betting Houses Act," 16 & 17 Vict. c. 119, s. 1, "no house, office, room, or other place shall be opened, kept or used for the purpose, amongst others, of the owner, occupier or keeper, or any person using the same, or any person procured or employed by, or acting for or on behalf of such owner, occupier or keeper, or person using the same, or of any person having the care or management, or in any way conducting the business thereof, betting with persons resorting thereto." By section 3 a penalty is imposed on "any person who, being the owner or occupier of any house, office, room, or other place, or a person

using the same, shall open, keep or use the same for the purposes hereinbefore mentioned, or either of them; and also on any person who, being the owner or occupier of any house, room, office or other place, shall knowingly and wilfully permit the same to be opened, kept or used by any other person for the purposes aforesaid, or either of them":—Held, that any such owner, occupier or keeper may be convicted under the Act for knowingly permitting any other person to use any such house, office or place for the purpose of betting with persons resorting to it, though the person so using it is in no sense the occupier or keeper of the premises. *Haigh v. The Corporation of Sheffield*, 44 Law J. Rep. (n.s.) M. C. 17; Law Rep. 10 Q. B. 102.

Information against the defendant as the occupier of a place called Hyde Park Cricket Ground, in Sheffield, for unlawfully permitting the place to be used by G. Trickett and others for the purpose of betting with persons resorting thereto. It appeared that the defendant occupied as tenant a house with a piece of enclosed ground adjoining, called Hyde Park Cricket Ground, used for cricket, foot-racing and other games and sports. On the day named in the information foot-racing took place in the grounds, to which persons were admitted on payment of sixpence within the grounds; but outside the space reserved for the runners, and amongst the spectators, some fifteen or twenty persons, being clearly professional bettors (Trickett being one of them), stood on chairs and stools in different spots with books in their hands, calling out the odds on the various runners, and betting with different persons, a man behind each of the professional bettors recording the bets in a book, the persons betting paying a shilling each and receiving a ticket. The evidence satisfied the magistrate that the defendant knew of what was going on, and took no steps to prevent it, and that he might have prevented it if he had been so minded; and the magistrate was also satisfied that Trickett resorted to the grounds for the sole or principal object of betting with other persons:—Held, affirming the conviction of the defendant, first, that as occupier of the premises, he knowingly permitted them to be used by Trickett for the purposes mentioned in sections 1 and 3 of the Act; secondly, that the cricket-ground was a "place" within the meaning of the Act. *Ibid.*

#### (B) VAGRANT ACT AMENDMENT ACT.

5.—Betting odds on one of several dogs about to be run in a race and paying half a sovereign, is not playing or betting with a coin as an instrument of gaming. *Hirst v. Molesbury*, 40 Law J. Rep. (n.s.) M. C. 76; Law Rep. 6 Q. B. 130.

6.—By the Vagrant Act Amendment Act, 1868 (31 & 32 Vict. c. 52), s. 3, "every person playing or betting by way of wagering on any street, road, highway, or other open and public place, or in any place in which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering on (*sic*) gaming, at any game or pretended

game of chance, shall be deemed a rogue and vagabond within the true intent and meaning of the recited Act, and liable to be punished accordingly." The appellants took to a racecourse a machine having on it numbers, beside each of which there were three holes. Behind these holes were figures which could be shifted so as to represent any number from 0 to 999. On the top of the machine was the word "total," and beside it were holes in which figures could be shifted and exhibited in a similar manner. Each of the numbers on the machine was appropriated to a particular horse about to run in a race. Any person who wished to bet upon any of these horses deposited half-a-crown with the appellants, and received from them a ticket with the number appropriated to the horse, and the appellants, by turning a key, altered the figures, increasing the sum indicated alongside of that number by one, and, as the machine was contrived, by the same turn of the key, increasing the sum indicated by the figures beside "total" by one. When the race was run, the holders of tickets which had on them the number appropriated to the winning horse, were entitled to divide among them the amount of the total, less ten per cent., which was retained by the appellants, as proprietors of the machine. It followed that any one desirous of betting might see at a glance the then state of the odds offered if he backed any particular horse, but the state of odds was, of course, liable to be changed, according to the number of persons subsequently betting and the horses they backed:—Held, that the appellants were rightly convicted under section 3, as the machine was an instrument of wagering or gaming, and the game on which the wagering took place a game of chance within the meaning of the statute. *Tollett v. Thomas*, 40 Law J. Rep. (n.s.) M. C. 209; Law Rep. 6 Q. B. 514.

#### GARNISHEE.

[See ATTACHMENT.]

#### GAS.

[33 & 34 Vict. c. 70 extended and amended. 36 & 37 Vict. c. 89.]

[Amendment of the Gasworks Clauses Act, 1847. Provisions as to supply and testing of gas, and recovery of gas rents. 34 & 35 Vict. c. 41.]

1.—By the Metropolis Gas Act, 1860 (23 & 24 Vict. c. 125), s. 4: The words "common gas" shall mean gas of an illuminating power hereinafter defined, of not less than twelve candles. The words "cannel gas" shall mean gas of an illuminating power hereinafter defined of not less than twenty candles. By section 25, the quality of the common gas supplied by any gas company shall be, with respect to its illuminating power, at a distance as near as may be of 1,000 yards from the works, such as to produce from an Argand burner,

having fifteen holes, and a 7-in. chimney, consuming 5 cubic feet of gas an hour, a light equal in intensity to the light produced by not less than twelve sperm candles of six to the pound, each burning 120 grains an hour; and the quality of cannel gas supplied by any gas company shall, with respect to its illuminating power at the distance aforesaid, be such as to produce from a batwing or fishtail burner, consuming 5 feet of gas per hour, a light equal in intensity to twenty such sperm candles; and each such gas shall, with respect to its purity, be so far free from ammonia and sulphuretted hydrogen that, upon certain specified tests, there shall not be more than twenty grains of sulphur in any form in 100 cubic feet of gas.

By the Gas Light and Coke Company's Act, 1868 (31 & 32 Vict. c. civ.), s. 8, The company shall be and continue subject to the powers and provisions of the Metropolis Gas Act, 1860, and of any Act passed, or hereafter to be passed, for amending the same, and entitled to the powers and privileges of those Acts, as if this Act were not passed, so far as the same are not varied by this Act. By section 109, If the Bill, the short title of which, when passed, is intended to be "The City of London Gas Act" (in this Act referred to as the City Gas Act), now pending, pass into a law in the present session, then the company and their undertaking shall be subject to the provisions of the City Gas Act without, as well as within, the City of London and the liberties thereof, and such Act shall extend to the whole undertaking of the company. By section 110, nothing in this Act contained shall exempt the company or their gas works from the provisions of the Metropolis Gas Act, 1860, or the Act for regulating measures used in sales of gas as amended by subsequent Acts, or any other general Act already or hereafter passed, in the present or any future session of Parliament, for regulating gas companies in the metropolis, or for regulating the supply or sale of gas in the metropolis, &c.

By the City of London Gas Act, 1868 (31 & 32 Vict. c. cxxv.), s. 3, such parts of the Act of 1860 as are described in the first schedule to the Act, and any part of any special Act of any company inconsistent with the Act are, so far as they respectively relate to the companies and the city, repealed. By sections 53 and 54, the gas (except cannel gas) supplied by each company, shall be of an illuminating power of not less than sixteen candles. The Act also contains provisions as to the purity and quality of the gas, and provides means for testing it:—Held (affirming the decision below, 41 Law J. Rep. (n.s.) Q. B. 36), that the Acts of 1868 did not repeal the provisions in the Act of 1860 as to the purity, quality, and mode of testing of the gas, and that the company remained subject to these provisions as well as to those contained in the City of London Gas Act. *The Gaslight and Coke Company v. The Vestry of St. George, Hanover Square*, 42 Law J. Rep. (n.s.) Q. B. 50.

2.—The Gasworks Clauses Act, 1871, which is to be construed as one with the Gasworks Clauses

Act, 1847, is to be deemed as incorporated into all Acts (e.g. the Metropolitan Gas Act, 1860) which incorporate the Act of 1847. *The Commercial Gas Company v. Scott*, 44 Law J. Rep. (n.s.) M. C. 171; Law Rep. 10 Q. B. 400.

### GIFT.

W., the uncle of H.'s wife, declined to accede to a request made by G., a friend of H., that he would lend H. 1,000*l.* towards the payment of certain election expenses, but stated to G. that he would give H. 500*l.* and deduct that amount from a legacy which he intended to leave H.'s family. He accordingly sent H. a cheque for 500*l.* H. acknowledged the receipt of this by letter, saying, that he would repay it. H. afterwards gave to W. a promissory note for the 500*l.* with interest at 1*l.* per cent. W. died, and this suit was instituted to restrain proceedings at law which W.'s executors had taken against H. upon his promissory note. H. deposed that the promissory note had been given at his own suggestion, and only for the purpose of securing to W. the interest during his life; but one of W.'s executors stated, that W. had told him he would have to get in the debt:—Held, upon the evidence that although the 500*l.* was in the first instance intended by W. as a gift, it was accepted by H. only as a loan, and was subsequently so treated by both parties in giving and taking the promissory note. It requires the assent of the minds of both parties to the making of a gift as well as to the making of a contract. And in this case the transaction being open to the parties at the time of the promissory note being given, to make it either a loan or a gift, the giving of the note was conclusive evidence that both parties treated it as a loan. Parol evidence is inadmissible to prove a note expressed to be a security for 500*l.* and interest, to have been intended to secure the interest only. *Hill v. Wilson*, 42 Law J. Rep. (n.s.) Chanc. 817; Law Rep. 8 Chanc. 888.

[See DONATIO MORTIS CAUSA.]

### GOLD FIELDS ACT.

*Construction of Gold Fields Act of New Zealand as to cancelling lease.* [See COLONIAL LAW, 32.]

### GUARANTIE.

[See PRINCIPAL AND SURETY.]

### GUNPOWDER.

1.—By 23 & 24 Vict. c. 139, s. 6, "The following regulations shall be observed with respect to the manufacture of loaded percussion caps, and the manufacture and keeping of ammunition, fireworks, fulminating mercury, or any other pre-

paration or composition of an explosive nature—no such articles aforesaid, except percussion caps, exceeding the respective quantities hereinafter mentioned, and set opposite to the descriptions of the respective articles (that is to say), ammunition containing five pounds of gunpowder, shall be kept in any place not licensed for that purpose." By section 7, "all loaded percussion caps made, and all ammunition, fireworks, fulminating mercury, &c., made or kept in any place, where, under the Act, it is not lawful to make percussion caps, or to make or (as the case may be) keep ammunition, &c., and any quantities of ammunition kept in any lawful place exceeding the quantity which may be lawfully kept there, shall be forfeited." The appellant, a gun and pistol manufacturer and a dealer in cartridges, which he retailed to customers, but not otherwise a manufacturer of the articles specified in section 6, kept on his premises without a license 50,400 loaded cartridges, which he had purchased from a manufacturer, and which severally contained small quantities of gunpowder, varying from six to nineteen grains each, and in the whole containing upwards of fifty pounds:—Held, that he was not liable to be convicted under section 6, which applied only to the keeping in connection with the manufacture of ammunition, and not to the case of a mere dealer purchasing ammunition from the manufacturer. *Webley v. Woolley*, 41 Law J. Rep. (n.s.) M. C. 38; Law Rep. 7 Q. B. 61.

2.—By 23 & 24 Vict. c. 139, s. 2, par. 9, "Every maker of gunpowder shall cause to be erected good and sufficient lightning conductors in connection with every store magazine where gunpowder is kept by him." By section 4, "All gunpowder made in any place where under this Act it is not lawful to make gunpowder, and all gunpowder in any mill, press-house, corning-house, drying-house, or other place exceeding the quantity which for the time being may lawfully be therein, shall be forfeited; and every person making or causing to be made any gunpowder contrary to this Act, or keeping or causing to be kept in any such mill or place any gunpowder contrary to the provisions hereinbefore contained, shall for so doing, in addition to such forfeiture as aforesaid, forfeit for every such offence any sum not exceeding 2s. for every pound of gunpowder so forfeited:—Held, that the forfeitures and penalties imposed by section 4 do not apply to the offence of keeping gunpowder in a store magazine without providing lightning conductors. *Elliott v. Majendie*, 41 Law J. Rep. (n.s.) M. C. 147; Law Rep. 7 Q. B. 429.

#### HABEAS CORPUS.

1.—The mother of a child, between ten and eleven years of age, although a Roman Catholic, had consented to the child being placed in a Protestant school for destitute children. Being ill, from consumption, in a workhouse infirmary, she

became, as she alleged, anxious that the child should be removed, and placed in a home for poor children, so that she might be brought up in the mother's own faith, and in that in which the child had been baptized. She had, before being in the infirmary, lived in lodging-houses, had neglected the child, and had lived a drunken and immoral life. The father of the child was dead, and the child herself desired to remain in the school:—Held, that under these circumstances the Court would not grant a habeas corpus to remove the child. *In re Turner; Ex parte Turner*, 41 Law J. Rep. (n.s.) Q. B. 142.

2.—By 31 Car. 2. c. 2, s. 6, it is provided "that no person set at large upon any 'habeas corpus' shall be again imprisoned or committed for the same offence by any person other than the legal process of the Court having jurisdiction of the same:—Held, that this provision only applies when a second arrest is substantially for the same cause as the first. *The Attorney-General of Hong Kong v. Kwok-a-Sing*, 42 Law J. Rep. (n.s.) P. C. 64; Law Rep. 5 P. C. 179.

[And see INFANT, 17.]

#### HABITUAL CRIMINALS.

By section 10 of 32 & 33 Vict. c. 99, every person who keeps any place where excisable liquors are sold, &c., and knowingly permits or suffers thieves or reputed thieves to meet or assemble therein shall be liable to a penalty. The appellant, who kept such a place, knowingly permitted thieves or reputed thieves to meet and assemble therein at a meeting held for the purpose of collecting money to pay for the defence of a person about to be tried upon a criminal charge, and not in pursuance of any unlawful design, or for the purpose of concerting crimes, or for misbehaviour. The appellant was convicted under the above section:—Held, that the magistrate was right in so convicting him. *Marshall v. Fox*, 40 Law J. Rep. (n.s.) M. C. 142; Law Rep. 6 Q. B. 370.

#### HACKNEY CARRIAGE.

1.—By an Act, 4 Vict. c. xvi., s. 145, if the driver of any hackney carriage . . . shall be found standing or plying for hire within the limits of the Act without a license, &c., he shall be liable to a penalty. There is no definition of a hackney carriage in the Act:—Held, that the words "hackney carriage" must be taken to mean a carriage exposed for hire to the public, whether standing in the public street or in a private yard. *Bateson v. Oddy*, 43 Law J. Rep. (n.s.) M. C. 131.

2.—By 6 & 7 Vict. c. 86, s. 2, the word "hackney carriage" shall include every carriage (except a stage carriage) which shall stand on hire or apply for a passenger for hire at any place within the limits of the city of London and the liberties

thereof and metropolitan police district. By section 33 every driver of a hackney carriage who shall apply for hire elsewhere than at some standing or place appointed for that purpose, or who by loitering or any wilful misbehaviour shall cause any obstruction in or upon any public street, road or place is liable to a penalty. The appellant was convicted of plying for hire elsewhere than at some standing or place appointed for that purpose. He was the servant of a cab proprietor, who was also the occupier of a public-house immediately opposite to a railway station. In front of the public-house, and between it and the road, was an open piece of ground belonging to the public-house, and private property. Here the appellant stood with his master's cab, took up a person who hailed him, and afterwards returned to his former position. The place was not appointed by the Commissioners of Police as a standing for hackney carriages:—Held, that the conviction was wrong, for the Act 6 & 7 Vict. c. 86, was not intended to alter the 1 & 2 Will. 4. c. 22, as to the place where it was legal to "ply for hire," but only to extend the area of the Acts, and therefore section 33 might be interpreted to mean "elsewhere in a public place," a description which did not apply to the appellant's premises. *Skinner v. Usher*, 41 Law J. Rep. (n.s.) M. C. 158; Law Rep. 7 Q. B. 423.

3.—By section 7 of 32 & 33 Vict. c. 115, if any unlicensed hackney or stage carriage plies for hire, the owner of the carriage is to be liable to a penalty, and the driver to a like penalty, unless he proves that he was ignorant of the fact of the carriage being unlicensed. By arrangement with a railway company, C., the owner of an unlicensed fly, sent it to the station of the company to await the arrival of the trains. It was driven by G. and waited in the enclosed yard of the company with the view of taking any of the passengers as a fare:—Held, that C. and G. were liable to the penalty above mentioned as being the owner and driver respectively of an unlicensed hackney carriage plying for hire. *Clarke v. Stanford*, 40 Law J. Rep. (n.s.) M. C. 151; Law Rep. 6 Q. B. 357.

4.—The owner of a brougham which he himself drove, and which was unlicensed as a hackney carriage, was allowed by a railway company the privilege of standing his carriage within their railway station, for the purpose of being hired by passengers arriving by their railway, and whilst there with his carriage alongside the arrival platform, he spoke to two such passengers, with the object of getting his carriage hired:—Held, on the authority of *Clarke v. Stanford* (see last case), that this was a plying for hire by an unlicensed hackney carriage within the meaning of section 7 of the Metropolitan Public Carriage Act, 32 & 33 Vict. c. 115. *Allen v. Tunbridge*, 40 Law J. Rep. (n.s.) M. C. 197; Law Rep. 6 C. P. 481.

5.—By 32 & 33 Vict. c. 115, a Secretary of State may license hackney carriages to be distinguished as he may order, such license to be granted at such price, on such conditions, in such form, and generally to be dealt with as he may prescribe by order; may by order make regulations for fixing

the fares for time and distance, and for securing their due publication; and may annex a penalty for breach of an order or regulation. A Secretary of State made an order that the application for a license should specify the proposed fares; that the carriage should be examined and numbered; that a license specifying the number and the fares should be granted; and that such fares should be put on a flag on the carriage; and provided a penalty for breach of the order:—Held, that the order was valid, and the penalty for not having a flag, inscribed with the fares enforceable. *Bocking v. Jones*, 40 Law J. Rep. (n.s.) M. C. 19; Law Rep. 6 C. P. 29.

*Wilful trespass by cabdriver.* [See RAILWAY, 42.]

*Carriage plying for hire without license.* [See TOWNS POLICE ACT, 1.]

## HARBOUR.

1.—By the Harbours, Docks and Piers Clauses Act, 1847 (10 Vict. c. 27), section 74, "the owner of every vessel shall be answerable to the undertakers for any damage done by such vessel, or by any person employed about the same, to the harbour, dock, or pier; and the master, or person having the charge of such vessel, through whose wilful act or negligence any such damage is done, shall also be liable to make good the same, &c., provided always that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall, at the time when such damage is caused, be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ, and put his vessel in charge of." A vessel, by inevitable accident, struck against a pier and thereby damaged it:—Held, that the owner of the vessel was answerable for damages under the section, the proviso making an exception where the vessel is in charge of a pilot, but no exception in case of damage done by inevitable accident. *Dennis v. Tovell*, 42 Law J. Rep. (n.s.) M. C. 33; Law Rep. 8 Q. B. 10.

2.—By 54 Geo. 3. c. 159, s. 14, in order to prevent damage being done to the shores and banks of the ports, harbours or havens in this kingdom, no person or persons shall take any ballast or shingle from the shores or banks or any portion of the shores or banks of any port, harbour or haven of this kingdom, from which the Admiralty Commissioners (now by 25 & 26 Vict. c. 69, s. 16, the Board of Trade instead) shall find it necessary for the protection of such port, harbour or haven, or the works thereof, by order to prohibit the taking or removing of such shingle or ballast under a certain penalty; and by 9 & 10 Vict. c. 102, s. 15, the Commissioners of Customs may annul the limits of any port, &c., declare it no longer a port, &c., and alter or vary the names, bounds or limits of any such port, &c. In the year 1848, by an order under the latter Act, the limits of the port of Hull were extended and defined, and the sea

shore between Flamborough Head and the Spurn Point (formerly in the port of Bridlington suppressed by the said order) placed within them; and in the years 1868 and 1869, by orders under the former Act, persons were prohibited from taking ballast or shingle from certain parts of the shore so added to the port of Hull:—Held, that the powers conferred by 54 Geo. 3. c. 159, s. 14, are not confined to that which is geographically or popularly, or was at the time of the Act part of a particular port, but extended to the port in its legal and proper sense; and that those conferred by 9 & 10 Vict. c. 102, s. 15, are not confined to customs purposes, and that the orders of the years 1868 and 1869 were therefore valid, and persons infringing them liable to the penalty imposed by 54 Geo. 3. c. 159, s. 14. *Nicholson v. Williams*, 40 Law J. Rep. (N.S.) M. C. 159; Law Rep. 6 Q. B. 632.

### HEIRLOOMS.

By a settlement made in 1804 real estate was settled to the use of C., third Earl of Harrington, for life, with remainder to his first son, Lord Petersham, for life, remainder to the first and other sons successively of Lord Petersham, in tail male, with similar remainders in succession, to the eight other sons of the third earl for life, and their respective first and other sons in tail male; remainder to the third earl in fee. By his will made in 1824 the third earl gave chattels upon trust "for the person or persons who for the time being should, under the limitations in the settlement, be in the actual possession of the estates, to the intent that the same chattels might be deemed heirlooms, to go along and for ever be enjoyed with the estates, so far as the rules of law and equity would permit, but so, nevertheless, as that the same chattels should not, as to the effect or purpose of transmission, vest absolutely in any person who under the settlement should become seized of or entitled to the estates for an estate of inheritance either in possession or reversion, or otherwise, unless such person should attain the age of twenty-one, or dying under that age should leave issue inheritable under the limitations in the settlement." The testator gave his residuary personal estate upon trusts for investment in lands to be settled to the same uses as those declared in the settlement of 1804. The first tenant in tail in possession died under twenty-one, within the period allowed by the law as to perpetuities:—Held, that the gift was not an executory bequest:—Held, also, that the proviso that no tenant in tail should take absolutely unless he attained twenty-one, was a condition inseparably annexed to the gift, so that any tenant in tail must take subject to it, and if the proviso was void the whole gift was void. But a tenant in tail having become entitled to the chattels absolutely, either as tenant in tail or under the gift of residue, the House pronounced no opinion on the validity of the gift. *Harrington v. Harrington* (H.L.), 40 Law J. Rep. (N.S.) Chanc. 716; Law Rep. 5 E. & I. App. 87.

By Lord Westbury.—The death of the first tenant in tail in possession under twenty-one having happened within the time allowed by law for the vesting of personality, the heirlooms on that event under the direction to accompany the real estate, were carried on to the next tenant under the limitations in the settlement. *Ibid*.

### HERIOT.

[See LIMITATIONS, STATUTE OF, 3.]

### HIGHWAY.

- (A) PRESUMPTION OF OWNERSHIP.
- (B) DEDICATION OF HIGHWAY.
- (C) LIABILITY TO REPAIR.
- (D) EXEMPTION FROM HIGHWAY RATE.
- (E) DIVERTING AND STOPPING UP.
  - (a) Notice of vestry meeting.
  - (b) Form of certificate.
  - (c) Notice of appeal.
- (F) NUISANCES AND OBSTRUCTIONS.
  - (a) Right to plough.
  - (b) Right to carriage way across foot pavement.
  - (c) Invalidity of custom to obstruct.
  - (d) Powers of highway board to dig up highway.
  - (e) Obstruction of navigable lake.
- (G) ENCROACHMENT.
- (H) SURVEYOR OF HIGHWAYS.
  - (a) Liability for negligence.
  - (b) Liability for trespass by order of board.
  - (c) Notice of action against.
  - (d) Mandamus to, to summon a vestry.
  - (e) Surveyor's accounts.
- (I) PERSONAL LIABILITY OF MEMBERS OF HIGHWAY BOARD.

### (A) PRESUMPTION OF OWNERSHIP.

[See PRESUMPTION.]

### (B) DEDICATION OF HIGHWAY.

1.—A highway cannot be created by statute unless the provisions of the statute creating it are strictly followed. *Cubitt v. Marse*, 42 Law J. Rep. (N.S.) C. P. 278; Law Rep. 8 C. P. 704.

By the General Inclosure Act, 41 Geo. 3. c. 109, ss. 8 and 9, the Commissioner, before making the allotments of the land to be enclosed, was to set out such roads as he should judge necessary, and to appoint a surveyor to form and complete the same, and until so formed and completed the parish was not to be bound to repair such roads, but after that time they were to be for ever after kept in repair by the parish. An Inclosure Commissioner appointed to act under a local Inclosure Act, subject to the provisions of 41 Geo. 3. c. 109, duly set out a road which he described in his award made in 1808, but although such road was staked out on the ground and fenced off from the adjoining



ing allotments on either side, it was never formed and completed as required by the 41 Geo. 3. c. 109, nor was it ever used by the public:—Held, that as the requirements of the statute had not been complied with, the road so set out was not a highway created by statute, and as there had been no user, and therefore no acceptance of the road by the public, it was not otherwise a highway. *Ibid.*

[And see next case.]

### (C) LIABILITY TO REPAIR.

2.—A private road, set out under an inclosure award, may, upon proof of sufficient user by the public before the passing of the Highway Act, 5 & 6 Will. 4. c. 50, be deemed to be a highway which the parish or township is compellable to repair, though the award provides that such road is for ever thereafter to be kept in repair by the owners or occupiers of the adjoining land. *The Queen v. The Inhabitants of Bradfield*, 43 Law J. Rep. (n.s.) M. C. 155; Law Rep. 9 Q. B. 552.

3.—Under 5 & 6 Will. 4. c. 50, s. 23, where a person is about to dedicate a new road to the public, and seeks to make it repairable by the parish, and gives notice to the surveyor that at the end of three months it will be dedicated, it is the duty of the surveyor to call a vestry meeting of the inhabitants of the parish, and if such meeting decides that the road is not of sufficient utility to justify its being kept in repair at the expense of the parish, it is his further duty to summon the party proposing to dedicate before the justices at the next special sessions for highways, who are to decide on the question of the utility of the road; but if the surveyor omits to summon the party, at the next special sessions after such vestry meeting, the parish is not liable to repair the road, and a mandamus will not lie to the justices, after such special sessions have been passed over, and after the three months mentioned in the notice have expired, to view and certify that the road has been substantially made. *The Queen v. Bagge and another, Justices of Norfolk*, 44 Law J. Rep. (n.s.) M. C. 45.

Semle—a mandamus would lie to the surveyor to summon the vestry or the party before the special sessions, and semle per Blackburn, J., after the three months had expired. *Ibid.*

*Highway repairable by the inhabitants at large within the Public Health Act, 1848, sec. 69.* [See PUBLIC HEALTH, 12, 14.]

### (D) EXEMPTION FROM HIGHWAY RATE.

4.—An occupier of land, forming part of a highway district, who claims exemption from highway rates, must shew that there is some consideration for such exemption, and it is not sufficient to shew that none of the inhabitants of the land, or the occupiers thereof, have ever paid highway rates, or done statute work, or paid composition in lieu of highway rates.—Lush, J., *dissentiente*. *The Queen v. Rollitt*, 44 Law J. Rep. (n.s.) M. C. 190; Law Rep. 10 Q. B. 469.

### (E) DIVERTING AND STOPPING UP.

#### (a) Notice of vestry meeting.

5.—By the Highways Act, 5 & 6 Will. 4. c. 50, s. 84, “when the inhabitants, in vestry assembled, shall deem it expedient that any highway should be stopped up, diverted or turned . . . the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to the justices to view the same, &c.” (specifying other proceedings for stopping up or diverting the highway). By 58 Geo. 3. c. 69, s. 1, no vestry shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel, &c.

Notice of a vestry meeting was given in the words following:—“Hamlet of Trevecca.—I, the undersigned, hereby give notice that a meeting of the ratepayers of the above hamlet will be held at the Vestry Room, &c. . . . for the purpose of taking into consideration the proceedings now taken by Mr. John Parry, of —, against Mr. Rhys Davies, surveyor of the Talgarth District Highway Board, respecting Blaenanbach Road, and for other purposes connected with the highways of the above hamlet.”

The meeting so convened passed a resolution that the road should be stopped up, under the Highways Act, 5 & 6 Will. 4. c. 50, s. 84:—Held, that, having regard to the fact that proceedings had been taken for compelling the parish to repair the highway, the notice sufficiently informed the public that any steps which might be necessary for defeating these proceedings, such as stopping up the highway, would be considered by the vestry, and that the meeting was therefore duly convened. *The Queen v. Powell*, 42 Law J. Rep. (n.s.) M. C. 129; Law Rep. 8 Q. B. 403.

#### (b) Form of certificate.

6.—A certificate of two justices relative to the stopping up of a highway did not state that the surveyors, at whose request, it was alleged, the justices viewed the highway, had first duly obtained the consent of the inhabitants in vestry assembled to the proposed stopping up of the highway, after a notice in writing from the party desirous of stopping up the same, requiring the surveyors to convene a meeting of the vestry for the purpose of obtaining such consent, or that the surveyors were, at the time of the said request to view, in possession of and acting under an order in writing of the chairman of a meeting of the inhabitants in vestry assembled:—Held, in opposition to the dictum in *The Queen v. The Justices of Worcestershire* (3 E. & B. 477; 23 Law J. Rep. (n.s.) M. C. 113) that the certificate was not bad for not containing statements as to these matters. *The Queen v. Hervey*, 44 Law J. Rep. (n.s.) M. C. 1; Law Rep. 10 Q. B. 46.

[And see next case.]

(c) *Notice of appeal.*

7.—Section 88 of 5 & 6 Will. 4. c. 50, provides that it shall be lawful for any person who may think that he would be injured or aggrieved if any highway should be ordered to be diverted and turned or stopped up, to make his complaint thereof by appeal to the justices of the peace at the Quarter Sessions, “upon giving to the surveyor ten days’ notice in writing of such appeal:”—Held, that notwithstanding this provision, it is necessary to give the fourteen days’ notice, required by the 12 & 13 Vict. c. 45, s. 1, which applies to such an appeal. *The Queen v. Maule*, 41 Law J. Rep. (n.s.) M. C. 47.

Where proceedings are instituted under s. 84 of 5 & 6 Will. 4. c. 50, at the desire of a person or persons other than the inhabitants in vestry, for stopping up or diverting a highway, the certificate of the justices need not state that the surveyor was authorised by an authority in writing of the chairman of the vestry meeting, to apply to the justices to view. *Ibid.*

## (F) NUISANCES AND OBSTRUCTIONS.

(a) *Right to plough up.*

8.—A footway across an arable field had from time immemorial at all times of the year been used by all persons, as of right, but the occupier of the field and his predecessors had also from time immemorial, in ploughing the field, ploughed up the footway in such parts as they thought fit, and in other parts lifted the plough across it:—Held, by the Court of Exchequer Chamber, upholding the decision in *Mercer v. Woodgate* (39 Law J. Rep. M. C. 21), that the surveyors of the parish highways were not justified in repairing the way with hard materials, so as to prevent it from being ploughed, or the plough from being lifted over it, so easily as before, as it must be presumed to have been dedicated to the public subject to the inconvenience of being occasionally ploughed up. *Arnold v. Blaker*, 40 Law J. Rep. (n.s.) Q. B. 185; Law Rep. 6 Q. B. 433.

9.—The public had a right to use a footpath across the field of A., but subject to the right of A. to plough it up when he ploughed the rest of the field. He did so plough it up, and having done so, did not set out or mark the line of the path, but left the public to tread it out. The public continued to walk across the field in the direction in which the path had been, but soon finding the path in a muddy and bad condition, turned out of it, and walked on either side thereof. To prevent them from doing so, A. placed hurdles on the parts upon which the public so walked, leaving a space of about six feet in width where the path had been. The respondent having thrown down the hurdles, an action was brought against him by A. in a County Court. The Judge having given judgment in favour of the respondent, the Court reversed such judgment, holding that the respondent could not claim a right to go off the line of the footpath or a right to pull down the hurdles. *Arnold v. Holbrook*, 42 Law J. Rep. (n.s.) Q. B. 80; Law Rep. 8 Q. B. 96.

(b) *Right to carriage way across foot pavement.*

10.—The respondent was owner and occupier of premises consisting of a yard, building, and railway arches, in a metropolitan parish. These premises abutted upon a highway consisting of a foot pavement and roadway, and had a gateway opening on to the pavement. For sixty years and upwards, whenever the occupier of premises abutting on the footway wished to have access to them, across the footway for carts, &c., it was the practice for him to apply to the highway board, or vestry, for permission to construct the necessary way, which was usually granted. The respondent after taking possession of his premises began to use them for the deposit of heavy machinery, the only use, owing to the character of the neighbourhood, to which they could be put. He at first conveyed the machinery across the causeway by means of rollers and levers, but this being objected to as an obstruction of the thoroughfare, he applied to the vestry for leave to take up the pavement and make a carriage way. This leave was refused, and he then conveyed it to and from his premises in waggons across the flagged footway. The weight of the machinery in the waggons crushed the paving stones and obstructed the way, and the appellants took out a summons against him under 5 & 6 Will. 4. c. 50, s. 72, for a nuisance. The magistrate dismissed the summons, finding as a fact that “the premises could not be reasonably enjoyed without access over the existing footway, and that the rights of ownership and those of the public might be jointly exercised consistently with the general welfare:”—Held, upon a case raising the question whether the magistrate was bound to convict, that the respondent was entitled to judgment, as the owner of land, who dedicates part of it as a public way, may enjoy all rights not inconsistent with the dedication, and that the respondent did not appear to have exceeded these rights. *The Vestry of St. Mary, Newington, v. Jacobs*, 41 Law J. Rep. (n.s.) M. C. 72; Law Rep. 7 Q. B. 47.

(c) *Invalidity of custom to obstruct.*

11.—Under 5 Eliz. c. 4, s. 48, it is lawful to hold Petty Sessions, otherwise called Statute Sessions, in all shires wherein such sessions have been used to be kept, but there cannot be a legal custom to put up stalls for refreshments at such sessions, on the public highway. And if such stalls are put up so as to obstruct the free passage of a public highway, the persons putting them up are liable to be convicted under s. 72 of 5 & 6 Will. 4. c. 50. *Simpson v. Wells*, 41 Law J. Rep. (n.s.) M. C. 105; Law Rep. 7 Q. B. 214.

The jurisdiction of justices is not ousted by a claim of right to put up such stalls. *Ibid.*

(d) *Powers of highway board to dig up highway.*

12.—A highway board may make and enforce an agreement with a gas company that the gas company may dig up the highway and pay at per yard for the surface broken. *The Edgware Highway Board v. The Harrow District Gas Company*,

44 Law J. Rep. (n.s.) M. C. 16; Law Rep. 10 Q. B. 92.

13.—Declaration, that it was agreed between the plaintiffs (a highway board) and the defendants, that if the plaintiffs would allow the defendants to open a highway within the jurisdiction of the plaintiffs, the defendants would make good the surface and pay one shilling per yard of the highway opened, that the license was given and acted upon, and neither the surface made good by the defendants, nor the one shilling per yard paid:—Held, on demurrer, a good declaration; that the forbearance of the plaintiffs to interfere, and their submission to the risk of having to repair the highway themselves, amounted each of them to a sufficient consideration for the agreement, and, further, that the consideration was not illegal, as the performance of the agreement by the defendants did not necessarily involve a nuisance to the highway. *The Edgware Highway Board v. The Harrow District Gas Company*, 44 Law J. Rep. (n.s.) Q. B. 1; Law Rep. 10 Q. B. 92.

(e) *Obstruction of navigable lake.*

[See TRESPASS, 3.]

(G) ENCROACHMENT.

14.—By s. 51 of 27 & 28 Vict. c. 101, if any person shall encroach by making or causing to be made any building or pit, or hedge, ditch, or other fence, &c., on the side or sides of any carriage way or cart way within 15 feet of the centre thereof, &c., he shall be subject, on conviction for any such offence, to any sum not exceeding 40s., notwithstanding that the whole space of 15 feet from the centre of such carriage-way or cart-way has not been maintained with stones or other materials used in forming highways:—Held, that this enactment only applies to persons who have committed the alleged encroachment upon the carriage-way or cart-way, or upon that part of the side thereof which has been dedicated to the public. *Easton v. The Highway Board of the Richmond Highway District*, 41 Law J. Rep. (n.s.) M. C. 25; Law Rep. 7 Q. B. 69.

(H) SURVEYOR OF HIGHWAYS.

(a) *Liability for negligence.*

15.—A Local Board of Health being, under the 117th section of the Public Health Act, 1848, surveyor of highways, is liable to an action at the suit of a person, who, when passing along the highway, is injured by reason of the servants of the Local Board negligently leaving a heap of stones upon the highway. *Foreman v. The Mayor, &c., of Canterbury*, 40 Law J. Rep. (n.s.) Q. B. 138; Law Rep. 6 Q. B. 214.

Quere—whether, if the negligence was that of the surveyor appointed by the Board under section 37, and who could not be removed without the approval of the General Board of Health, there would be such liability. *Ibid.*

16.—The defendant had been appointed by the vestry surveyor of highways. The vestry resolved that a part of a highway should be raised, and

ordered the defendant to employ men to do it. He contracted with G. to do the work, at so much per yard, and the vestry found the materials. G. employed his own men, and proceeded to perform the work. The defendant did not personally interfere with the work. G. left the road in such a state that the plaintiff, in driving along by night, was overturned and injured. The defendant did not give any direction that the road should be left in such a state:—Held (in an action by the plaintiff), that the defendant was not liable. *Taylor v. Greenhalgh. Pendlebury v. Same*, 43 Law J. Rep. (n.s.) Q. B. 168; Law Rep. 9 Q. B. 487.

[And see NEGLIGENCE, 9, 10, 14.]

(b) *Liability for trespass by order of board.*

17.—If a highway board acting as a corporation order the district surveyor to commit a trespass on private property within the district of the board, for the purpose of removing an obstruction from a disputed highway, the surveyor is liable to an action if he obeys the order and commits the trespass. So held, affirming the decision of the Court below (43 Law J. Rep. (n.s.) Exch. 129; Law Rep. 9 Exch. 309) on that question, leaving untouched the decision of that Court (see next note) that the individual members of the board are personally liable to an action of trespass. *Mill v. Hawker* (Exch. Ch.), 44 Law J. Rep. (n.s.) Exch. 49; Law Rep. 10 Exch. 92.

18.—A highway board under 25 & 26 Vict. c. 61, has no authority to determine whether a disputed highway is or is not a highway, or to order the removal of an obstruction from a disputed highway. That statute, by section 9, sub-section 6, protects the members of the board from liability by reason of any "lawful act done by them in execution of any of the powers of the board;" but if the board, acting as a corporation, order the surveyor to commit a trespass on private property for the purpose of removing an obstruction from a disputed highway, such an order is *ultra vires*, and the members of the board who concur in giving the order are personally liable and may be sued for the trespass, though they have acted *bond fide*. The surveyor who obeys such an order and commits the trespass is also liable to be sued; and he is not protected from such a liability by section 16, which requires him "in all respects to conform to the orders of the board in the execution of his duties."—So held per Pigott, B., and Cleasby, B.; *dissentiente Kelly, C. B. Mill v. Hawker*, 43 Law J. Rep. (n.s.) Exch. 129; Law Rep. 9 Exch. 309.

(c) *Notice of action against.*

*Notice of action against surveyors of highways.* [See ACTION, 12.]

(d) *Mandamus to, to summon vestry.*

[See *supra* No. 3.]

(e) *Surveyor's accounts.*

19.—Justices, sitting at a special sessions for highways, have no power, under section 44 of 5 & 6 Will. 4. c. 50, to allow charges in the surveyor's

accounts which are illegal by reason of the provisions of the 46th section of that Act. *Barton v. Piggott*, 44 Law J. Rep. (N.S.) M. C. 5; Law Rep. 10 Q. B. 86.

(I) PERSONAL LIABILITY OF MEMBERS OF HIGHWAY BOARD.

[See *supra* No. 18.]

HOSIERY.

The Hosiery Manufacture (Wages) Act, 1874 (37 & 38 Vict. c. 48), s. 3, enacts—"If any employer shall bargain to deduct or shall deduct, directly or indirectly, from the wages of any artificer in his employ any part of such wages for frame-rent and standing or other charges, or shall refuse or neglect to pay the same or any part thereof in the current coin of the realm, he shall forfeit a sum of five pounds for every offence, to be recovered by the said artificer, or any other person suing for the same, in the County Court in the district where the offence is committed, with full costs of suit." The plaintiff, a handframe worker, was in the employment of the defendants, who were hosiery manufacturers. By the regulations of the factory he was liable to a fine of 8d. a day for staying away from work without permission. The plaintiff, having been fined for such absence and the amount having been deducted from his wages, brought an action to recover from the defendants the penalty mentioned in section 3:—Held, that the employer was prohibited from deducting from the wages of the artificer frame-rent and standing or other charges *ejusdem generis* with rent and standing, but that fines were not charges within the meaning of section 3, and therefore the defendants had not incurred the penalty under that section. *Willis v. Thorp*, 44 Law J. Rep. (N.S.) Q. B. 137; Law Rep. 10 Q. B. 383.

HOSPITAL.

*Rating of.* [See *RATE*, 12, 31.]

HOTCHPOT.

[See *WILL*, Construction, M.]

HOUSE OF LORDS.

*Decisions binding on House.*

1.—Decisions of the House of Lords upon questions of law, as the construction of statutes, and especially of fiscal Acts, are binding upon the House in subsequent cases. *The Commissioners of Inland Revenue v. Harrison*, 43 Law J. Rep. (N.S.) Exch. 138; Law Rep. 7 E. & I. App. 1.

*What questions appealable.*

2.—A question depending on a mere preponderance of a balance of evidence ought not to be brought before an appellate tribunal. *Gray v. Turnbull*, Law Rep. 2 Sc. App. 53.

3.—Appeal entertained though the amount of damages was infinitesimal. *Neilson v. Betts* (H.L.), 40 Law J. Rep. (N.S.) Chanc. 317; Law Rep. 5 E. & I. App. 1.

Election between enquiry as to the plaintiff's damages and the defendant's profits. *Ibid.*

4.—An appellant in the House of Lords will not be allowed to raise a merely technical objection which was disposed of in the Court of first instance and which he failed to raise in the intermediate Court of Appeal. *Hillhard v. Eiffe*, Law Rep. 9 E. & I. App. 39.

*Practice in appeals.*

5.—Case in which the House rectified the decree below so as to suit the pleadings. *The Parish of Rathven v. The Parish of Elgin*, Law Rep. 2 Sc. App. 535.

6.—An alteration in a decree will not be made by the House of Lords on the application of a person who is not an appellant. *Yates v. The University College, London*, Law Rep. 7 E. & I. App. 438.

7.—Interest will as a matter of course be given for the time that execution has been delayed by a proceeding in error. *The Lancashire and Yorkshire Railway Company v. Gidlow*, Law Rep. 7 E. & I. App. 517.

8.—Although the rule of the House of Lords, where the decree appealed from is reversed or varied, is that the respondent is not fixed with the costs of the appeal, yet where the appellant had offered to withdraw the appeal and to pay the respondent's costs on condition that the respondent submitted to a variation in the decree to which the House held that he was entitled, and the respondent refused to consent to the proposal, the House marked its disapproval of the respondent's conduct by directing him to pay all the costs incurred after the date of the making of the offer by the appellant. *De Vitre v. Betts* (H. L.), 42 Law J. Rep. (N.S.) Chanc. 841; Law Rep. 6 E. & I. App. 319.

*As to practice and jurisdiction on Scotch appeals.* [See *SCOTCH LAW*.]

*1 Husband & Wife  
See Baron & Ames*

ILLEGITIMACY.

[See *BASTARDY*; *LEGITIMACY DECLARATION ACT*.]

*Whether entitled under gift to children.*  
[See *WILL*, Construction, H 11-17.]

IMPRISONMENT FOR DEBT.

[See *DEBTORS ACT*.]

## INCLOSURE.

- (A) RIGHT OF PASTURAGE OF LORD OF MANOR.  
 (B) RIGHT OF SPORTING OF LORD OF MANOR.

## (A) RIGHT OF PASTURAGE OF LORD OF MANOR.

1.—The words, in section 27 of 8 & 9 Vict. c. 118, "right of pasturage which may have been usually enjoyed by the lord or his tenants," mean rights of common or pasturage, *de facto* enjoyed by the lord and his tenants in respect of the demesne lands, for such a period as, but for the fact that the lord was the freeholder both of the dominant and servient tenement, would be evidence of an immemorial right. *Musgrave v. The Inclosure Commissioners for England and Wales*, 43 Law J. Rep. (N.S.) Q. B. 80; Law Rep. 9 Q. B. 162.

A provisional order, silent as to any such rights, was assumed to have omitted to take them into account in the allotment to the lord. *Ibid.*

There being claims to pasturage over different parts of the waste in respect of seven farms, and no objection being made before the valuer and assistant commissioner,—Held, that these officers had no power, in the absence of any such objection, to disallow a claim. *Ibid.*

## (B) RIGHT OF SPORTING OF LORD OF MANOR.

2.—The lords of the manor of K., in which there was waste land, were the owners of the soil, subject to rights of common. As an incident to the ownership of the soil, they had a right to take the game. Under the powers conferred by 8 & 9 Vict. c. 118, and 11 & 12 Vict. c. 99, the waste lands of the manor were inclosed, and certain portions allotted to T. M. The Commissioners made a provisional order, and declared as one of the conditions on which they were of opinion that the inclosure should be made, "that one-sixteenth part in value of the said lands be allotted under the provisions of the said Act to the said lords of the said manor, in lieu of their right and interest in the soil of the said lands, exclusively of their right and interest in the game, and in all mines, minerals, stone and other substrata under the said lands." The defendants, by the authority of T. M., killed game upon the land allotted to him:—Held, that the Commissioners had power to impose the condition that the right to the game should be in the lord, that the language used by them was sufficient, and that consequently the right of taking the game was in the lord, who might maintain an action against the defendants for killing game on the allotment. *Musgrave v. Forster*, 40 Law J. Rep. (N.S.) Q. B. 207.

3.—The reservation clause of an inclosure Act enacted that nothing in the Act should prejudice the right of the lords or ladies of a certain manor "of, in or to the seignory or royalties incident or belonging to such manor or lordship, or either or any of them; but that the present and all succeeding lords of the manor should and might, from time to time, and at all time, hold and enjoy all

rents, &c., and rights of fishery, and liberty of hawking, hunting, coursing, fishing and fowling within the said manor, and all tolls, fairs," &c., "royalties, jurisdictions, franchises, matters and things whatsoever to the said manor, or to the lord thereof incident . . . other than and except such common right as could or might be claimed by the then lord as owner of the soil and inheritance of the said commons or waste grounds:"

—Held (per Cockburn, C.J., Mellor, J., Bramwell, B., and Amphlett, B.), affirming the judgment of the majority in the Court of Common Pleas (42 Law J. Rep. (N.S.) C. P. 233; Law Rep. 8 C. P. 514) (Cleasby, B., and Pollock, B., *dissentientibus*), that the reservation clause referred only to the seignorial or manorial rights of the lady of the manor, and did not extend to her territorial right, as owner of the soil, of shooting over the allotted lands. *Sowerby v. Smith* (Exch. Ch.), 43 Law J. Rep. (N.S.) C. P. 290; Law Rep. 9 C. P. 524.

## INCOME TAX.

Commissioners empowered by Act of Parliament to levy a duty on every ton of coal, culm, &c., landed on the beach at, or brought into and consumed within the town of Brighton, for the purpose of erecting and maintaining groines against the inroads of the sea, were by a later Act authorised to form from these coal dues, and from other rates they were then also empowered to levy, a common fund for the purposes of lighting, watching, &c., as well as for the maintenance of groins:—Held, that these dues were property or profits within the meaning of the Income Tax Act, and that they were chargeable with income tax accordingly. *The Attorney-General v. Black* (Exch. Ch.), 40 Law J. Rep. (N.S.) Exch. 194; Law Rep. 6 Exch. 308: affirming the judgment of the Court of Exchequer, 40 Law J. Rep. (N.S.) Exch. 89; Law Rep. 6 Exch. 78.

## INDECENT ASSAULT.

[See ASSAULT, 2, 3; NUISANCE, 9.]

## INDEMNITY.

*Implied contract: delivery of goods to person not being the owner thereof at his request.* [See CONTRACT, 30.]

## INDICTMENT.

- (A) FORM AND REQUISITES IN PARTICULAR CASES.  
 (B) AMENDMENT.  
 (C) COSTS.

## (A) FORM AND REQUISITES IN PARTICULAR CASES.

1.—Indictment for conspiracy to fraudulently remove the goods of a bankrupt:—Held, that it was not necessary to allege that the debtor had been adjudged a bankrupt, as the offence was complete if there was an agreement to remove the goods in contemplation of an adjudication being obtained. No such agreement was expressly alleged, but the defect was held to be cured by the verdict of the jury. There is no distinction between civil and criminal pleadings as to defects being cured by the verdict. *Heyman v. The Queen*, Law Rep. 8 Q. B. 102.

*Allegation of ownership: arson: intent to injure.* [See ARSON, 4.]

*For indecency in public place.* [See NUISANCE, 8.]

*Indictment for larceny.* [See LARCENY.]

*For perjury.* [See PERJURY.]

*For embezzlement.* [See EMBEZZLEMENT.]

## (B) AMENDMENT.

2.—An indictment alleged that the prisoner stole nineteen shillings and sixpence. The Court ordered it to be amended at the trial by describing the property stolen to be a sovereign, subject to the question whether the Court had power so to do. The jury found the prisoner guilty of stealing a sovereign:—Held, that the Court had power to order the amendment to be made as a variance between the statement and the proof in the description of a thing named in the indictment, under 14 & 15 Vict. c. 100, s. 1. *The Queen v. Gumble*, 42 Law J. Rep. (n.s.) M. C. 7; Law Rep. 2 C. C. R. 1.

*Indictment for receiving stolen goods: defect cured by verdict.* [See RECEIVING STOLEN GOODS.]

## (C) COSTS.

3.—Upon the removal of an indictment by *certiorari* into the Queen's Bench the prosecutor, on conviction of the prisoner, is entitled to his costs under 16 & 17 Vict. c. 30, s. 5, although he is not the "party grieved or injured" as mentioned in 5 & 6 Wm. 4. c. 11, s. 3. *The Queen v. Oastler*, 43 Law J. Rep. (n.s.) Q. B. 42; Law Rep. 9 Q. B. 132.

## INFANT.

## (A) MAINTENANCE.

(a) *On what property chargeable.*

(b) *Bequest for benefit of infant.*

(c) *Maintenance by mother.*

## (B) ADVANCEMENT.

## (C) POWERS OF COURT OF CHANCERY OVER INFANT'S PROPERTY.

(a) *Sale of reversion.*

(b) *Sale of more than required: conversion.*

(c) *Raising fine on copyholds.*

(d) *Settlement of property of ward of Court.*

## (D) RELIGIOUS EDUCATION.

## (E) CONTRACTS OF INFANT.

## (F) SUIT TO RECOVER LAND.

## (G) GUARDIAN.

(a) *Appointment.*

(b) *Powers and duties.*

## (H) INFANTS RELIEF ACT, 1874.

[2 & 3 Vict. c. 54, repealed. Power to Court of Chancery to order that the mother may have access to and custody of the infant under sixteen. Separation deeds providing for the giving up to the mother of the custody of the children not to be held invalid. 36 & 37 Vict. c. 12.]

[Rules of equity as to custody and education of infants to prevail after November the 2nd, 1874. 36 & 37 Vict. c. 66, s. 25.]

[Provisions for the protection of infant life. The Summary Jurisdiction Acts applied. 35 & 36 Vict. c. 38.]

[Amendment of the law as to the contracts of infants. 37 & 38 Vict. c. 62.]

## (A) MAINTENANCE.

(a) *On what property chargeable.*

1.—The Court has power on petition of an infant owner of real estate to make an order charging his real estate with the cost of his past maintenance, and the costs of the petition. *In re Howarth*, 42 Law J. Rep. (n.s.) Chanc. 316; Law Rep. 8 Chanc. 415.

2.—Reversionary property of infants, some of whom might never become entitled in possession, charged with money required for their maintenance. Insurance directed for restoring the money in the event of the infants not becoming entitled. *De Witte v. Palin*, Law Rep. 14 Eq. 251.

3.—A legacy of 5,000*l.* was given to trustees to be expended by them for the benefit and advancement of an infant as they in their absolute discretion should think fit. There was also a gift by the same will, of the income of a share of residue to the same infant for life on his attaining twenty-one, with a power to the trustees to apply the income during his minority for his maintenance and education. A suit for administration was instituted by the trustees immediately after the testator's death, and orders were from time to time made in it for the advancement, and also the maintenance and education of the infant out of the 5,000*l.* legacy. On his attaining twenty-one,—Held, that he was absolutely entitled to the unapplied residue of the legacy. Held, also, that inasmuch as maintenance would have been ordered out of the income of the contingent share of the petitioner, he was entitled to be recouped out of the past income of the residuary estate what had been expended out of the 5,000*l.* legacy for his maintenance and education. *Furley v. Hyder*, 41 Law J. Rep. (n.s.) Chanc. 583.

4.—The testator, in 1853, devised freeholds to the trustees, upon trusts to pay the rents (after satisfying certain premiums and repairs) to and for the use of his grandson, C. D., for life, and after his decease "to and for the use of all and every child or children of C. D., equally as tenants

in common, who should attain the age of twenty-one years being sons, or being daughters, should attain that age or marry," and if but one such child, to him or her absolutely. The testator devised and bequeathed the residue of his estates to his trustees, upon trust to convert, invest, and hold the same, and the accumulations thereof, upon similar trusts for his grandchildren and their issue. He then directed his trustees to apply a competent part of the income of the investments for the maintenance and education of such "grandchildren and their issue;" and to accumulate the residue, as in his will was mentioned. C. D. attained twenty-one, and died in 1869 leaving three children, still infants:—Held, that they were entitled to maintenance out of the interim rents and profits of the specifically devised freeholds. *Best v. Donmall*, 40 Law J. Rep. (n.s.) Chanc. 160.

(b) *Bequest for benefit of infant.*

5.—Interest on a legacy bequeathed in trust to apply the income or principal, for the benefit of an infant, is payable from the death of the testator. *In re Richards* (Law Rep. 8 Eq. 119) observed upon, but followed. *Chidgey v. Whitby*, 41 Law J. Rep. (n.s.) Chanc. 699.

6.—Gift of an annuity to A. in trust for the maintenance of an infant at the discretion of A. — Held, that A. must account for all sums not shewn to be applied for the infant's maintenance. *Wainford v. Heyl*, Law Rep. 20 Eq. 321.

(c) *Maintenance by mother.*

*Mother not bound to maintain child: maintenance by mother not a debt.* [See PARENT AND CHILD, 4.]

(B) ADVANCEMENT.

[See ADVANCEMENT.]

(C) POWERS OF COURT OF CHANCERY OVER INFANT'S PROPERTY.

(a) *Sale of reversion.*

7.—When in an administration suit an order has been made by the Court for the sale of an infant's reversion in personal property, and the sale has been effected subject to a condition that the jurisdiction of the Court to make such an order should not be questioned, nor should any requisition or objection be made on account thereof, the purchaser cannot be discharged from his purchase on the ground that the Court had no jurisdiction to order the sale, but he is entitled to a declaration on the face of the order confirming the sale that all parties to the suit are bound by it. *Nunn v. Hancock*, 40 Law J. Rep. (n.s.) Chanc. 700; Law Rep. 6 Chanc. 850.

Semble—the Court has jurisdiction in such a suit to sell an infant's reversionary interest in personal estate. *Ibid.*

(b) *Sale of more than required: conversion.*

8.—When real estate of an infant is ordered to be sold for payment of costs or any other special purpose, and more is sold than is required, the

Digest, 1870–1875.

surplus proceeds of sale are converted into personal estate, and on the death of the infant go to his personal representatives. *Jerry v. Preston* (13 Sim. 356) and *Cooke v. Dealey* (22 Beav. 196) questioned. *Steed v. Preece*, 43 Law J. Rep. (n.s.) Chanc. 687; Law Rep. 18 Eq. 192.

(c) *Raising fine on copyholds.*

9.—The Court has no jurisdiction to direct a fine in respect of copyholds to which an infant has become entitled as customary heir of an intestate to be raised by a mortgage of the copyholds. *Harbroe v. Combes*, 43 Law J. Rep. (n.s.) Chanc. 336.

(d) *Settlement of property of ward of Court.*

10.—The Court, on a petition presented in an administration suit by a ward of Court and her husband, who had married without its consent while the wife was a minor and in ignorance that she was a ward of Court, settled her property on her for life, with remainder to her children; and with a power for the wife to appoint the property by will to her husband for his life. *Wilkinson v. Joughin*, 40 Law J. Rep. (n.s.) Chanc. 234.

(D) RELIGIOUS EDUCATION.

11.—Upon an application for a habeas corpus to secure the custody of an infant affidavits were read, which stated that before marriage an arrangement was made between the parents of the infant (the father being a Roman Catholic and the mother a Protestant) that sons of the marriage should be brought up as Roman Catholics and the daughters as Protestants; that a daughter, the infant, who at the date of the application was about ten years old, was, with the sanction of the father, who died a few months after her birth, baptized as a Protestant, and that when she was about a year old she was left in the custody of her maternal grandmother, by whom she was brought up as a Protestant, and at whose expense she was maintained and clothed until the date of the application. It was alleged that two days before the father's death he had executed a document appointing the applicant, his brother, testamentary guardian of his children, but it did not appear that the applicant made any claim to the custody of the child until it was about eight years old:—Held, notwithstanding the lateness of the application, that the Court had no power to refuse the writ, so as to give effect to the arrangement made by the father as to the religious education of his child, but as there appeared to be some doubt upon the affidavits as to the validity of the document appointing the applicant guardian, an issue must be directed in order that the question might be submitted to a jury. *In re Edwards*, 42 Law J. Rep. (n.s.) Q. B. 99.

[And see WARD OF COURT, PARENT AND CHILD, 1–3.]

(E) CONTRACT OF INFANT.

12.—Where an infant mortgaged his reversionary interest in a fund, and at the same time executed a statutory declaration stating that he

was of full age, and afterwards on coming of age mortgaged the same interest to a *bond fide* mortgagee without notice.—Held, that the voidable first mortgage was avoided by the second, and that the second mortgagee had therefore priority. *Inman v. Inman*, Law Rep. 15 Eq. 260.

13.—An infant entered into the service of a milk-seller, and covenanted not to carry on the same trade, and after he came of age he continued in the same service for eighteen months without repudiating the contract:—Held, that this conduct amounted to a ratification of the contract in equity, and an injunction to restrain a breach of the covenant was granted. *Cornwall v. Hawkins*, 41 Law J. Rep. (N.S.) Chanc. 435.

*Contract by, to take shares.* [See COMPANY, G 21.]

[And see *infra* Nos. 18, 19.]

#### (F) SUIT TO RECOVER LAND.

14.—An infant may file a bill in equity to recover land under an equitable title, whether he has been in possession himself or not. *Crowther v. Crowther* (23 Beav. 305; s. c. 26 Law J. Rep. (N.S.) Chanc. 702) dissented from. *Howard v. Earl of Shrewsbury*, 43 Law J. Rep. (N.S.) Chanc. 495; Law Rep. 17 Eq. 378.

An infant filed a bill claiming real estate under an equitable title; it was held at the hearing that on the construction of the documents he had a legal title, but the Court made a decree without requiring any amendment. *Ibid.*

#### (G) GUARDIAN.

##### (a) Appointment.

15.—A father cannot appoint a testamentary guardian to his illegitimate child. *Sleeman v. Wilson*, Law Rep. 13 Eq. 36.

##### (b) Powers and duties.

16.—If a person appointed guardian takes possession in that character of any of the ward's property he becomes trustee of such property. *Sleeman v. Wilson*, Law Rep. 13 Eq. 36.

17.—A guardian duly appointed by the will of the father has a legal right to the custody of his infant ward, and a Court of common law has no discretion to refuse him a writ of habeas corpus to obtain possession of such ward. If the validity of the appointment is questioned, an issue will be directed. *In re Andrews*, Law Rep. 8 Q. B. 153.

*Guardian of infant remainder-man, under Places of Worship Sites Act, 1873.* [See PLACES OF WORSHIP SITES ACT.]

*Voluntary settlement: liability of infant's guardian to costs.* [See VOLUNTARY SETTLEMENT, 14.]

#### (H) INFANTS RELIEF ACT, 1874.

18.—Section 2 of the Infants Relief Act, 1874, applies to a contract entered into during infancy, and before the passing of the Act by a person who attains full age after the passing of the Act, and renders it impossible for such person to ratify a contract (not for necessities) so entered into. *Ex*

*parte Kibble*; *In re Onslow*, 44 Law J. Rep. (N.S.) Bankr. 63; Law Rep. 10 Chanc. 373.

19.—A charging order obtained by a judgment creditor under section 14 of 1 & 2 Vict. c. 110, has no greater operation than an instrument of charge signed in his favour by the judgment debtor would have had. *In re Onslow's Trusts*, 44 Law J. Rep. (N.S.) Chanc. 628; Law Rep. 20 Eq. 677.

O. having attained his majority shortly after the passing of the Infants Relief Act, 1874, D. obtained judgment by default in an action for money lent to him during his minority, the judgment being followed by a charging order, under section 14 of 1 & 2 Vict. c. 110, against a trust fund to which O. was entitled:—Held, that D. had no claim upon the fund, inasmuch as, O.'s debt having been contracted during infancy, the judgment and subsequent proceedings were inoperative. *Ibid.*

*Habeas corpus to remove child.* [See HABEAS CORPUS.]

### INJUNCTION.

[And see BANKRUPTCY, O.]

#### (A) JURISDICTION OF COURT OF CHANCERY TO GRANT.

(a) *Against Commissioners for Reduction of the National Debt.*

(b) *To restrain libel.*

#### (B) WHEN GRANTED IN PARTICULAR CASES.

(a) *Not granted for breach of agreement which Court could not enforce.*

(b) *Absence of negative words not regarded.*

(c) *To restrain proceedings in other Courts.*

(1) *To restrain action at law.*

(2) *To restrain proceedings in Probate Court.*

(3) *To restrain proceedings in Police Court.*

(d) *Light and air.*

(e) *Interference with water.*

(f) *Nuisance.*

(1) *Sewers.*

(2) *Erection of national school.*

(3) *Acquiescence.*

(4) *Obstruction of street: right of reversioner to sue.*

(5) *"Visible" damage: smoke nuisance.*

(6) *Railways Clauses Act.*

(7) *Prospective nuisance.*

(g) *Interference with right of shooting.*

(h) *Trespass.*

(i) *Secret preparation.*

(k) *Sale of goodwill.*

(l) *Confidential communication.*

(m) *Injurious document.*

(n) *Against public bodies.*

(o) *Inequitable use of powers by directors.*

#### (C) DAMAGES.

#### (D) PRACTICE IN SUITS FOR INJUNCTION.

(a) *Parties.*

(b) *Injunction before bill filed.*

(c) *Motion ordered to stand till the hearing.*

(d) *Interlocutory injunction.*

(e) *Mandatory injunction.*



## (A) JURISDICTION OF COURT OF CHANCERY TO GRANT.

(a) *Against Commissioners for Reduction of the National Debt.*

1.—The Court has jurisdiction under 5 Vict. c. 5, s. 4, to restrain the Commissioners for the Reduction of the National Debt from paying or transferring an annuity payable by them. *Watts v. Watts*, 40 Law J. Rep. (N.S.) Chanc. 388.

(b) *To restrain libel.*

2.—The Court of Chancery has no jurisdiction to restrain the publication of a libel, even when its publication will be injurious to property or reputation. Dicta of Malins, V.C., in *Dixon v. Holden* (Law Rep. 7 Eq. 492) disapproved. *The Prudential Assurance Company v. Knott*, 44 Law J. Rep. (N.S.) Chanc. 192; Law Rep. 10 Chanc. 142; and *Fisher v. The Apollinaris Company (Lim.)*, 44 Law J. Rep. (N.S.) Chanc. 500; Law Rep. 10 Chanc. 297.

## (B) WHEN GRANTED IN PARTICULAR CASES.

(a) *Not granted for breach of agreement which Court could not enforce.*

3.—An injunction will not be granted to restrain a breach of a portion of an agreement of which the Court could not enforce the whole. *Fothergill v. Rowland*, 43 Law J. Rep. (N.S.) Chanc. 252; Law Rep. 17 Eq. 132.

4.—The plaintiffs, a colliery company, having sidings which connected their collieries with a railway, gave notice to the railway company of their desire to run engines and carriages over the railway, pursuant to the provisions of the 92nd section of the Railway Companies Clauses Act, 1845. The railway company declined to give effect to the notice, and obstructed the passage of the plaintiffs' trains over their line. The plaintiffs filed a bill to restrain the railway company from interfering with their use of the railway:—Held, that although the plaintiffs were entitled, under the above section, to the use of the railway, the Court could not compel the railway company to employ their servants in working the points and signals on the line, or to entrust the working of them to the plaintiffs' servants; and, since it was impossible for the plaintiffs to exercise their rights without the use of the points and signals, their bill must be dismissed, but without costs. *The Powell Duffryn Steam Coal Company v. The Taff Vale Railway Company*, 43 Law J. Rep. (N.S.) Chanc. 575; Law Rep. 9 Chanc. 331.

(b) *Absence of negative words not regarded.*

5.—In considering whether to grant or refuse an injunction to restrain a breach of a particular clause of an agreement, the Court will look to the substance of the act to be performed, and not merely to the presence or absence of negative words. *The Wolverhampton and Walsall Railway Company v. The London and North-Western Railway Company*, 43 Law J. Rep. (N.S.) Chanc. 131; Law Rep. 16 Eq. 433.

A lease of a line of railway contained an agreement by the lessee company to carry over it all traffic between certain places, and to pay the lessor company one-half the receipts in respect of such traffic. The lease contained other provisions on which no relief could have been obtained in equity, and it contained no negative stipulation restricting the lessee company from carrying the traffic in question over other lines. On demurrer to a bill by the lessor company, alleging that the lessee company were carrying the traffic mentioned in the agreement over other lines of their own, and praying for an injunction to restrain them,—Held, that relief could be granted in such a case, and the demurrer must be overruled. *Ibid.*

(c) *To restrain proceedings in other Courts.*(1) *To restrain action at law.*

6.—An interim injunction to restrain the delivery of a cargo was obtained upon the usual undertaking by the plaintiffs as to damages in a suit instituted against the shipowners and the shippers by merchants who claimed the goods upon the ground that the bills of lading had wrongfully been handed to the shippers instead of to them. Afterwards, the indorsee of the bills of lading brought an action at law against the shipowners for damages for breach of contract, by reason of the non-delivery of the goods. Subsequently the merchants' bill was amended (without prejudice to the injunction) by making the indorsee of the bills of lading a defendant. The shipowners then instituted a suit to restrain the action at law:—Held, that inasmuch as the rights of all parties would be determined in the first-mentioned suit, and the indorsee of the bills of lading, as a party to that suit, would have the benefit of the undertaking of the plaintiffs therein as to damages, the action must be stayed, on the shipowners suffering judgment therein to be dealt with as this Court should direct. *Laing v. Zeden*, 40 Law J. Rep. (N.S.) Chanc. 155.

7.—Written agreements relating to the working of some quarries contained (*inter alia*) the following provisions:—"That the defendants should allow and pay to the plaintiffs for two years, from the 7th of December, 1870, the sum of 400*l.* for each year, by equal quarterly sums of 100*l.*; that the sums of money which should be paid to the plaintiffs under that clause, should be added to a debt of 7,035*l.* then due from the plaintiffs, and that the whole amount of such debt should bear interest from time to time at the rate of 5*l.* per cent. per annum; that the said sum of 7,035*l.* (meaning the 7,035*l.*) and all additions thereto, whether by means of the two sums of 400*l.* above-mentioned, and all interest upon the said debt, should be a first charge upon the purchase-money which should become payable to the plaintiffs under the sixth clause of the last agreement." The defendants had advanced the above sum of 7,035*l.* and other moneys to the plaintiffs on their personal account and also on the security of the working of the quarries which were managed by the plaintiffs. The defendants considered the workings were not successful; and in June, 1872,

they sued the plaintiffs at law for their debt. The plaintiffs then filed their bill in this suit for the specific performance of the agreements, an account, and an injunction to restrain the action. A motion for the injunction was made on the 1st of August, but refused by Wickens, V.C., mainly on the grounds that there was no implied covenant by the defendants not to sue for their debt before the expiration of the two years from the date of the agreements, and that a parol understanding to the contrary, relied on by the plaintiffs, could not be allowed to control the written contract. On appeal, however, to Hatherley, L.C., the injunction was granted until the expiration of the two years, and the costs of the two motions were ordered to be costs in the cause; with liberty to apply. *Curteis v. Fenning*, 41 Law J. Rep. (N.S.) Chanc. 791.

8.—The plaintiffs in this suit were defendants in two actions at law in respect of certain policies of insurance. An order was made at law staying the proceedings in one action till the other had been tried. The defendants at law agreed to be bound by the result of the first action, but the plaintiffs at law were to be at liberty to proceed with the second action if they failed in the first. The bill in this suit was filed to restrain both actions, but proceedings in the suit were stayed till verdict was given in the first action. Ultimately the Court of law decided the first action in favour of the defendants at law. This suit was then proceeded with to restrain the plaintiffs at law from proceeding with the second action, and for the delivery up of the policies, which were the subject of both actions:—Held, that, as the plaintiffs were liable to have the second action brought against them, they were entitled to come to this Court and to have the proceedings at law restrained; and that as they were clearly right with respect to the subject-matter of the suit, the whole of the costs of the suit must be paid by the defendants. *The London and Provincial Marine Insurance Company v. Seymour*, 43 Law J. Rep. (N.S.) Chanc. 120; Law Rep. 17 Eq. 85.

9.—A plaintiff, claiming equitable rights under an instrument, unsuccessfully attempted to assert them in a suit in equity, alleging that he had no rights which he could assert at common law, the instrument being void at law. He afterwards commenced an action at law, in which he claimed common law rights under this instrument:—Held, that having so pleaded in the suit in equity, he put his legal rights under the control of the Court, and the action being in respect of the same matter must be stayed. *Tredegar v. Windus*, 44 Law J. Rep. (N.S.) Chanc. 268; Law Rep. 19 Eq. 607.

10.—Building contract providing that no payment was to be made without the architect's certificate. Injunction to restrain an action at law by the builders for a larger sum than was certified by the architect, refused on the ground that the fact that the certificate was conclusive could be pleaded at law. *Baron de Worms v. Mellier*, Law Rep. 16 Eq. 554.

11.—The general rule that a Court of Equity will not interfere to stay an action at law where there is a good defence at law, must depend upon

the particular circumstances of each case. *Kempe v. Tucker*, 42 Law J. Rep. (N.S.) Chanc. 532; Law Rep. 8 Chanc. 369.

*As to granting an interlocutory injunction.*  
[See infra Nos. 45–47.]

## (2) To restrain proceedings in Probate Court.

12.—C. executed a deed to carry into effect the provisions of a draft will, believing the original will had been mislaid; afterwards, on receiving information which led him to believe the original will had been intentionally cancelled by the testator, he commenced proceedings in the Probate Court to obtain letters of administration. On bill filed to restrain these proceedings it was held, that C. could not be allowed to take proceedings in derogation of his own deed, and that the validity of the deed could only be tried in this Court. *Wilcock v. Carter*, 44 Law J. Rep. (N.S.) Chanc. 253; Law Rep. 19 Eq. 327.—On appeal, the order for an injunction was discharged, the Court holding that it had jurisdiction, but that on the construction of the deed there was nothing inequitable in the proceedings by C. Law Rep. 10 Chanc. 441.

## (3) To restrain proceedings in Police Court.

13.—Although there may be cases in which this Court will interfere to restrain criminal proceedings taken by a plaintiff in equity against the defendant to the suit in respect of the matters to which the suit relates, yet the Court will not so interfere where the remedies in the proceedings in the criminal Court are for a purely criminal charge. *Saull v. Browne*, 44 Law J. Rep. (N.S.) Chanc. 1; Law Rep. 10 Chanc. 64.

In a suit instituted against the late co-partners of the plaintiff it was alleged that the defendants had together arranged and carried out a scheme for defrauding her of partnership assets, and she sought to recover the assets so alleged to have been misappropriated. After answers filed and issue joined in the suit, the plaintiff commenced criminal proceedings against the defendants in the police court, on a charge of conspiracy to defraud her in the matters to which her suit related. The defendants moved to restrain the proceedings:—Held, that the plaintiff's remedy in the police court, which was the personal punishment of the defendants, was so distinct from her remedy in this Court, which was the recovery of the property, that this Court would not restrain the criminal proceedings, and that the discretion to stay such proceedings rested with the magistrates. *Ibid.*

## (d) Light and air.

[See that title.]

*Windows in party walls.* [See BRISTOL IMPROVEMENT ACT.]

## (e) Interference with water.

14.—Although a landowner will not in general be restrained from drawing off subterranean waters from adjoining lands, he will be restrained

if, in so doing, he draws off water flowing in a defined surface channel. The compensation clause in the Public Health Act, 1848, s. 144, will not prevent a local board of health from being restrained by injunction from interfering with a watercourse in a manner not authorised by the Local Government Act, s. 68, art. 3. *The Grand Junction Canal Company v. Shugar*, Law Rep. 6 Chanc. 483.

15.—Where a bill is filed by the conservators of a river to prevent interference with the water, the Court, regarding them as a public body, will give credit to their evidence that the interference will be injurious. *The Attorney-General v. The Great Eastern Railway Company*, Law Rep. 6 Chanc. 572.

16.—An injunction will be granted at the suit of a canal company entitled to take water from a stream to prevent abstraction of the water though damage is only shewn to have taken place in an exceptionally dry season. *The Wilts and Berks Canal Navigation Company v. The Swindon Waterworks Company*, 43 Law J. Rep. (n.s.) Chanc. 393; Law Rep. 9 Chanc. 451.

This decision was affirmed, on appeal to the House of Lords, Law Rep. 7 E. & I. App. 697.

17.—A waterworks company, by their special Act, incorporating the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), were empowered to construct a reservoir in a certain locality, and to use the waters which flowed into a certain river, but the Act gave the company no power of acquiring the land compulsorily, and did not provide for the reservoir being of any particular construction; it contained provisions for keeping up the supply of water in the river. Another private Act of the company, passed after the construction of the reservoir, recognised it as an existing work, and gave the company certain rights against mill owners on the stream as regarded the quantity of water, but saved all other rights. The company's works fouled the river with mud, so much as to make the water unfit for the purposes of the trade of silk dyeing theretofore carried on at mills of the plaintiff on the river bank:—Held, that there was nothing in the Acts to take away the plaintiff's right to have the water pure and in its natural state, or to deprive her of her right of action at law for the injury sustained thereby, and therefore (the damage having been proved to be substantial), to avoid multiplicity of actions, the plaintiff was entitled to an injunction restraining the nuisance. *Clowes v. The Staffordshire Potteries Waterworks Company*, 42 Law J. Rep. (n.s.) Chanc. 107; Law Rep. 8 Chanc. 125.

[And see next two cases.]

(f) Nuisance.

(1) Sewers.

18.—A sewage company was under covenant with a local board to keep their own works in working order, so as to admit the free flow of sewage from sewers of the board. A demurrer to a bill seeking to restrain the company from causing or permitting sewage to remain in the

sewers of the board was overruled. *The Nuneaton Local Board of Health v. The General Sewage Company*, 44 Law J. Rep. (n.s.) Chanc. 561; Law Rep. 20 Eq. 127.

19.—The Court of Chancery will grant an injunction to restrain a nuisance being committed or continued by a metropolitan local board, notwithstanding a month's notice of the proceeding has not been given in accordance with section 106 of the Metropolis Local Management Acts Amendment, 1862. *The Attorney-General v. The Hackney Board of Works*, 44 Law J. Rep. (n.s.) Chanc. 545; Law Rep. 20 Eq. 626.

The plaintiff filed a bill to restrain a nuisance without giving the defendants notice of his intention to take proceedings. The defendants by their answer justified the nuisance, and insisted on their legal rights. The Court on the evidence considered the nuisance proved, and held that the nature of the answer precluded the defendants from objecting to the want of notice, and entitled the plaintiffs to the costs of the suit. *Ibid.*

A watercourse, whether called by the name of "sewer" or "brook," cannot be allowed to remain in such a state as to be a nuisance to the neighbourhood, or to be covered over and turned into a sewer, so as to take away from the occupiers of adjoining lands any rights they may have to use it as a watercourse. *Ibid.*

(2) Erection of national school.

20.—C. being entitled to a conveyance of a piece of land, subject to a covenant by him with E., his vendor, not to do or suffer anything to be done which should be a nuisance to E. or his tenants, &c., the occupiers of the adjoining property put up for sale and sold the land in lots subject to a condition in the terms of the covenant, and the purchaser of each lot entered into a covenant with C. not to do or suffer anything to be done which should be a "nuisance" to E. or any of the tenants, &c., "of the adjoining property or the houses to be built thereon." Upon bill filed by several of the owners of the lots to restrain the establishment of a national parochial school on one of the lots,—Held, first, that the words "adjoining property" in the last-mentioned covenant, meant the property adjoining the lots purchased, and accordingly the owner of any lot was entitled to enforce the covenant against the owner of any other lot. Secondly, that the word "nuisance" meant only a legal nuisance for which an action would lie, and that the establishment of a national school, although it would injure and depreciate the adjoining property, was not a nuisance within the meaning of the covenant; but the bill was dismissed without costs, on the ground that another site might have been chosen so as to avoid annoyance. *Harrison v. Good*, 40 Law J. Rep. (n.s.) Chanc. 294; Law Rep. 11 Eq. 338.

(3) Acquiescence.

21.—Where the owner of a house, the ground floor of which had been used as a stable for many years, made alterations which caused the noise of the horses to become a nuisance to his next-

door neighbour:—Held, that the latter was not deprived of his right to an injunction by the fact that horses had been previously kept in the stable. *Ball v. Ray*, Law Rep. 8 Chanc. 467.

22.—Noise caused by machinery having been acquiesced in for more than five years, the Court refused to grant an injunction, on the ground of increase evidenced only by the sense of hearing, it being proved on the other side that no new machinery or change in the manner of working had been introduced. *Gaunt v. Pyne*, 42 Law J. Rep. (N.S.) Chanc. 122; Law Rep. 8 Chanc. 8.

(4) *Obstruction of street: right of reversioner to sue.*

23.—To entitle a reversioner to maintain a suit for a private nuisance, the wrong complained of must be of a necessarily permanent character. *Mott v. Schoolbred*, 44 Law J. Rep. (N.S.) Chanc. 380; Law Rep. 20 Eq. 22.

The plaintiff was entitled in reversion to two houses in a street. The defendants carried on an extensive business in a newly-built warehouse, at which carts and vans were constantly loading and unloading goods. The carts and vans obstructed the carriage-way and occasioned a nuisance to the tenants of the plaintiff's houses and their lodgers, so that some of the lodgers quitted, and the apartments could not be let, except at a lower value:—Held, that a suit for an injunction to restrain the nuisance could not be maintained, for the injury complained of was not in itself of a permanent character, and there was nothing to lead to the inference that it would be permanent, except the presumed intention of the defendants to continue the nuisance. *Ibid.*

(5) *"Visible" damage: smoke nuisance.*

24.—A plaintiff seeking to interfere on the ground of nuisance with a work carried on in a normal manner must, in order to sustain his suit, shew that he has incurred actual and substantial or "visible" damage. The primary evidence of such damage should be that of ordinary witnesses. Scientific evidence should be resorted to, not to establish the fact of the damage, but only to explain the causes of it. *Salvin v. The North Brancepeth Coal Company*, 44 Law J. Rep. (N.S.) Chanc. 149; Law Rep. 9 Chanc. 705.

The Court will not in such cases send an expert to report where such course would in fact be giving a new trial on new evidence, and delegating the judgment of the Court to that of the expert, nor will it direct an issue where the state of things may have been materially altered from lapse of time since the institution of the suit. *Ibid.*

(6) *Railway Clauses Act.*

25.—In the Railway Clauses Consolidation Act, 1845, the "powers aforesaid" of the 32nd section, in exercise of which a railway company may do certain specified acts upon lands of which they have taken temporary possession, are exercisable for the purposes named in that section only, and the words, "action for nuisance or other

injury," in the same section, include "suit." Therefore where a railway was in course of construction at the rear of the plaintiff's shop, and the railway company took temporary possession of an adjoining piece of land not owned by the plaintiffs, and erected a mortar mill thereon, for the purpose of making mortar to be used in the construction of the railway, that not being one of the purposes named in the 32nd section,—Held, that an injunction would be granted to restrain the railway company from working the mortar mill, so as to be a nuisance to the plaintiffs. *Fenwick v. The East London Railway Company*, 44 Law J. Rep. (N.S.) Chanc. 602; Law Rep. 20 Eq. 544.

Held also, following *The Queen v. The High Wycombe Railway Company* (36 Law J. Rep. (N.S.) Q. B. 121; Law Rep. 2 Q. B. 310), that the making of mortar was not an act necessary for making the railway within the 16th section, for the company might get mortar elsewhere, and it was not an act without which the railway could not be made. *Ibid.*

(7) *Prospective nuisance.*

26.—Where in a suit for injunction the existence of an actual nuisance had been proved, it was held no objection to the bill that the nuisance was prospective only until after the date of replication being filed. *Umfreville v. Johnson*, 44 Law J. Rep. (N.S.) Chanc. 752; Law Rep. 10 Chanc. 580.

*Nuisance by licensee of occupier: occupier a proper party to suit.* [See *infra* No. 41.]

(g) *Interference with right of shooting.*

27.—G., owner of a farm of 180 acres, subject to a right of shooting, which had been demised for a term to P., staked out a road across the farm, pulling down two hedges for the purpose, and put up the farm for sale by auction in thirteen lots, some of which were described as eligible for building purposes. The particulars mentioned the right of shooting, and stated that the sale was subject to such right. On a bill for injunction by P. to restrain the sale,—Held, that it did not appear that the sale must inevitably result in an injury to the plaintiff's right of shooting, and that accordingly the bill must be dismissed with costs, and an enquiry was directed as to damages caused by the *ex parte* injunction. *Pattison v. Guilford*, 43 Law J. Rep. (N.S.) Chanc. 524; Law Rep. 18 Eq. 259.

Principles on which Courts of equity act in granting injunctions to restrain threatened acts considered. *Ibid.*

(h) *Trespass.*

28.—Where the plaintiff's title is not disputed, the Court will grant an injunction to restrain acts of trespass without requiring him first to bring an action at law. *Goodson v. Richardson*, 43 Law J. Rep. (N.S.) Chanc. 790; Law Rep. 9 Chanc. 221.

If the plaintiff is guilty of no acquiescence or delay, he will be entitled to a mandatory injunc-

tion, though the works complained of may have been completed before the filing of the bill. *Ibid.*

[And see *TRESPASS*, 5-7.]

*Motion ordered to stand till hearing.*

[See *infra* No. 44.]

(i) *Secret preparation.*

**29.**—After the death of Lieutenant Robert James—the inventor of a blister ointment, known as Lieut. James's blister, the recipe for making which was a valuable trade secret, but not patented, while his successors in title were carrying on the business of selling it—his nephew, R. J. James, who had discovered the recipe under circumstances which did not make it a breach of duty to avail himself of his discovery, made and sold the ointment under the name of the original inventor, signed with the signature R. James, and advertised his ointment as the only genuine:—Held, on bill filed against him by the successors of the original inventor, that he was entitled to make and sell the article as Lieut. James's blister, but not to do anything which was calculated to make the public think that he was the original inventor or the successor of the inventor, or to represent that his was the only genuine preparation. *James v. James*, 41 Law J. Rep. (N.S.) Chanc. 353; Law Rep. 13 Eq. 421.

(k) *Sale of goodwill.*

**30.**—Although the fact that a man has sold the goodwill of a business does not prevent him from setting up again immediately in the same trade, the Court will nevertheless restrain him from sending special solicitations to the customers of the old house asking them to deal with him at his new place of business, and it will not justify his conduct that he is not in any way holding himself out as continuing to carry on the old business. *La-bouchere v. Dawson*, 41 Law J. Rep. (N.S.) Chanc. 427; Law Rep. 13 Eq. 322.

(l) *Confidential communication.*

**31.**—The plaintiffs, a telegram company in London, made an arrangement with the defendants, being two individuals in Australia, for the transmission of messages, in which certain words were used as short expressions of the names and addresses of the principal customers; and the defendants were described as the plaintiffs' agents. In a little time the parties quarrelled, and one of the defendants came to England to carry on an independent telegram business with his partner in Australia, and sent circulars to the plaintiffs' customers, mentioning that he had their cyphers. On motion to restrain him from using the cyphers:—Held, that there was nothing confidential in the cyphers, and that he was entitled to use them. *Reuter's Telegram Company v. Byron*, 43 Law J. Rep. (N.S.) Chanc. 661.

(m) *Injurious document.*

[See also *supra* No. 2.]

**32.**—An association formed to supply, through an annual published registry, information as to iron ships, to members and subscribers, and reserving the right to make periodical surveys of ships registered, objected to certain alterations made in a ship of their highest classification, inserted the words "class suspended" opposite her name in their list, and refused to omit those words or to withdraw her name from the list:—Held, that there being no proof of malice, falsehood, or unfair dealing, the association were entitled to publish their *bona fide* opinion, although it was injurious to the property of the shipowners, and a motion by the shipowners to restrain publication of the words "class suspended," and to compel the withdrawal of the ship from the list, refused with costs. *Clover v. Royden*, 43 Law J. Rep. (N.S.) Chanc. 665; Law Rep. 17 Eq. 190.

(n) *Against public bodies.*

**33.**—The Metropolitan Board of Works purchased a metropolitan common. They agreed that if within a stipulated time the common should not be devoted to the public, having no part of it sold or let on building or other lease, that the plaintiff, who had been beneficially entitled to part of the common, should repurchase his share. The board prepared a scheme for the Inclosure Commissioners under the above Act, which provided for the sale or letting of a part of the common, which scheme was promulgated by the Commissioners. The Court restrained the Board of Works from promoting such scheme. *Telford v. The Metropolitan Board of Works*, 41 Law J. Rep. (N.S.) Chanc. 589; Law Rep. 13 Eq. 574.

**34.**—When the Legislature imposes certain conditions on a public body for the protection of the public, that body cannot break the conditions and plead in excuse that they are unnecessary for the protection of the public. *The Workington Local Board v. The Cockermouth Local Board*; and *The Attorney-General v. The Cockermouth Local Board*, 44 Law J. Rep. (N.S.) Chanc. 118; Law Rep. 18 Eq. 172.

The statute 24 & 25 Vict. c. 61, s. 4, gives power to a local board to make an outfall of drains beyond their district, with a proviso that nothing therein contained shall authorise them to pour any noxious matter into any stream. On an information to restrain a local board from pouring noxious matter into a stream through an outfall beyond their district, the local board tendered evidence to shew that no damage was caused to anyone thereby:—Held, that this was immaterial, and that an injunction was a matter of course. *Ibid.*

**35.**—Decree for injunction to restrain a public body, in the exercise of their statutory powers, from interfering with the cellar of a house in a street of which they were lowering the roadway, until compensation for the whole house was ascertained and paid, and inquiry as to damages:—Held, that the plaintiff was not entitled to compensation for indirect injury to his trade through diversion of traffic caused by the lowering of the road-way, but only for direct structural injury.

*Bigg v. The Corporation of London*, Law Rep. 15 Eq. 376.

*Interference with steam or watercourse by Local Board of Health.* [See supra No. 14 and PUBLIC HEALTH ACT, 4.]

*Nuisance by Metropolitan Local Board.* [See supra No. 19.]

*Nuisance by Railway Company.* [See supra No. 25.]

*Interference with watercourse under statutory powers of Waterworks Company.* [See supra No. 17.]

(c) *Inevitable use of powers by directors.*

**36.**—Directors called the annual meeting of a company earlier than usual to disqualify certain transferees of shares from voting. The directors were restrained from calling the meeting before the transferees were qualified. *Cannon v. Trask*, 44 Law J. Rep. (n.s.) Chanc. 772; Law Rep. 20 Eq. 669.

(C) DAMAGES.

**37.**—Where an unlawful obstruction of an ancient light had existed for nearly six years, the Court being of opinion that before the passing of Lord Cairns' Act (21 & 22 Vict. c. 27) a bill for an injunction would have been dismissed, refused to direct an inquiry as to damages under that Act. *Gaunt v. Fynney*, 42 Law J. Rep. (n.s.) Chanc. 122; Law Rep. 8 Chanc. 8.

**38.**—Wherever a plaintiff would recover substantial damages at law he has a right to sue in a Court of Equity, but there may be cases where the Court of Equity will exercise the power conferred on it by Cairns' Act, 21 & 22 Vict. c. 27, and give damages instead of an injunction. But the Court will not let the defendant gain an advantage in this respect by refusing an interlocutory injunction, and merely putting him on an undertaking to pull down if ordered at the hearing. *Aynsley v. Glover*, 43 Law J. Rep. (n.s.) Chanc. 777; Law Rep. 18 Eq. 544.

**39.**—The power conferred by the 21 & 22 Vict. c. 27, s. 5, on the Court of Chancery, of directing an inquiry as to damages, was not intended to be exercised concurrently with the ancient jurisdiction of the Court for granting an inquiry as to profits. Therefore a plaintiff cannot obtain an inquiry both as to damages and also as to profits. He must be put to his election between the two inquiries. *De Vitre v. Betts* (H. L.), 42 Law J. Rep. (n.s.) Chanc. 841; Law Rep. 6 E. & I. App. 319.

**40.**—A Court of Equity will not decree specific performance of a mere agreement to advance money, and therefore has no jurisdiction to award damages for breach of such an agreement. *Larios v. Bonany y Gurety*, Law Rep. 5 P. C. 346.

(D) PRACTICE IN SUITS FOR INJUNCTION.

(a) *Parties.*

**41.**—Where under license from the occupier of lands the licensee does acts which amount to a nuisance, the occupier may be made defendant in a suit to restrain the nuisance, as he is bound to

see that his property is so managed that others are not injured. *White v. Jameson*, Law Rep. 18 Eq. 303.

(b) *Injunction before bill filed.*

**42.**—An application for an injunction having been made on a day when, on account of the offices of the Court being closed, the bill and affidavit in support could not be filed, the Court granted the injunction and directed the bill and affidavit to be filed as on the day the offices were closed. *Carr v. Morice*, 42 Law J. Rep. (n.s.) Chanc. 787; Law Rep. 16 Eq. 125.

**43.**—In a pressing case the Court will grant an injunction before bill filed. *Thornloe v. Skoines*, 42 Law J. Rep. (n.s.) Chanc. 788; Law Rep. 16 Eq. 126.

(c) *Motion ordered to stand till the hearing.*

**44.**—Motions, (1) to restrain a contractor with the Government from continuing on Government land after notice to quit given under the powers of the contract, (2) by the contractor to restrain the Secretary of State for War from preventing him from completing the contract, ordered to stand to the hearing of the respective suits. *The East Lancashire Railway Company v. Hattersley* (8 Hare, 72) considered. *Kirk v. The Queen*; *The Attorney-General v. Kirk*, Law Rep. 14 Eq. 558.

(d) *Interlocutory injunction.*

**45.**—An injunction to restrain the alleged infringement of a patent will not be granted on an interlocutory application, unless it can be shewn that there has been active user of the invention, even where the patent has been in force for eight years. *Plimpton v. Malcolmson*, 44 Law J. Rep. (n.s.) Chanc. 257; Law Rep. 20 Eq. 37.

**46.**—In a suit to restrain the user of names in trade in a fraudulent manner, the right to an interlocutory injunction is lost by a delay in filing the bill of nine or ten months since the discovery of the user. *Isaacson v. Thompson*, 41 Law J. Rep. (n.s.) Chanc. 101.

**47.**—An interlocutory injunction to stay proceedings at law will not be granted where in the ordinary course of proceeding the whole subject matter of the suit can be more speedily and satisfactorily determined at law than in equity; and this notwithstanding the suit in equity may have been commenced before the action at law. Decision of Malins, V.C., affirmed. *Hoare v. Bremridge*, 42 Law J. Rep. (n.s.) Chanc. 1; Law Rep. 8 Chanc. 22.

(e) *Mandatory injunction.*

**48.**—The Court will not refuse to grant a mandatory injunction to compel the removal of new buildings for the mere reason that the buildings were completed before the bill was filed, or that the damage admits of pecuniary compensation. *Smith v. Smith*, 44 Law J. Rep. (n.s.) Chanc. 680; Law Rep. 20 Eq. 500.

The Court has no more hesitation in granting a mandatory injunction in a proper case than any other injunction. The circumstances under which

the Court will grant a mandatory injunction and those under which it will order an inquiry as to damages, considered. *Ibid.*

49.—On a bill filed to compel the removal of so much of a large shed as interfered with the lights of a chapel and school-room below it, and to restrain the carrying on of the business of the defendants as boiler makers so as to interfere with the user of the chapel:—Held (affirming the decision of Bacon, V.C.), that having regard to the nature of the building, relief as prayed would be granted at the hearing, though the shed was allowed to be erected and completed and the works carried on for some months without complaint. *Baxter v. Bower*, 44 Law J. Rep. (n.s.) Chanc. 625.

A partial interference with lights by the owner is no bar to a suit to prevent a subsequent interference by other persons. *Ibid.*

It is to be understood that an injunction is not to be used oppressively, but the Court will not too carefully limit its orders, but will leave any abuse to be dealt with when it arises. *Ibid.*

"Air" is not to be coupled with "light" in an injunction as a matter of common form. *Ibid.*

*Injunction not dissolved by amendment of bill.* [See PRACTICE IN EQUITY, 15.]

### INNS OF COURT.

A Court of Equity has no jurisdiction to restrain an action at law by an Inn of Court against one of its own members on his suretyship bond. The proper tribunal is that of the Judges of the superior Courts of England and Wales, in their visitatorial capacity over the Inn. *Neate v. Denman*, 43 Law J. Rep. (n.s.) Chanc. 409; Law Rep. 18 Eq. 127.

The bill in the suit prayed a full discovery of all the matters in dispute between the plaintiff and the society relating to the suit; the delivery up to the plaintiff for cancellation of the bond given by him to the society on his call to the bar; an injunction to restrain the defendants, the representatives of the surviving obligee of the bond, from suing him at law upon it; and a declaration that he might be at liberty to retire from the Inn without making any further payment or entering into any undertaking not to practise as a barrister in the United Kingdom, the Colonies or India. The defendants demurred to the bill for want of jurisdiction in the Court, and want of equity:—Held, that the demurrer must be allowed. *Ibid.*

### INNKEEPER.

- (a) *Lien on goods.*
- (b) *Liability for loss of goods.*

#### (a) *Lien on goods.*

1.—B. hired a pianoforte from the plaintiff for a term of six months, and went with his wife and sister to the defendant's hotel, where he took a private sitting-room at a weekly rent, and remained in the house for about two months, incurring a considerable debt for the rent of the room and for board and lodging. He kept the pianoforte in his room, and the defendant did not know that it belonged to any one except B.:—Held, first, that the pianoforte, though not an article usually taken to inns by travellers, was, if received by the innkeeper, subject to his lien. Secondly, that as he received the pianoforte supposing it to belong to B., he could maintain his lien upon it as against the plaintiff. *Threlfall v. Borwick*, 41 Law J. Rep. (n.s.) Q. B. 266; Law Rep. 7 Q. B. 711.

Affirmed on appeal, the Court holding that, whether or not the innkeeper was bound, in the first place, to take in the piano, having done so he could maintain his lien upon it, as against the person from whom it was hired. *Threlfall v. Borwick* (Exch. Ch.), 44 Law J. Rep. (n.s.) Q. B. 87; Law Rep. 10 Q. B. 210.

#### (b) *Liability for loss of goods.*

2.—The plaintiff put up at the defendants' hotel, produced a bag of money to make a small payment in the commercial room, went up to bed, contrary to his usual habit did not lock his door though there was a lock and key, left his money in his trousers on a chair at the bedside, and went to sleep. Some one entered and stole the money, and the plaintiff brought this action to recoup this loss:—Held, that there was evidence to go to, and it was a proper question for the jury, whether the loss would or would not have happened if the plaintiff had used the ordinary care that a prudent man might reasonably be expected to have taken under the circumstances. *Oppenheim v. The White Lion Hotel Company*, 40 Law J. Rep. (n.s.) C. P. 231; Law Rep. 6 C. P. 515.

3.—The salaried manager of a hotel belonging to a company is not an innkeeper so as to be by law responsible for the goods and property of the guests, although the usual license under 1 Geo. 4, c. 61, has been granted to him personally. *Dixon v. Birch*, 42 Law J. Rep. (n.s.) Exch. 135; Law Rep. 8 Exch. 135.

### INSPECTORSHIP DEED.

- (A) JURISDICTION OF COURT OF BANKRUPTCY.
- (B) AFTER-ACQUIRED PROPERTY.
- (C) PROOF: INTEREST SUBSEQUENT TO BANKRUPTCY.
- (D) LIABILITY OF INSPECTORS.

#### (A) JURISDICTION OF COURT IN BANKRUPTCY.

1.—The jurisdiction given to the Court of Bankruptcy by section 197 of the Bankruptcy Act, 1861, applies to deeds registered under section 194 of the same Act, as well as to deeds registered under section 193. *Ex parte Clough; In re Ingram*, 41 Law J. Rep. (n.s.) Bankr. 45.

2.—The Court granted an injunction to restrain the prosecution of an action in Ireland upon a claim, which, if due, would be proveable under a

deed of inspection executed in December, 1869. *In re Tait and Company*; *Ex parte Tait*, 41 Law J. Rep. (N.S.) Bankr. 32; Law Rep. 13 Eq. 311.

#### (B) AFTER-ACQUIRED PROPERTY.

3.—By a deed of inspectorship, registered under the Bankruptcy Act, 1861, s. 192, it was provided that all the estate and effects of P., the debtor, should be administered in accordance with the bankrupt law. At the date of the deed there was in existence an agreement between railway companies, to which P. was no party, by which it was agreed that the contract for the execution of the works therein referred to should be let to P. or his nominee. P. afterwards, and during the continuance of the inspectorship, nominated contractors, and received from them a sum of 3,500*l.* for so doing.—Held, that this sum was no part of the estate and effects of the debtor at the date of the deed; also, that upon the construction of the deed, after-acquired property was not included therein. *Ex parte Piercy*; *In re Piercy*, 43 Law J. Rep. (N.S.) Bankr. 9; Law Rep. 9 Chanc. 33.

#### (C) PROOF: INTEREST SUBSEQUENT TO BANKRUPTCY.

4.—A debtor executed a deed of inspectorship under the provisions of the Bankruptcy Act, 1861, and afterwards under the Liquidation Act, 1868, a scheme was settled under which the Court of Chancery ascertained the value of the securities held by the secured creditors, which value was to be taken by these creditors in part discharge of their debts, and they were to be at liberty to prove for the deficiency:—Held, reversing the decision of Bacon, V.C., that the value must be taken as a discharge *pro tanto* of the principal and interest due at the date of the deed, and not in discharge of any subsequent interest, so that the balance only of such principal and interest due at the date of the deed could be proved under the deed. *In re Savin*, 42 Law J. Rep. (N.S.) Bankr. 14; Law Rep. 7 Chanc. 760.

#### (D) LIABILITY OF INSPECTORS.

5.—J. P. executed a deed of inspectorship under the Bankruptcy Act, 1861, by which he assigned all his property (but not his business) to trustees, upon trust for the benefit of his creditors. The deed contained a covenant by J. P. to carry on his business to the best of his ability under the inspection and control of the trustees, to whom he was to pay all moneys received by him; a provision that the trustees should be liable as against each other for his own defaults only; and an express declaration that the deed was intended to operate as a deed of inspectorship and composition under the Act. The trustees derived no benefit under the deed other than that which they shared in common with the other creditors. After the deed was registered, the plaintiffs supplied goods upon written orders expressed to be "for J. P.," to the place where he had carried on his business previously to the execution of the deed, and where the business was still being carried on under his management. The trustees regularly supplied him

with money for the current expenses weekly in advance, and they had no personal knowledge of the orders given to the plaintiffs, who, on the other hand, were not shewn to have had any knowledge of the deed:—Held, that the real intention of the parties as appearing by the deed was that J. P. should carry on the business as his own, subject to the inspection and control of the trustees; and that the relation of master and servant or of principal and agent did not exist between them and him, and consequently that they were not liable to the plaintiffs for the price of the goods supplied on his orders. *Easterbrook v. Barker*, 40 Law J. Rep. (N.S.) C. P. 17; Law Rep. 6 C. P. 1.

### INSURANCE.

#### (A) INSURANCE COMPANIES.

#### (B) MUTUAL INSURANCE ASSOCIATION UNDER STATUTE.

#### (C) LIFE POLICY.

- (a) *Proviso avoiding policy if declaration untrue.*
- (b) *Limitation of liability of insurance company.*
- (c) *Policy effected by creditors.*
- (d) *Mortgage of policy.*
- (e) *Assignment: notice.*

#### (D) FIRE POLICY.

- (a) *Misdescription.*
- (b) *Construction: risk.*
- (c) *Subrogation.*

[33 & 34 Vict. c. 61; 34 & 35 Vict. c. 58 amended. 35 & 36 Vict. c. 41.]

#### (A) INSURANCE COMPANIES.

1.—Policy holders in the winding up of a life assurance company held entitled to prove for the sum which would be required in each case to purchase a policy of the same amount at the same premium in a solvent office. The decision of Lord Cairns in *Lancaster's case* (*Albert Arbitration*), holding that the measure of proof was the difference between the present value of the reversion to the sum assured at the decease of the life and the present value of the future annual premiums, disapproved. *In re the English Assurance Company*; *Holdich's case*, Law Rep. 14 Eq. 72.

[And see *infra* No. 4.]

*Action by member for expulsion contrary to rules of society.* [See ACTION, 4.]

#### (B) MUTUAL INSURANCE ASSOCIATION UNDER STATUTE.

2.—A fund was established under a special Act as a provision, upon the principle of a life insurance, by officers of the Customs for their widows, children and relatives. Under the Act, directors of the fund were appointed, with power to frame rules for the management of the fund, and with discretion to admit nominees of the subscribers, other than relatives, to the benefit arising out of any subscriptions. By the Act a restriction was



placed on alienation of the benefit provided for them by the fund, by widows, children and other claimants without consent of the directors. By the rules, each subscriber had power to direct how his portion of the fund should be applied for the benefit of his widow, children or relatives, or his nominees, who should have been duly admitted by the directors. A subscriber, a widower, made, on the occasion of his daughter's marriage, an appointment of his share of the fund to the trustees of his daughter's settlement, the trusts being for his daughter for her life, remainder to her husband for life, remainder to the children of the marriage. The trustees were never formally admitted under the rules, though their names were sent in for that purpose by the settlor. The daughter predeceased her father. On his death, the directors paid his share into Court under the Trustee Relief Act, one moiety of it being claimed by the surviving son of the subscriber:—Held, that the settlement on the daughter's marriage was such a settlement for the benefit of his daughter as the subscriber had a right to make, and did not require the consent of the directors to complete the title of the trustees to the fund, and that therefore their formal admission by the directors as the nominees of the settlor was unnecessary, and, consequently, that the fund must be paid to them. *In re Pocock's Policy*, 40 Law J. Rep. (N.S.) Chanc. 681; Law Rep. 6 Chanc. 445.

#### (C) LIFE POLICY.

##### (a) *Proviso avoiding policy if declaration untrue.*

3.—A policy of insurance was granted by the defendants to the plaintiff on the life of T., containing a proviso that "if the declaration under the hand of the plaintiff delivered at the defendants' office as the basis of the insurance is not in every respect true, and if there has been any misrepresentation, &c. . . then the said insurance shall be void:—Held, that an inaccurate statement of a material fact contained in the declaration avoided the policy, though the statement was made *bonâ fide*, and was not untrue to the knowledge of the plaintiff. *Macdonald v. The Law Union Fire and Life Insurance Company*, 43 Law J. Rep. (N.S.) Q. B. 131; Law Rep. 9 Q. B. 328.

##### (b) *Limitation of liability of insurance company.*

4.—Wherever under a policy of assurance there is a contract that the assured are to look to the assets and property of the company only, each shareholder is (except as to the expenses of a winding up) liable only to the extent of the amount unpaid upon his shares. *Lethbridge v. Adams; Ex parte the Liquidator of The International Life Assurance Society*, 41 Law J. Rep. (N.S.) Chanc. 710; Law Rep. 13 Eq. 547.

##### (c) *Policy effected by creditors.*

5.—A debtor arranged with his creditors for payment of his debts by instalments, to be further secured by a policy of insurance on his life to be effected by the creditors, who were to pay the premiums, and to assign the policy to the debtor on payment of their debts and all pre-

miums paid, with interest. All the instalments except the last having been paid, and another premium on the policy being about to become due, the creditors offered to assign it to the debtor on being repaid the premiums paid by them with interest, but the offer was declined, and the creditors paid the premium, and the debtor paid the last instalment of his debts. Shortly afterwards the debtor died, and his executrix filed a bill claiming to be entitled to the sum assured on payment to the creditors of the money paid by them for premiums with interest. A demurrer for want of equity was overruled by one of the Vice-Chancellors, but allowed on appeal by the Lords Justices. *Lewis v. King*, 44 Law J. Rep. (N.S.) Chanc. 259.

##### (d) *Mortgage of policy.*

6.—Where there are no funds to keep up mortgaged policies the mortgagee has a right to have them sold. *Ford v. Tynte*, 41 Law J. Rep. (N.S.) Chanc. 758.

[And see MORTGAGE, 6.]

##### (e) *Assignment: notice.*

*Life policy: notice of assignment: what notice sufficient to take policy out of order and disposition of bankrupt.* [See BANKRUPTCY, G 18.]

*Covenant to pay premiums on policy.* [See COVENANT, 8.]

#### (D) FIRE POLICY.

##### (a) *Misdescription.*

7.—F. & Co. effected a policy with an insurance company, through D., an agent of the company, by whom the premises insured were inspected. One of the conditions of the policy was, that any material misdescription of any of the property insured should render the policy void. The buildings were stated in the policy as built of brick and slated; but on a fire occurring it was discovered that one part of the buildings was roofed with tarred felt. In the winding up of the company, F. & Co. claimed 1,350*l.* under the policy. The claim was resisted by the liquidator on the ground of misdescription, and that D. was not the agent of the company:—Held, that the misdescription did not render the policy void, and was wholly immaterial, and even if it had been material it had been given to the company by D. as their agent, and did not proceed from the assured at all. *In re The Universal Non-Tariff Fire Insurance Company; Forbes's Claim*, 44 Law J. Rep. (N.S.) Chanc. 761; Law Rep. 19 Eq. 485.

##### (b) *Construction: risk.*

8.—By a floating policy goods in a specified wharf were insured against loss by fire, but the insurance was limited to goods which were "the assured's own, in trust or on commission for which the assured was responsible." Goods were destroyed by fire at such wharf, which the assured, to whom they had belonged, had sold to purchasers, who had paid him for the same before the

fire. The assured, however, held the wharfinger's delivery warrants for such goods on behalf of such purchasers, but merely for the convenience of paying, if required to do so, the charges necessary to clear the goods, such as custom-house dues and rent payable by these purchasers:—Held, that at the time of the fire the property in the goods had passed to the purchasers, and that the goods remained at their risk, and not at the risk of the assured, who had no longer any interest in them, or responsibility to the purchasers in respect of them in case of fire; and further that, as the assurer's liability was expressly limited by such policy to such goods as were not only held in trust by the assured but for which he was responsible, the goods were not covered by the policy. *The North British and Mercantile Insurance Company v. Moffatt*, 41 Law J. Rep. (n.s.) C. P. 1; Law Rep. 7 C. P. 25.

9.—A steamship was insured against fire as "lying in the V. docks, with liberty to go into dry dock." She was taken along the Thames to a proper dry dock, and on her return stopped in the Thames to put on part of her paddles, which had been taken off to admit her into the dry dock, a proceeding usual under the circumstances, and during such stoppage was burnt:—Held (affirming the decision below, 33 Law J. Rep. (n.s.) C. P. 85; 15 Com. B. Rep. (n.s.) 304), that this was not a loss within the insurance. *Pearson v. The Commercial Union Assurance Company* (Exch. Ch.), 42 Law J. Rep. (n.s.) C. P. 164; Law Rep. 8 C. P. 548.

#### (c) *Subrogation.*

10.—The defendant owned a warehouse at H., which he had insured for about a third of its value in several insurance offices, and which was burnt down by the negligence of servants of the corporation of H. On a motion in a suit instituted by the insurance companies to restrain the defendant from suing the corporation for less than the whole loss, and from compromising the action to the prejudice of the plaintiffs, and from refusing to allow the plaintiffs to sue the corporation in his name, he undertook to sue the corporation for the whole loss, and not to compromise the action otherwise than *bond fide*:—Held, that this undertaking gave the plaintiffs all the relief to which they were entitled before the hearing. *The Commercial Union Insurance Company v. Lister*, 43 Law J. Rep. (n.s.) Chanc. 601; Law Rep. 9 Chanc. 483.

*Sale of goods: fire policy: interest of buyer in seller's insurance.* [See SALE OF GOODS, 20.]

### INTEREST.

1.—Interest at 4l. per cent. was allowed on money which had been paid on an order which was reversed on appeal. *The Merchant Banking Company of London v. Maud*, 43 Law J. Rep. (n.s.) Chanc. 861; Law Rep. 18 Eq. 659.

2.—Where a person borrows money for a certain period, with interest at a certain rate down to the day named, a contract for payment of interest at that rate after the day named is not to be implied. The principal and interest, if not then paid, become a debt, and any allowance for detention or non-payment made by any tribunal before which the payment may be sought, is in the nature of damages, not of interest. *Cook v. Fowler* (H.L.), 43 Law J. Rep. (n.s.) Chanc. 855; Law Rep. 7 E. & I. App. 27.

Although the rate of interest agreed on for the time certain is usually adopted as the proper measure of the damages for the subsequent delay, the tribunal may look at all the circumstances of the case, and award such a rate of interest as shall appear fair and reasonable. *Ibid.*

Where the holder of a warrant of attorney to enter judgment for a fixed sum on a day named, with interest at the rate of 5l. per cent. per month and costs, did not enter up judgment, and did not, the maker of the instrument having died, make any definite claim against his debtor's estate for the space of four years and upwards,—Held, that the tribunal (one of the Vice-Chancellors) before whom the claim at last came, was justified in awarding by way of damages such a rate of interest as the holder of the warrant of attorney would have been entitled to, according to the ordinary rule of the Court of Chancery, had he entered up judgment on the day named in the defeasance to the warrant of attorney, namely, at the rate of four per cent. *Ibid.*

3.—It is not necessary in order to enable a jury, under 3 & 4 Will. 4. c. 42, s. 28, to allow interest upon a debt not payable at a time certain, that the demand in writing should be of a specific sum, it is sufficient to satisfy that enactment that the demand be of what is due, with notice that the debtor is required to pay interest thereon. *Geake v. Ross*, 44 Law J. Rep. (n.s.) C. P. 315.

The plaintiff having for some years supplied coal to an unregistered mining company, wrote a letter to the defendant who was a shareholder, containing the following passages:—"I feel it my duty to write to you about my claim on this company. They owe me for balance of coal account and interest over 1,100l. . . . Now I must ask you the plain question why is not my account paid? . . . I must now give you notice that if my account with this mine be not settled on or before the 1st day of November next, I shall instruct my solicitor to take the necessary proceedings to recover the money this company owes me."—Held, a sufficient demand within 3 & 4 Will. 4. c. 42, s. 28, to justify a jury giving interest from the date of such letter. *Ibid.*

[And see also DEBTOR AND CREDITOR, 6, 7; CONTRACT, 33; PRIVY COUNCIL, 43.]

*Interest on advances by solicitor to client.*

[See ATTORNEY, 37.]

*During stay of proceedings on error.* [See COSTS AT LAW, 14.]

*On legacy.* [See INFANT, 5; LEGACY, 34; LIMITATIONS, STATUTE OF, 13.]

*On costs of mortgagee added to his security.*  
[See MORTGAGE, 51.]  
*As between parties after dissolution.* [See  
PARTNERSHIP, 15.]  
*On deposit recovered by purchaser.* [See  
VENDOR AND PURCHASER, 28.]

## INTERNATIONAL LAW.

By the Treaty of Tientsin, Article XV., it is provided that "all questions in regard to rights, whether of property or persons, arising between British subjects, shall be subject to the jurisdiction of the British authorities." The appellant, a British subject, on behalf of the Chinese Government, engaged the respondent, a British subject, as a Professor at a Chinese College. In consequence of representations made by the appellant to the Chinese Government, the respondent was dismissed. In an action by the respondent against the appellant for false representation,—Held, first, that the wrong complained of not being an act of the Chinese Government, the action was properly brought in the British Court at Shanghai; secondly, that communications made by the appellant to the Chinese Government were privileged and so far justified, as to rebut the inference of malice arising from defamatory statements. *Hart v. Gumpach*, 42 Law J. Rep. (N.S.) P. C. 25; Law Rep. 4 P. C. 439.

*Damage by collision: ship belonging to Khedive of Egypt: immunity from arrest.* [See SHIPPING LAW, F 1.]

## INTERPLEADER.

### (A) AT LAW.

(a) *Equitable rights.*

(b) *Jurisdiction and practice of County Court.*

### (B) IN EQUITY.

#### (A) AT LAW.

(a) *Equitable rights.*

1.—Upon the hearing of an interpleader summons at chambers a Judge has power to recognise equitable rights. *Duncan v. Cashin*, Law Rep. 10 C. P. 554, and *Englebach v. Nixon*, 44 Law J. Rep. (N.S.) C. P. 396; Law Rep. 10 C. P. 645.

Furniture, which had been settled by a testator on a married woman for her separate use, was replaced, as it were, out of new furniture bought by her out of money forming her separate income, and paid to her by her trustee. Such new furniture being seized by the sheriff under an execution against the goods of her husband was claimed by the wife's trustee as part of the trust property:—Held, that a Judge at chambers on an interpleader summons by the sheriff had power to recognise the equitable right of the wife, and to order the sheriff to withdraw without directing an issue. *Ibid.*

(b) *Jurisdiction and practice of County Court.*

2.—The plaintiff having claimed goods seized under an execution from a County Court, an interpleader summons issued under section 31 of the County Court Act, 1867, and the plaintiff gave particulars, but did not therein claim damages as directed by Rule 175. His claim to the goods was adjudicated upon by the County Court Judge, who made an order which was in the plaintiff's favour with respect to part of the goods. An action was subsequently brought by the plaintiff in the Court of Exchequer against the execution creditor for special damages resulting from the seizure of the goods:—Held, that the claim of damages should have been made at the time and in the manner prescribed by the above-mentioned Act and Rule, and that the order of the County Court Judge being "final and conclusive," the action could not be maintained. *Death v. Harrison*, 40 Law J. Rep. (N.S.) Exch. 26; Law Rep. 6 Exch. 15.

[And see COUNTY COURT, 21, 22.]

### (B) IN EQUITY.

3.—Stakeholders having a bill filed against them by one set of claimants, and an action brought by the others (the legal owners), who were only made parties to the first bill by amendment after the action was commenced, filed a bill to restrain the action, not however making the first claimants parties. The bill of the first claimants having been dismissed,—Held (reversing the decision of Bacon, V.C., 43 Law J. Rep. (N.S.) Chanc. 239), that the bill of the stakeholders against the second claimants must be dismissed with costs, and an inquiry as to damages under their undertaking was directed. *Laing v. Zeden*, 43 Law J. Rep. (N.S.) Chanc. 626; Law Rep. 9 Chanc. 736.

The only way in which a person harassed by two claims can protect himself is by an interpleader proceeding. If he litigates with the parties separately, he will have to bear the costs of the party who is successful. *Ibid.*

[And see FIXTURES, 4.]

## INTESTATES.

[See DISTRIBUTIONS, STATUTE OF.]

[Provisions to increase the facilities for taking out administration to intestates possessed of property less than 100*l.* in value, and to reduce the expenses attending the same. 36 & 37 Vict. c. 52.]

[36 & 37 Vict. c. 52 extended to children of poor intestate widows. 38 & 39 Vict. c. 27.]

## INVENTIONS.

[See PATENT.]

[The provisions of 13 & 14 Vict. c. 104, and 15 & 16 Vict. c. 6, extended so as to protect inventions exhibited at international exhibitions in the United Kingdom. 33 & 34 Vict. c. 27.]

## ISLE OF MAN.

*Rates: rent-charge: rateability under local statutes of Isle of Man.* [See RATE, 18.]

*Mines: mining rights: Act of Tynwald, 1703.* [See MINES, 2.]

*Investment allowed on land in, under Lands Clauses Act.* [See LANDS CLAUSES ACT, 34.]

## JERVIS' ACT.

[See JUSTICES' JURISDICTION.]

## JOINT TENANTS.

- (A) WHEN JOINT TENANCY ARISES.
- (B) RIGHTS OF JOINT TENANTS.

## (A) WHEN JOINT TENANCY ARISES.

1.—A testator gave and devised his real and personal estate to his wife for the use and benefit of herself and all his children:—Held, reversing the decision of one of the Vice-Chancellors, that the wife and children took as joint tenants. *Newill v. Newill*, 41 Law J. Rep. (N.S.) Chanc. 432; Law Rep. 7 Chanc. 253.

2.—Gift to relatives after the death of A. and B.:—Held, first, that relatives meant the persons who would take under the Statutes of Distribution. Secondly, that the class was to be determined at the death of the testatrix. Third, that the members of it took as joint tenants. *Eagles v. Le Breton*, 42 Law J. Rep. (N.S.) Chanc. 362; Law Rep. 15 Eq. 148.

3.—Under a will a copyhold estate became vested in A. for life with remainder to B., C. and D., as tenants in common for life, the ultimate reversion being in C. and E. as co-heirs of the testator. During the life of A., B. and C. were in occupation of the estate as tenants to A., and for upwards of twenty years after her death they remained in possession, and farmed the estate at their equal expense:—Held, that B. and C. were joint tenants as to the one-third share of which they came into wrongful possession on the death of A. *Ward v. Ward*, Law Rep. 6 Chanc. 789.

[And see WILL, Construction, I 1-7.]

## (B) RIGHTS OF JOINT TENANTS.

4.—A joint tenancy in income is severed as to each instalment as it becomes payable, without actual payment. *Walmsley v. Foxhall*, 40 Law J. Rep. (N.S.) Chanc. 28.

5.—Shares registered in the joint names of two persons are their joint property, and on the death of one of them the whole liability in respect of the shares accrues to the survivor, and the executors

of the deceased joint tenant are discharged. *In re The Maria Anna and Steinbank Coal and Coke Company (Lim.)*, 44 Law J. Rep. (N.S.) Chanc. 423; Law Rep. 20 Eq. 585.

## JUDGMENT.

- (A) EXECUTION.
  - (a) *Right to issue immediate execution.*
  - (b) *"Actual seizure" under Mercantile Law Amendment Act.*
  - (c) *Rights of execution creditor.*
- (B) CHARGES ON LAND UNDER 27 & 28 VICT. c. 112.
  - (a) *Lands actually delivered in execution.*
  - (b) *Remedies of creditor.*
  - (c) *Form of order for sale.*
- (C) CHARGING ORDER ON SHARES OR STOCK.
- (D) COMMITTAL OF DEBTOR.
- (E) EFFECT OF JUDGMENT AGAINST ONE OF SEVERAL WRONG-DOERS.
- (F) FOREIGN JUDGMENT.

[The law as to Crown debts and judgments in Ireland amended. 34 & 35 Vict. c. 72.]

## (A) EXECUTION.

- (a) *Right to issue immediate execution.*

1.—Judgment for 20*l.* having been recovered and signed against the defendant, a man of known and undoubted wealth, the costs were taxed at 72*l.*, and on the allocatur being given for that sum about one o'clock in the day, the attorney's clerk, who represented the defendant at the taxation, asked the attorney's clerk attending for the plaintiff, to grant time until a return of post in which to pay the money. This the latter refused to do, and he at once issued execution, which was levied at four o'clock the same afternoon. A Master made an order setting aside the *fi. fa.*, and all proceedings thereunder, with costs, on the ground that the execution had been issued with unreasonable haste:—Held, that such order was wrong, as the plaintiff had a right to issue execution instant, not being bound to wait during the time asked for, and no other indulgence of a more reasonable kind having been craved. *Smith v. Smith*, 43 Law J. Rep. (N.S.) Exch. 86; Law Rep. 9 Exch. 121.

- (b) *"Actual seizure" under Mercantile Law Amendment Act.*

2.—Such a seizure by a sheriff of a debtor's goods under an execution as would have been good before the Mercantile Law Amendment Act, 1856, is an "actual seizure" within s. 1 of that statute; and the expression "actual seizure" means no more than "seizure." *Gladstone v. Padwick*, 40 Law J. Rep. (N.S.) Exch. 154; Law Rep. 6 Exch. 203.

Where premises, consisting of a mansion house, offices, gardens, farm and farm house, are in the same county and in one and the same occupation

as an entirety, a seizure by a sheriff, at the mansion house, of part of the effects liable to the execution in the name of the whole, is an "actual seizure" within the statute of everything on the premises liable to the execution, whatever the extent of the premises, and however dispersed the effects may be. *Ibid.*

Semble, per Bramwell, B.—Knowledge that a writ of execution will probably at a certain time be delivered to the sheriff, is not, when that time arrives, notice that it has been delivered within the statute. *Ibid.*

(c) *Rights of execution creditor.*

*Rights of execution creditor as against trustee in bankruptcy.* [See *BANKRUPTCY*, G.]

*Railway Company: rights of judgment creditor in possession under *elegit*.* [See *RAILWAY*, 18, 19.]

*Judgment creditor: leave to proceed with execution after winding-up order.* [See *COMPANY*, I 65.]

*Enforcement of rule of Court: garnishee order.* [See *ATTACHMENT*, 4.]

*Seizure by sheriff in execution after expiration of tenancy: stat. 8 Ann. c. 14.* [See *LANDLORD AND TENANT*, 14.]

*Action against sheriff for not levying.* [See *SHERIFF*, 3.]

(B) CHARGES ON LAND UNDER 27 & 28 VICT.  
c. 112.

(a) *Lands actually delivered in execution.*

3.—Creditors instituted a suit for administration of the testator's estate, and obtained an order for payment into Court by the defendant of certain moneys in respect of the estate. The moneys were not paid into Court. The plaintiffs then procured a writ of sequestration, to be issued against the defendant for contempt of Court; and the sequestrators thereunder seized his real and personal estates. The plaintiffs then presented a petition, praying for an order for the sale of the defendant's real estate:—Held, that neither the plaintiffs, nor the sequestrators, nor the Court, were "creditors to whom the lands of the debtor had been actually delivered in execution, within the above statutes," and that the petition must be dismissed with costs. *Johnson v. Burgess*, 42 Law J. Rep. (N.S.) Chanc. 400; Law Rep. 14 Eq. 398.

4.—An estate in remainder cannot be delivered in execution by the sheriff. *In re South*, 43 Law J. Rep. (N.S.) Chanc. 441; Law Rep. 9 Chanc. 369.

5.—To entitle a judgment creditor to a valid charge on his debtor's real estate, under 27 & 28 Vict. c. 112, there must be actual delivery in execution under the writ of *elegit*. The Act makes no distinction in that respect between hereditaments corporeal and incorporeal. *Hatton v. Haywood*, 43 Law J. Rep. (N.S.) Chanc. 372; Law Rep. 9 Chanc. 229.

Where the estate of the judgment debtor is equitable only and therefore incapable of delivery

in execution the creditor should obtain the decree of the Court of Chancery vesting in him the estate of the debtor, and this will be equivalent to delivery in execution in the case of legal estates. *Ibid.*

The plaintiff recovered a judgment at law against the owner of the equity of redemption in certain real estate. The judgment was duly registered, and a writ of *elegit*, also duly registered, was issued against the lands of the judgment debtor, and delivered to the sheriff for execution, but in consequence of the debtor's interest in the lands being merely equitable, the sheriff was unable to execute the writ, and he accordingly returned "*nil*." The debtor subsequently became bankrupt. A bill having been filed by the judgment creditor for a declaration that his judgment constituted a valid charge on his debtor's equity of redemption, a demurrer for want of equity was allowed by one of the Vice-Chancellors, and upon appeal the judgment was affirmed by the full Court. *Thornton v. Finch* (4 Giff. 515; 34 Law J. Rep. (N.S.) Chanc. 466) observed upon. *Ibid.*

(b) *Remedies of creditor.*

6.—Where a judgment creditor has sued out a writ of *elegit*, but cannot proceed in consequence of the debtor's estate being mortgaged, his proper course is to file a bill against the debtor and his mortgagee for accounts, redemption and foreclosure. *Beckett v. Buckley*, Law Rep. 17 Eq. 435.

7.—A railway company being indebted to the contractor for its original line, in a sum of 5,734*l.*, obtained an Act of Parliament for the making of an extension line, which Act authorised the raising of 85,000*l.* by shares to be called "extension shares" and of 28,000*l.* by mortgage, and enacted that the works thereby authorised should for financial purposes form a separate undertaking, and that the capital and new shares should constitute a separate capital, and that the money to be raised by mortgage should be applied only to the purposes authorised by the Act. The contractor having obtained judgment for the amount due to him, extended certain surplus lands acquired under the extension Act, and then petitioned the Court for a sale:—Held (affirming the decision of Wickens, V.C.), that the judgment creditor was entitled to his order for sale; for that, whatever might be the equities of the shareholders *inter se*, that could not affect the rights of the creditor to have the lands sold to pay the debt due to him. *In re Ogilvie*, 41 Law J. Rep. (N.S.) Chanc. 336; Law Rep. 7 Chanc. 174.

8.—A judgment creditor who has in 1872 sued out an *elegit*, to which a return of *nil* has been made by the sheriff, the legal estate in the debtor's lands being vested in a mortgagee may, on a bill filed against the debtor and the prior incumbrancers, obtain a decree for a sale and receiver of the rents of an equity of redemption of the debtor, subject to the rights of prior incumbrancers. He cannot obtain a declaration that he has a charge or a decree for foreclosure. *Wells v. Kilpin*, 44

Law J. Rep. (N.S.) Chanc. 184; Law Rep. 18 Eq. 298.

(c) *Form of order for sale.*

9.—Form of order where, upon the petition of a judgment creditor, a sale of land of a debtor was directed in addition to the usual enquiries. *Houson v. Trant*, 42 Law J. Rep. (N.S.) Chanc. 808.

(C) CHARGING ORDER ON SHARES OR STOCK.

10.—The declaration alleged that the plaintiff having, on the 13th of February, 1872, recovered judgment against S., on the plaintiff's application a Judge's order *nisi* was made, on the 16th of February, under 1 & 2 Vict. c. 110, s. 14, charging with the judgment debt certain shares in the defendant company; that the defendants, a public company in England, were registered under the Joint Stock Companies Acts; that the shares were then standing in the name of S. in his own right within the meaning of section 14; that notice of the order was afterwards on the same day given to an authorised agent of the company; that after receiving the notice the company permitted a transfer of the shares to F.; and that after the shares ceased to stand in S.'s name the order was made absolute. The declaration then alleged that the defendants became thereupon, under section 15 liable to the plaintiff for such part of the value of the shares as would satisfy the unpaid judgment debt. The defendants pleaded on equitable grounds that on the 28th of December, 1871, S. sold all his interest in the shares for valuable consideration to F., and executed a transfer thereof; that on the 17th of January, 1872, F. gave notice thereof to the defendants, and requested them to register the transfer; that they returned the transfer, which was not duly stamped, to F., that it might be duly stamped; that on the 19th of February they received from F. the transfer duly stamped and registered it; and except as above the defendants never permitted any transfer of the shares:—Held, a good plea, since at the time the order *nisi* was made the shares were not standing in the name of S. in his own right within the meaning of 1 & 2 Vict. c. 110, s. 14. *Gill v. The Continental Gas Union Company*, 41 Law J. Rep. (N.S.) Exch. 176; Law Rep. 7 Exch. 332.

(D) COMMITTAL OF DEBTOR.

11.—Where a judgment debt is not payable by instalments there is no power under section 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), to commit the debtor more than once for default. *Horsnail v. Bruce*, 42 Law J. Rep. (N.S.) C. P. 140; Law Rep. 8 C. P. 378.

[And see DEBTORS ACT, 14–18.]

(E) EFFECT OF JUDGMENT AGAINST ONE OF SEVERAL WRONG-DOERS.

12.—Judgment against one of two or more joint wrong-doers is a bar to an action against the others for the same cause of action, although

such judgment be unsatisfied. *Brinsmead v. Harrison*, (Exch. Ch.), 41 Law J. Rep. (N.S.) C. P. 190; Law Rep. 7 C. P. 547: affirming the judgment of the Court of Common Pleas, 40 Law J. Rep. (N.S.) C. P. 281; Law Rep. 6 C. P. 584.

(F) FOREIGN JUDGMENT.

13.—A foreign judgment of a competent Court cannot be impeached on appeal, unless manifest error appears on the face of it, or it be shewn to have been obtained by fraud or to be wanting in the conditions of natural justice; but it cannot be applied to persons who were not parties to the litigation, except where the judgment is *in rem*. *Messina v. Petrocovichino*, 41 Law J. Rep. (N.S.) P. C. 27; Law Rep. 4 P. C. 144.

*Appointment of receiver in suit by judgment creditor.* [See RECEIVER, 1.]

*Proof by joint creditor in administration suit.* [See ADMINISTRATION, 3, 4.]

JUDICATURE ACT.

[Additional rules of Court with scale of costs and district registries. 12th August, 1875. See 44 Law J. Rep. (N.S.) Introd.]

[And see SUPREME COURT OF JUDICATURE.]

JUDICIAL SEPARATION.

[See DIVORCE, E.]

JURISDICTION AT LAW.

(A) COURT OF ERROR.

(B) TRIAL AT BAR.

(C) OVER ACTION REMITTED TO COUNTY COURT.

(D) BREACH OF PROMISE OF MARRIAGE.

(E) OVER JUSTICES OF THE PEACE.

(F) REFERENCE TO ARBITRATION.

[Powers conferred upon the Chief Justices of the Courts of Queen's Bench and Common Pleas and the Chief Barons of the Exchequer to adjust from time to time the sittings of those Courts in Banco, at Nisi Prius. 33 Vict. c. 6.]

(A) COURT OF ERROR.

1.—A Court of Error has no larger power to draw inferences than had the Court of original jurisdiction. Where, in a special case, power for the Court to draw inferences from the facts stated is not reserved, neither the Court of first instance nor the Court of Error can draw such inferences. *Latter v. White* (H.L.), 41 Law J. Rep. (N.S.) Q. B. 342; Law Rep. 5 E. & I. App. 578.

2.—Upon an appeal to the Exchequer Chamber from a decision of the Court below, making absolute a rule for a new trial, the respondent cannot

support that decision on the ground that the verdict was against the weight of evidence; for under the Common Law Procedure Act, 1854, the Court of appeal has no jurisdiction to entertain that question in any form. *Morrison v. The Universal Marine Insurance Company* (Exch. Ch.), 42 Law J. Rep. (n.s.) Exch. 115.

(B) TRIAL AT BAR.

3.—An indictment found by the grand jury in the Central Criminal Court for perjury committed within the jurisdiction of that Court contained two counts, in one of which the perjuries assigned were in respect of an oath taken before a Commissioner in Chancery, sitting in the city of London. In the other count the perjuries assigned were in respect of an oath taken by the defendant in the sessions house at Westminster, on the trial of an ejection in the Court of Common Pleas. The indictment was removed into this Court by a writ of *certiorari*, which, as required by 9 & 10 Vict. c. 24, s. 3, specified "Middlesex" as the county in which it should be tried. On the application of the Attorney-General it was ordered that the trial should be at bar. This Court, in Hilary Term, under statute 11 Geo. 4. & 1 Will. 4. c. 70, s. 7, appointed for the trial the 23rd of April, 1873 (being a day in Easter Term), and every day up to and inclusive of the 1st of November, 1873, being the day before the first day of Michaelmas Term; and further ordered, that, in case the trial should not terminate on or before the 1st of November, the further trial should be adjourned till Michaelmas Term next, and be thereafter continued at such times as the Court should then direct. The jury was taken from the county of Middlesex, and the trial at bar commenced. The Court did not sit continuously, but adjourned not only over Sundays and holidays, but also over days included in this period on which it might have sat. In particular, there was an adjournment from the 31st of October, 1873, to the 17th of November, 1873, which was a day in Michaelmas Term. The defendant's counsel objected to this last adjournment, and the Court adjourned without consent. The trial having been protracted, this Court in Michaelmas Term, 1873, made a second order, appointing every day up to Michaelmas Term, 1874, for the trial. The trial proceeded, and on the 28th of February, 1874, a day in the vacation before Easter Term, the defendant was found guilty, and the Court then passed upon him sentence of penal servitude upon each count of the indictment:—Held, that the proceedings were regular, and that the sentence was properly pronounced. *The Queen v. Castro*, 43 Law J. Rep. (n.s.) Q. B. 105; Law Rep. 9 Q. B. 350.

(C) OVER ACTION REMITTED TO COUNTY COURT.

4.—Where an action commenced in a Superior Court has been remitted to a County Court under the County Courts Act, 1867, section 10, the Superior Court has no longer jurisdiction to make an order for costs under section 5. *Moodie v.*

DIGEST, 1870-1875.

*Steward*, 40 Law J. Rep. (n.s.) Exch. 25; Law Rep. 6 Exch. 35.

(D) BREACH OF PROMISE OF MARRIAGE.

5.—The defendant, a British subject residing in Germany, agreed to marry the plaintiff. The agreement was made in Germany, and the marriage was to take place in that country, though no precise time for the ceremony was fixed. Subsequently the defendant, while still in Germany, wrote to the plaintiff giving back his promise and withdrawing her own. The letter was received by the plaintiff in England; he wrote refusing to accept her refusal, and urging her to marry him. A writ out of this Court having been personally served upon her, a Master made an order, under section 18 of the Common Law Procedure Act, 1852, that the plaintiff should be at liberty to proceed in the action:—Held, that the order was wrong, that the words "cause of action," in the 18th section, mean the whole cause of action, that the contract was made in Germany, and that the breach occurred there also; the receipt of the letter written by the defendant furnishing the plaintiff with evidence that the defendant had renounced the relation of betrothed persons. The Court declined to concur with the opinion expressed by the Court of Common Pleas in *Jackson v. Spittal* (39 Law J. Rep. (n.s.) C. P. 321; Law Rep. 5 C. P. 542), and adhered to its own decision in *Allhusen v. Malga-rejo* (37 Law J. Rep. (n.s.) Q. B. 169; Law Rep. 3 Q. B. 340). *Cherry v. Thompson*, 41 Law J. Rep. (n.s.) Q. B. 243; Law Rep. 7 Q. B. 573.

(E) OVER JUSTICES OF THE PEACE.

[See JUSTICE OF THE PEACE.]

(F) REFERENCE TO ARBITRATION.

*Compulsory reference.* [See ARBITRATION, 13.]

*Setting aside award.* [See ARBITRATION, 20, 23.]

*Jurisdiction to impeach foreign judgment.* [See JUDGMENT, 13.]

JURISDICTION IN EQUITY.

(A) GENERAL PRINCIPLES GOVERNING EXERCISE OF JURISDICTION.

- (a) *Mistake.*
- (b) *Where statutory remedy has not been had recourse to.*
- (c) *Assumption of jurisdiction by fictitious issue.*

(B) CONCURRENT JURISDICTION WITH OTHER COURTS.

- (a) *With Courts of law.*
  - (1) *Fraud or misrepresentation.*
  - (2) *Money demand.*
  - (3) *Delivery up of bond.*
  - (4) *Libel.*
  - (5) *Specific performance.*
- (b) *With Courts of Bankruptcy.*

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## (C) IN RESPECT OF PERSONS AND PROPERTY OUT OF THE JURISDICTION.

## (D) OVER PARTICULAR PERSONS.

(a) *Commissioners for Reduction of National Debt.*(b) *Members of Inns of Court.*(c) *Executor who has not proved or renounced.*(d) *Against Crown.*(e) *Over persons in contempt.*

## (E) UNDER PARTICULAR ACTS OF PARLIAMENT.

## (F) IN GENERAL.

## (A) GENERAL PRINCIPLES GOVERNING EXERCISE OF JURISDICTION.

(a) *Mistake.*

1.—In cases of mutual mistake equity will interpose to grant relief. *Earl Beauchamp v. Winn*, Law Rep. 6 E. & I. App. 223.

Relief will not be refused merely because circumstances have rendered it difficult to restore the parties to their original condition. *Ibid.*

The maxim *ignorantia juris neminem excusat* applies to ignorance of a well-known rule of law, not to ignorance of the true construction of a doubtful deed of grant. *Ibid.*

Acquiescence arising from ignorance of a man's rights is not a bar to relief. *Ibid.*

[And see MISTAKE.]

(b) *Where statutory remedy has not been had recourse to.*

2.—The Court of Chancery will not entertain a suit to enforce the making or repairing railway accommodation works, unless recourse has been had in the first instance to justices, where by Act of Parliament they have jurisdiction in the matter. *Hood v. The North-Eastern Railway Company*, 40 Law J. Rep. (n.s.) Chanc. 17; Law Rep. 11 Eq. 116.

(c) *Assumption of jurisdiction by fictitious issue.*

3.—A special case was presented raising the question whether, under an appointment, Mrs. P. (deceased) had been tenant in tail or only tenant for life of certain estates, the plaintiff (Mrs. P.'s daughter) contending, first, that Mrs. P. was tenant in tail, in which case the plaintiff was now tenant in tail subject to her father's tenancy by the curtesy; second, that if Mrs. P. was only tenant for life, she (the plaintiff) was entitled now to the whole or part of an estate of inheritance. The plaintiff's father was in possession as tenant by the curtesy:—Held, that, under the circumstances, the Court could not assume jurisdiction, on the ground that the plaintiff was entitled to call for an account, or for the title deeds. *Key v. Key* (4 De Gex, M. & G. 73; 22 Law J. Rep. (n.s.) Chanc. 641), and *Forsbrook v. Forsbrook* (Law Rep. 3 Chanc. 93) considered. *Pryse v. Pryse*, 42 Law J. Rep. (n.s.) Chanc. 253; Law Rep. 15 Eq. 86.

## (B) CONCURRENT JURISDICTION WITH OTHER COURTS.

(a) *With Courts of Law.*(1) *Fraud or misrepresentation.*

4.—A bill will lie by a shareholder to recover from directors of a joint-stock company money paid on false representations, the jurisdiction of Courts of common law in such cases being only concurrent. Observations on dictum of Lord Cairns, L. C., in *Ogilvie v. Currie*, 37 Law J. Rep. (n.s.) Chanc. 541. *Hill v. Lane*, 40 Law J. Rep. (n.s.) Chanc. 41; Law Rep. 11 Eq. 215.

5.—The Court will not grant an injunction to restrain proceedings at law upon a judgment obtained in a foreign Court on the ground that such judgment was obtained by fraud, the Court of Common Law having full jurisdiction to entertain the question of fraud, and being the fittest tribunal to try it. *Ochsenbein v. Papelier*, 42 Law J. Rep. (n.s.) Chanc. 861; Law Rep. 8 Chanc. 695.

[And see next case.]

(2) *Money demand.*

6.—A partner sued in equity for a money demand, alleging by his bill that his co-partner had released the debt, which was still due to the partnership:—Held, that the release created such a difficulty in suing at law for the debt, that the bill was not demurrable for want of equity. *Piercy v. Fynney*, 40 Law J. Rep. (n.s.) Chanc. 464; Law Rep. 12 Eq. 69.

[And see MISTAKE.]

(3) *Delivery up of bond.*

7.—A bill in equity will not lie to have a bond which has been satisfied delivered up. *Binns v. Fisher*, 43 Law J. Rep. (n.s.) Chanc. 188.

(4) *Libel.*

8.—The Court of Chancery has no jurisdiction to restrain the publication of a libel. *Fisher v. The Appollinaris Company (Lim.)*, 44 Law J. Rep. (n.s.) Chanc. 500; Law Rep. 10 Chanc. 297.

Where a person complaining of injury has a choice of remedies by proceeding either civilly or criminally, and elects to take criminal proceedings, it is not against public policy to compromise such proceedings. *Ibid.*

A prosecution instituted by the defendants against the plaintiff under the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88), was by agreement compromised, and the plaintiff gave the defendants a written apology, requesting them not further to continue proceedings against him, and authorising them to make such use of the apology as they might think necessary. Upon demurrer to a bill to restrain the excessive publication of this apology, —Held, reversing the decision of one of the Vice-Chancellors, that the Court had no jurisdiction to interfere. *Ibid.*

(5) *Specific performance.*

[See SPECIFIC PERFORMANCE, 4.]



(b) *With Court of Bankruptcy.*

[See also BANKRUPTCY, A.]

9.—To a bill filed by an equitable mortgagee against the trustee under liquidation of the mortgagor, seeking a sale of the security, the defendant demurred on the ground that the Court of Bankruptcy was the proper tribunal. Demurrur allowed by one of the Vice-Chancellors, but overruled on appeal with reluctance. *White v. Simmons*, 40 Law J. Rep. (N.S.) Chanc. 689; Law Rep. 6 Chanc. 555.

10.—A Court of Equity will not interfere upon any question arising out of a creditor's composition deed, or other proceedings in bankruptcy, except under special circumstances. *Graham v. Winterston*, 42 Law J. Rep. (N.S.) Chanc. 633; Law Rep. 16 Eq. 243.

A solicitor who has not been allowed costs in bankruptcy is not entitled to file a bill or plaint in a Court of Equity to recover them. *Ibid.*

11.—Although under the provisions of the Acts of Parliament relating to bankruptcy in cases of registered arrangement deeds the Court of Bankruptcy is armed with powers, both legal and equitable, large enough to do complete justice, the jurisdiction of a Court of Equity is not thereby ousted, as between the trustee of a deed of arrangement, and a third person who is a stranger to the bankruptcy. *Ellis v. Silber*, 42 Law J. Rep. (N.S.) Chanc. 666; Law Rep. 8 Chanc. 83.

*Jurisdiction to set aside sale made in proceedings in Bankruptcy.* [See BANKRUPTCY, A 12.]

(C) IN RESPECT OF PERSONS AND PROPERTY OUT OF THE JURISDICTION.

12.—The subject-matter of the suit was a mine in America, in which the plaintiff and the defendants P. and B. (all Americans) were interested. Various negotiations and contracts were made and entered into between the parties, under or by virtue of which an English company (limited) was formed here to work the mine. P. came over to this country to superintend the English company, but B. remained throughout in America. Disputes arose, and a suit was instituted here to restrain P. from selling certain shares of the English company; for an account; and for other relief. P. did not object to the jurisdiction. An order was made in the suit to serve process upon B. in America, which was done:—Held, upon a motion by B. to discharge such order, that as it did not appear that P. was B.'s agent, his not objecting to the jurisdiction did not operate as a waiver by B. of any objection which he (B.) might have to it, or of his rights as an American citizen to be sued in respect of an American contract, in the Courts of his own country alone; and the order was therefore discharged, with costs. *Davis v. Park*, 42 Law J. Rep. (N.S.) Chanc. 204; affirmed, on appeal, 42 Law J. Rep. (N.S.) Chanc. 673; Law Rep. 8 Chanc. 862 n.

13.—The Court will specifically enforce against a foreigner a contract of sale made abroad, if the subject-matter of the contract is within its juris-

diction. *Watson v. Cox*, 42 Law J. Rep. (N.S.) Chanc. 279; Law Rep. 15 Eq. 219.

And, therefore, where a contract was made abroad for the sale of a foreign vessel to be delivered in this country, the Court granted an interim injunction to restrain the removal of the ship from an English port, allowing substituted service of the notice of motion on the captain. *Ibid.*

14.—The Court of Chancery will not entertain a suit in respect of a foreign contract, in which the parties are foreign subjects and the subject-matter is in a foreign country, although the plaintiff's claim is in respect of moneys in the possession of a second defendant as stakeholder, and who is within the jurisdiction. *Matthaei v. Galitzin*, 43 Law J. Rep. (N.S.) Chanc. 536; Law Rep. 18 Eq. 340.

15.—If a foreign government or state having notice of a suit instituted in this country for the administration of a fund in which it is entitled to claim an interest, does not appear, and submit its rights to the jurisdiction of the Court, the Court will proceed in its absence. *Larivière v. Morgan*, 41 Law J. Rep. (N.S.) Chanc. 746; Law Rep. 7 Chanc. 550.

In November, 1870, the French Government instructed their bankers in London to open a special credit in favour of the plaintiff for 40,000*l.*, to be paid to him rateably as certain goods contracted to be supplied by the plaintiff should be delivered. Part of the contract was performed, and a proportionate part of the money was paid to the plaintiff, but a dispute having arisen as to the rest of the contract, the plaintiff filed his bill against the bankers and the French Republic, for a declaration and performance of the trusts of the residue of the 40,000*l.* The French Republic did not appear:—Held, that the Court had jurisdiction over the fund, and in the absence of the French Republic would proceed to ascertain, as it best could, the rights of the parties who appeared. *Ibid.*

16.—The Court declined to entertain a suit in which the plaintiffs were natives of India, the subject-matter was in India, and the defendant was capable of being sued in India. *Doss v. The Secretary of State for India*, Law Rep. 19 Eq. 509.

17.—The Court has jurisdiction to make a foreclosure decree in respect of lands situate out of the jurisdiction. *Paget v. Ede*, 43 Law J. Rep. (N.S.) Chanc. 571; Law Rep. 18 Eq. 118.

*As to service on parties out of jurisdiction and substituted service.* [See PRACTICE IN EQUITY, 124-129.]

(D) OVER PARTICULAR PERSONS.

(a) *Commissioners for Reduction of National Debt.*

18.—The Court has jurisdiction under 5 Vict. c. 5, s. 4, to restrain the Commissioners for the Reduction of the National Debt from paying or transferring an annuity payable by them. *Watts v. Watts*, 40 Law J. Rep. (N.S.) Chanc. 388.

(b) *Members of Inns of Court.*

19.—A Court of Equity has no jurisdiction to restrain an action at law by an Inn of Court against

one of its own members on his suretyship bond. The proper tribunal is that of the Judges of the superior Courts of England and Wales, in their visitatorial capacity over the Inn. *Neate v. Denman*, 43 Law J. Rep. (N.S.) Chanc. 409; Law Rep. 18 Eq. 127.

(c) *Executor who has not proved or renounced.*

20.—Where a person named executor, though he has not proved the will nor acted, has not renounced probate, he cannot be sued by his coadjutor at law for a debt due from him to the estate, and therefore he can properly be sued in equity. *Morley v. White*, 42 Law J. Rep. (N.S.) Chanc. 880; Law Rep. 8 Chanc. 731.

A person named executor, alleged to be a debtor to the estate, was made defendant to a bill for administration, and answered it, stating that he had not acted, and purporting to disclaim. Afterwards he renounced probate, and on the bill being amended to state how he was indebted to the estate, he pleaded the renunciation:—Held, that he was originally properly made a defendant, and that the jurisdiction having once attached, still remained after the renunciation. *Ibid.*

(d) *Against Crown.*

*Jurisdiction to make foreclosure decree against Crown.* [See MORTGAGE, 43.]

(e) *Over persons in contempt.*

[See PRACTICE IN EQUITY, M; and DEBTORS ACT, 2, 3.]

#### (E) UNDER PARTICULAR ACTS OF PARLIAMENT.

*To award damages under 21 & 22 Vict. c. 27, s. 2.* [See INJUNCTION, 37–40.]

*Under Lands Clauses Consolidation Act.* [See that title.]

*Under Trustee Act.* [See TRUSTEE, E.]

*Under Trustee Relief Act.* [See TRUSTEE, D.]

*To award costs under special Act.* [See COSTS IN EQUITY.]

#### (F) IN GENERAL.

*In suits for injunction.* [See INJUNCTION.]

*To appoint receiver.* [See RECEIVER.]

*To set aside unconscionable bargains.* [See USURY.]

*To set aside transactions on ground of fraud or undue influence.* [See FRAUD, UN-DUE INFLUENCE.]

*In suit by a garnishee under attachment out of Lord Mayor's Court.* [See LONDON.]

*In partition suits.* [See PARTITION.]

*To rectify register of company under Companies Act, 1862.* [See COMPANY, D 64.]

*In winding up cases.* [See COMPANY, I 56–59.]

*In respect of infants.* [See INFANT; PARENT AND CHILD.]

*In patent cases.* [See PATENT.]

*On petition for opinion of Court under Lord St. Leonard's Act.* [See PRACTICE IN EQUITY, 102.]

*Jurisdiction to order sale by auction by chief clerk.* [See PRACTICE IN EQUITY, 117–120.]

*To set aside award.* [See ARBITRATION, 22.]

#### JURY.

[33 & 34 Vict. c. 77, as to payment of jurors, repealed. 34 & 35 Vict. c. 2.]

[The Acts as to juries in Ireland amended. 35 & 36 Vict. c. 25; 36 & 37 Vict. c. 27; 37 & 38 Vict. c. 28.]

[Regulæ Generales, Michaelmas Term, 1870, relating to trials in London and Middlesex, and at the assizes. 40 Law J. Rep. (N.S.) C. L. 1.]

#### Expenses.

1.—The payment of fees to justices' clerks "for notice to parish officers to return and verify jury lists, and for allowance of list and return thereof," are not expenses properly incurred within the meaning of 7 & 8 Vict. c. 101, s. 60, and a rule to quash the disallowance of the same in the overseers' accounts by the Poor Law auditor was discharged. *The Queen v. Overseers of Haslingfield*, 43 Law J. Rep. (N.S.) Q. B. 38; Law Rep. 9 Q. B. 203.

Semble—that if the fees had been payable to the overseers, the amount ought to have been allowed to them out of the poor-rate. *Ibid.*

#### View by jury.

2.—It is competent for the judge presiding at the trial of a criminal offence to permit the jury to view the locus in quo at any time during the trial, and it is discretionary with him to take such precautions as he may deem necessary as to the persons to accompany them, and with regard to the communications which they may receive from such persons or others. *The Queen v. Martin*, 41 Law J. Rep. (N.S.) M. C. 113; Law Rep. 1 C. C. R. 378.

Quære—whether if any evidence be given irregularly to the jury at the view, and that fact be duly examined into by the Court and ascertained, it be a matter to be placed upon the record, and the subject of a writ of error, or be ground for a case for this Court or for an application to the Home Secretary for remission of the sentence. *Ibid.*

Quære, also, whether this Court has jurisdiction to award a *venire de novo* in the case of a mistrial. *Ibid.*

#### JUSTICE OF THE PEACE.

##### (A) JURISDICTION OF JUSTICES.

(a) *Joint information: several convictions.*

(b) *Order for payment of money.*

(c) *Claim of right.*

(d) *In particular cases.*

(B) QUARTER SESSIONS.

- (a) *Signature to notice of appeal*
- (b) *Power to make rules.*
- (c) *Power to order justices to pay costs.*
- (d) *Appeal to, referred to arbitration.*
- (e) *Power to state case to Superior Court.*
- (f) *Table of fees.*
- (g) *Adjournment.*
- (h) *Licensing.*

(C) JURISDICTION AND PRACTICE OF SUPERIOR COURT.

- (a) *Time for certiorari.*
- (b) *Amendment of order of justices.*
- (c) *Case stated.*
- (d) *Power to order justices to pay costs.*
- (e) *Mandamus.*

[The practice of the Courts of Law with respect to the review of the decisions of justices of the peace amended. 35 & 36 Vict. c. 26.]

(A) JURISDICTION OF JUSTICES.

(a) *Joint information: several convictions.*

1.—Upon the hearing of a joint information against two persons for using a gun on Sunday, for the purpose of killing game, such persons have no right to insist that the charge should be heard separately against each, so that each might call the other as a witness on his behalf. Nor is there anything wrong in drawing up separate convictions, ordering the payment of separate penalties by the persons against whom the joint information has been laid. *The Queen v. Littlechild*; *The Queen v. Heslop*, 40 Law J. Rep. (N.S.) M. C. 137; Law Rep. 6 Q. B. 293.

(b) *Order for payment of money.*

2.—The adjudication of two justices under the Lands Clauses Act (8 Vict. c. 18), s. 22, as to the value of an interest in lands required for the execution of an undertaking within that Act, in respect to which no agreement has been come to between the promoters and the party entitled to sell as to the value thereof, is not an order for the payment of money within 11 & 12 Vict. c. 43, s. 11 (Jervis' Act), and the summons to hear and determine such question of compensation is not out of time if issued after six months from the notice to treat given by the promoters of the undertaking. *The Queen v. Hannay*, 44 Law J. Rep. (N.S.) M. C. 27.

(c) *Claim of right.*

3.—A *bonâ fide* claim of right under ordinary circumstances suffices to render a conviction by justices for any criminal offence improper; for they cannot try the existence of a right *bonâ fide* set up in answer to a criminal charge brought before them. But although where there must be a *mens rea* to constitute an offence, an honest claim of right, however absurd, will frustrate a summary conviction, yet, where the absence of *mens rea* is not necessarily a defence, the person who sets up a claim of right must shew some ground for its assertion, and if he fails to do so, is liable to be convicted of the offence charged against him.

*Watkins v. Mayor*, 44 Law J. Rep. (N.S.) M. C. 164; Law Rep. 10 C. P. 662.

An information was preferred against the appellant for killing a rabbit, contrary to 1 & 2 Will. 4. c. 32, s. 30. It was proved that E. claimed to be lord of the manor of A., and a witness stated that the manor had belonged to two persons, who were predecessors in title to E. A deputation was also produced, which appeared to have been duly enrolled by the clerk of the peace of the county, by which S. was appointed gamekeeper for and within the manor of A. The witness also stated that he had known the common of A. for forty years, and had always believed it to be part of the manor of A., and that E. had allowed him to shoot over the common. The appellant went by direction of his father on to the common of A., and there shot a rabbit. The father had previously acquired the lease of some land near the common, and had built a house on it. He claimed in respect of this land, as one of the commoners, a right of killing rabbits on the common, but no evidence was adduced that any of the commoners had ever claimed or exercised a right of killing rabbits on the common. The claim to kill rabbits was made by the appellant and his father *bonâ fide*, and the justices having convicted the appellant,—Held, first, that there was evidence that the manor of A. existed, that the common of A. was within it, and that E. was the lord of it; secondly, that as the appellant had given no sufficient evidence of a right justifying him in killing the rabbit, he was properly convicted, although he *bonâ fide* believed himself to be entitled to shoot the rabbit. *Ibid*.

4.—The respondent was the owner, at a place above the flow of the tide, of the soil of a river which had been made navigable under several Acts of Parliament, which did not affect the right to the soil. The public had for many years fished in the river, and on the respondent setting up a notice prohibiting this, the appellant, in order to raise the question of the right of the public, fished there, and was summoned under 24 & 25 Vict. c. 96, s. 24, for fishing in water where there was a private right of fishing. He claimed a right, as one of the public, to fish:—Held, that such a right could not be acquired, and therefore the claim did not oust the jurisdiction of the justices. *Hargreaves v. Diddams*, 44 Law J. Rep. (N.S.) M. C. 178; Law Rep. 10 Q. B. 582.

*Jurisdiction of justices, when ousted by claim of right.* [See HIGHWAY; MALICIOUS INJURY, 2.]

(d) *In particular cases.*

*Summary jurisdiction under Master and Servant Act, 1867.* [See MASTER AND SERVANT, E.]

*Jurisdiction as to licensing.* [See ALHOUSE.]

*Jurisdiction on bastardy summons.* [See BASTARDY.]

*Jurisdiction on information for neglect to supply water to cattle on transit by rail.* [See ANIMALS, 3.]

*As to abatement of nuisance.* [See NUISANCE, 3-8.]

## (B) QUARTER SESSIONS.

## (a) Signature to notice of appeal.

5.—By 12 & 13 Vict. c. 45, s. 1, in every case of appeal (except as thereafter mentioned) to the General or Quarter Sessions of the Peace, the notice of appeal "shall be in writing signed by the person or persons giving the same, or by his, her or their attorney, on his, her or their behalf;" &c.:—Held, that a notice of appeal signed, in the name of the appellant, by a clerk to the appellant's attorney, by the authority of the appellant, and afterwards acknowledged by him, was sufficiently signed. *The Queen v. The Justices of Kent*, 42 Law J. Rep. (n.s.) M. C. 112; Law Rep. 8 Q. B. 305.

## (b) Power to make rules.

6.—Upon appeal to quarter sessions from the refusal of a license at the special licensing sessions it appeared that the preliminaries introductory to an appeal required by 9 Geo. 4. c. 61, s. 27, had been observed, but that the appeal had not been entered and the grounds of appeal deposited with the clerk of the peace three clear days before the first day of the sessions, pursuant to a rule or standing order of the sessions. The Court thereupon refused to allow the appeal to be entered, and made an order on the appellant for costs:—Held, that the order of sessions must be quashed, for the rule was one which they had no power to make inasmuch as it did not merely relate to the practice of the sessions, but added to the conditions prescribed by the statute with regard to appeals. *The Queen v. Pawlett*, 42 Law J. Rep. (n.s.) M. C. 157; Law Rep. 8 Q. B. 491.

## (c) Power to order justices to pay costs.

7.—Upon an appeal to quarter sessions under 34 & 35 Vict. c. 32, s. 3, the quarter sessions have no power to order the justices who wrongfully convicted the appellant to pay costs. *The Queen v. Goddall*, 43 Law J. Rep. (n.s.) M. C. 119; Law Rep. 9 Q. B. 557.

## (d) Appeal to, referred to arbitration.

8.—On reference to arbitration of an appeal at quarter sessions under 12 & 13 Vict. c. 45, s. 13, no mention being made of costs, the appeal having been regularly adjourned from sessions to sessions, on the award being made, the subsequent sessions have no power to award any costs either of the reference or appeal, their duty being simply to enter the award as the judgment of the Court. *The Queen v. The Justices of Middlesex. The West London Extension Railway Company v. The Fulham Union Assessment Committee*, 40 Law J. Rep. (n.s.) M. C. 109; Law Rep. 6 Q. B. 220.

Power as to costs. [See ARBITRATION, 81.]

## (e) Power to state case to Superior Court.

9.—Upon an application to enter and respite an appeal, the Court of Quarter Sessions has no power to state a special case; and the Court of Queen's Bench will take no notice of the facts of a case so stated. *The Queen v. The London and*

*North-Western Railway Company*, 43 Law J. Rep. (n.s.) M. C. 57; Law Rep. 9 Q. B. 153, *sub nom. The Queen v. Sutton Coldfield*.

## (f) Table of fees.

10.—In an action brought under 26 Geo. 2. c. 14, s. 2, to recover a penalty against a clerk to justices of the peace for extorting excessive fees from the plaintiff, the venue is local by 31 Eliz. c. 5, s. 2; for 26 Geo. 2. c. 14, s. 2, gives a right of action for the penalty to any person, and not to the party grieved alone. *Lewis v. Davis*, 44 Law J. Rep. (n.s.) Exch. 86; Law Rep. 10 Exch. 86.

Semble—per Blackburn, J., Mellor, J., and Archibald, J., that the power given by 26 Geo. 2. c. 14 to justices of the peace from time to time to make a table of fees may be exercised, although no table was made in 1753 as required by the statute. *Ibid*.

## (g) Adjournment.

11.—An adjournment of quarter sessions to a subsequent sessions is a continuation of the original sessions. Therefore, where, at the general quarter sessions holden in October, an appeal under 32 & 33 Vict. c. 27, and 9 Geo. 4. c. 61, s. 27, was dismissed with costs, but the amount of such costs was not ascertained by the clerk of the peace until the sessions holden by adjournment in November,—Held, that an order of sessions for the payment by the appellant of such ascertained amount of costs was good. *Rawnsley v. Hutchinson*, 40 Law J. Rep. (n.s.) M. C. 97; Law Rep. 6 Q. B. 305.

## (h) Licensing.

*Discretion of justices as to granting music and dancing licenses.* [See PUBLIC ENTERTAINMENT.]

*Stopping up or diverting highway: time for giving notice of appeal.* [See HIGH WAY, 7.]

## (C) JURISDICTION AND PRACTICE OF SUPERIOR COURT.

## (a) Time for certiorari.

12.—The general rule that application for a writ of mandamus to the quarter sessions to enter continuances and hear an appeal must be made not later than the term following the sessions at which the refusal was made, does not apply to an application to remove into this Court an order of sessions for the purpose of getting it quashed. *The Queen v. The Justices of Brecknockshire*, 42 Law J. Rep. (n.s.) M. C. 135.

## (b) Amendment of order of justices.

13.—The mother of a bastard child, born on the 27th of May, 1870, applied on the 11th of August to M., a justice, who issued a summons against T., the alleged father. Several successive summonses were issued, and in March, 1871, T. was served with a summons to appear before the justices on the 11th of April. The mother and T. attended, but the mother withdrew the sum-

mons and on the same day applied to B., another justice, who issued a summons requiring T. to appear on the 25th of April. On that day an order was made, which recited the application to M., adjudged T. to be the father of the child, and ordered him to pay 2s. 6d. per week, commencing from the 11th of August, 1871, on which day the mother had applied to M. :—Held, that section 7 of 12 & 13 Vict. c. 45 gave the Court no power to amend this invalid order, by alleging the application to B. instead of the application to M., or by making the payments to begin from the 11th of April, 1871, instead of from the 11th of August, 1870. *The Queen v. Tomlinson*, 42 Law J. Rep. (N.S.) M. C. 1; Law Rep. 8 Q. B. 12.

(c) *Case stated.*

14.—On a case stated under 20 & 21 Vict. c. 43, the Court will decide a point of law arising on the case, though such point was not raised before the justices. *Knight v. Halliwell*, 43 Law J. Rep. (N.S.) M. C. 113; Law Rep. 9 Q. B. 412.

(d) *Power to order justices to pay costs.*

15.—By the Criminal Law Amendment Act (34 & 35 Vict. c. 32), s. 3, an appeal to sessions is given against any conviction under the Act. By sub-section 2 the appellant shall, within seven days after the cause of appeal has arisen, give notice to the other party and to the Court of summary jurisdiction of his intention to appeal, and of the ground thereof. By sub-section 5 the Court of Appeal may make such order as to costs to be paid by either party as the Court thinks just. The defendants, having been convicted under the Act, gave notice of appeal to the prosecutor and the justices at petty sessions, and made the justices and prosecutor respondents. The justices did not appear, and the conviction was quashed. In drawing up the order of sessions directing the respondents, or some of them, to pay the appellant's costs, the justices were named as respondents:—Held, that a rule to strike out so much of the order as ordered the justices to pay costs, must be made absolute, as it was quite clear that under the circumstances there was no power to order them to pay costs. *The Queen v. Goodall*, 43 Law J. Rep. (N.S.) M. C. 119; Law Rep. 9 Q. B. 557.

(e) *Mandamus.*

16.—Where justices refused to proceed with an information against a person under the Licensing Act, 1872, 35 & 36 Vict. c. 94, s. 11, for having an untrue statement on his premises as to his license to sell liquor, the Court refused to grant a rule under 11 & 12 Vict. c. 44, s. 5, calling upon the justices to proceed with the case, and held that the remedy was by mandamus. *The Queen v. Percy and others, Justices of Cumberland*, 43 Law J. Rep. (N.S.) M. C. 45; Law Rep. 9 Q. B. 64.

LAND DRAINAGE.

A drainage board appointed under 24 & 25 Vict. c. 133, with all the powers of Commissioners of Sewers, incurred an expenditure of more than 1,000*l.* in and about the obtaining plans and surveys of the lands within their district, and estimates for executing the works which they proposed to carry out. The proprietors of more than one-half the necessary area of the land within the district duly declared their unwillingness that the works should be completed. The defendants made a rate on the occupiers, including the plaintiff, of lands in the district, according to the quantities and qualities of their estates, for the costs, charges and expenses incurred in causing plans and estimates of the works to be prepared. The plaintiff was assessed as the occupier of houses, gardens, and orchards, as well as of land:—Held, that under section 38, the rate was good as a general rate upon the occupiers, and that the expenses were not such as ought to be defrayed out of a special rate upon the owners. *Griffiths v. The Longdon and Eversfield Drainage Board*, 41 Law J. Rep. (N.S.) Q. B. 25; Law Rep. 6 Q. B. 738.

LAND REGISTRY.

[Amendment of the Land Registry Act, 1862. Power to owners of freehold and leasehold lands to apply for registration with absolute or possessory title. Provisions as to dealings with registered lands, &c. Institution of land registries. Section 7 of the Vendor and Purchaser Act (as to tacking and abolition of protection by the legal estate) repealed as from the date thereof except as to anything duly done thereunder before the present Act. 38 & 39 Vict. c. 87.]

1.—When the registered owner of land has granted a first mortgage with the statutory power of sale, and has also granted subsequent mortgages, a purchaser from the first mortgagee is entitled to be registered with an indefeasible title, just as if the subsequent mortgages had not been granted, and he had purchased from the mortgagor and mortgagee together. *In re Richardson's Purchase*, 40 Law J. Rep. (N.S.) Chanc. 616; Law Rep. 12 Eq. 398.

The order made in this case varied. *In re Richardson's Purchase*, 41 Law J. Rep. (N.S.) Chanc. 221; Law Rep. 13 Eq. 142.

2.—When a mortgagor has registered his title under the Transfer of Land Act as an indefeasible title, subject to a mortgage, a purchaser from the mortgagee having entered his conveyance on the register, but not having registered his title as indefeasible, can have the entries of the mortgagor's title removed from the register under section 34. *In re Winter*, 42 Law J. Rep. (N.S.) Chanc. 318; Law Rep. 15 Eq. 166.

LACHES.

*Exoneraton of surety by laches of creditor.*  
[See PRINCIPAL AND AGENT, 14.]

LAND TAX.

Under 42 Geo. 3. c. 116, s. 100, providing that sale moneys of lands sold to redeem the tax on any

lands may be applied in discharge of incumbrances on the lands, or in the purchase of other lands,—Held, that the sale moneys of part of the glebe lands of a vicarage could not be applied in improving the vicarage house. *In re the Nether Stowey Vicarage*, Law Rep. 17 Eq. 156.

### LANDED ESTATES COURT.

Where parties in the character of incumbrancers have obtained an order for sale from the Landed Estates Court in Ireland, and the money has been brought into Court, and on appeal the Court decides that such parties are not incumbrancers, the Court of Appeal has power to order payment of the money to the persons properly entitled. *Grier v. Grier*, Law Rep. 5 E. & I. App. 689.

### LANDLORD AND TENANT.

[For cases as to construction of leases or agreements for leases, see LEASE.]

#### (A) THE TENANCY.

(a) *Constitution of tenancy: new tenancy after determination of prior tenancy.*

(b) *Nature of tenancy.*

(1) *Tenancy from year to year, subject to agreement void as lease.*

(2) *Grant of right of shooting.*

(c) *Notice to quit.*

#### (B) RENT.

(a) *Payment before due.*

(b) *Distress for.*

(1) *What goods may be taken in distress.*

(2) *Effect of, on proceedings by landlord.*

(3) *Where tenant bankrupt.*

(4) *Excessive seizure.*

(5) *Special power to distrain on lands not included in the tenancy.*

(6) *Seizure by sheriff: 8 Anne, c. 14, s. 1.*

#### (C) VALUATION BETWEEN OUTGOING AND INCOMING TENANT.

#### (D) WARRANT OF POSSESSION BY LANDLORD.

#### (E) ENCROACHMENT BY TENANTS.

#### (F) IMPLIED DUTIES ARISING FROM THE RELATION OF LANDLORD AND TENANT.

#### (G) RIGHT TO MONEYS UNDER FIRE POLICY.

[The law relating to the occupation and ownership of land in Ireland amended. 33 & 34 Vict. c. 46.]

[The Landlord and Tenant Act (Ireland) explained and amended as to the purchase of their holdings by tenants. 35 & 36 Vict. c. 32.]

#### (A) THE TENANCY.

(a) *Constitution of tenancy: new tenancy after determination of prior tenancy.*

1.—Wherever a tenancy for years comes to an end either by efflux of time, or by the death or end of title of the lessor, so that either he or his

representative, or any independent owner of the demised hereditament, can without notice eject the tenant, and the person entitled to eject leaves the tenant in possession, and receives rent from him without explanation or stipulation, the person receiving the rent is to be assumed to have created a tenancy upon the terms on which the tenant held in the demise originally made to him; and the holding to be presumed is as of a tenancy from year to year according to the former holding of the tenant, and therefore commencing at a time corresponding to that from which he originally held. *Kelly v. Patterson*, 43 Law J. Rep. (N.S.) C. P. 320; Law Rep. 9 C. P. 681.

Certain premises had been let by the tenant in fee on a lease expiring at Midsummer, 1866: at that date the defendant was in occupation as tenant from year to year to the intermediate lessee, on a demise commencing at Michaelmas; the tenant in fee let the premises on a fresh lease to the plaintiff, commencing at Midsummer, 1866: the defendant continued in occupation and paid rent to the plaintiff. Notice to quit at Midsummer was given by the plaintiff to the defendant, who refused to leave the premises. The plaintiff having sued in ejectment:—Held, that the plaintiff having allowed the defendant to hold over, and having received rent as from year to year without explanation or stipulation, the inference was that there had been a tacit agreement that the defendant should hold from year to year according to the terms of his former tenancy, that is to say, from Michaelmas to Michaelmas, that the notice to quit at Midsummer was wrong, and that the plaintiff must be non-suited. *Ibid.*

2.—Where, at the expiration of a lease, the landlord verbally agrees with the tenant for a new lease, and the tenant remains in possession and does any act referable to the verbal agreement, there is a part performance of the agreement which takes it out of the Statute of Frauds and entitles the tenant to specific performance. *Williams v. Evans*, 44 Law J. Rep. (N.S.) Chanc. 319; Law Rep. 19 Eq. 547.

#### (b) *Nature of tenancy.*

(1) *Tenancy from year to year subject to agreement void as lease.*

3.—When a tenant enters a house under an unsealed agreement to let for a term of more than three years, and occupies and pays rent till the end of the term, he is during the whole term tenant from year to year, subject to all those stipulations in the agreement which are applicable to such a tenancy, and may be sued for the breach of any of them, e.g. one binding him to paint in the last year of the term. *Martin v. Smith*, 43 Law J. Rep. (N.S.) Exch. 42; Law Rep. 9 Exch. 50.

#### (2) *Grant of right of shooting.*

4.—Under an ordinary grant of the exclusive right of shooting over an estate the tenant has no right to prevent the landlord from cutting down trees in the proper course of management of the estate, even though the result of the cutting will

be prejudicial to the shooting. Decision of Hall, V.C., reversed. *Gearns v. Baker*, 44 Law J. Rep. (n.s.) Chanc. 334; Law Rep. 10 Chanc. 355.

(c) *Notice to quit.*

5.—A notice to quit served at a tenant's house upon his servant is sufficient to sustain ejectment notwithstanding that such notice never reached the tenant's hands. The sole question to be considered is whether the servant was the agent of the tenant to receive the notice. *Tanham v. Nicholson*, Law Rep. 5 E. & I. App. 561.

[And see supra No. 1, and LEASE No. 24.]

(B) RENT.

(a) *Payment before due.*

6.—The defendant, a tenant, prepaid his rent to L., his landlord, who afterwards mortgaged his reversion to the plaintiff; one B. brought ejectment against the defendant as being entitled under a mortgage previous to the tenancy, but nothing came of it; the plaintiff wrote to the defendant saying B. no longer had any title, and asking for the rent; the defendant answered, saying he did not understand the application, and asking for particulars; no reply was made, but subsequently the action was brought for the rent:—Held, that though the plaintiff could not recover rent prepaid and accruing due before his letter, yet there was a sufficient notice within 4 Anne, c. 16, s. 10, and he was entitled to recover rent paid before but accruing due after the letter. *Cook v. Guerra*, 41 Law J. Rep. (n.s.) C. P. 89; Law Rep. 7 C. P. 132.

(b) *Distress for.*

(1) *What goods may be taken in distress.*

[The goods of lodgers protected in certain cases against distresses for rent due by the intermediate landlord to the superior landlord. 34 & 35 Vict. c. 79.]

7.—Goods warehoused in the ordinary course of business at a furniture depository are privileged from distress for rent. *Miles v. Furber*, 42 Law J. Rep. (n.s.) Q. B. 41; Law Rep. 8 Q. B. 77.

The plaintiff warehoused furniture at a depository in London, and obtained a receipt signed on behalf of "The London Depository Company, Limited." The business of the depository had some years previously been carried on in the same premises by the company, but previously to the deposit they had, under the powers of their articles of association, assigned the goodwill of their business to B., with liberty to carry on the business in their names, and granted him a lease of the premises. At the time of the deposit the name of the company was painted over the premises; and the plaintiff believed that the business was carried on by them, and did not know that B. was their tenant. The company having distrained the plaintiff's furniture for rent due from B.,—Held, first, that the furniture was privileged from distress for rent; secondly, that even if it had not been so privileged, the company having induced the plaintiff to believe that the business

was carried on by them could not, in another character, distrain upon his goods. *Ibid.*

8.—Sale by auction of the plaintiff's goods on premises occupied by the plaintiff and another (who owed rent to the landlord), and under conditions of sale which provided that each lot was to be considered as delivered at the fall of the hammer, and to remain at the purchaser's risk. The landlord having, after the sale, threatened to distrain on the goods not removed, the auctioneer paid the rent:—Held, that as the loss if the landlord had distrained would have fallen on the purchasers, the auctioneer was not justified in making the payment, so as to be entitled to deduct the amount from the sum realised by the sale of the goods. *Sweeting v. Turner*, 41 Law J. Rep. (n.s.) Q. B. 58; Law Rep. 7 Q. B. 310.

*Distress and seizure of chattels in partnership: attornment by mortgagors.* [See PARTNERSHIP, 7.]

(2) *Effect of, on proceedings by landlord.*

9.—A distress for rent suspends the right of the landlord to recover the rent by action, so long as the goods distrained continue in his hands as a pledge unsold. *Lehain v. Philpott*, 44 Law J. Rep. (n.s.) Exch. 225; Law Rep. 10 Exch. 242.

10.—Where a landlord brought ejectment against his tenant on the 21st of July, claiming as from that day, and after action, distrained for rent due on the 24th of June previous,—Held, that he might still rely, in the action of ejectment, on a forfeiture accruing before the 24th of June. *Grimwood v. Moss*, 41 Law J. Rep. (n.s.) C. P. 239; Law Rep. 7 C. P. 360.

(3) *Where tenant bankrupt.*

11.—A landlord's distress for rent is not liable to be restrained as "an execution or other legal process" within the Bankruptcy Act, 1869, s. 13. *Ex parte the Birmingham and Staffordshire Gas-light Company; In re Fanshaw and Yorston*, 40 Law J. Rep. (n.s.) Bankr. 52; Law Rep. 11 Eq. 615.

12.—A landlord distrained for one year's arrear of rent on goods of a debtor in the hands of a receiver appointed by the Court of Bankruptcy. On an application by the receiver to the County Court Judge for an injunction, the landlord was restrained from proceeding with the distress, and was also committed for contempt of Court. On appeal, it was held that the landlord could distrain as against the receiver without the leave of the Court, and further that the position of a receiver in Bankruptcy is not the same as that of a receiver in Chancery. *Ex parte Till; In re Mayhew*, 42 Law J. Rep. (n.s.) Bankr. 84; Law Rep. 16 Eq. 97.

(4) *Excessive seizure.*

13.—A declaration alleged that the plaintiff was tenant to the defendant of a house, and the defendant wrongfully distrained for certain arrears of rent on goods of the plaintiff of much greater value than the said arrears and of the charges of the distress and appraisement and sale,

although part of the said goods was of sufficient value to have satisfied the said arrears and charges, and thereby made an unreasonable distress contrary to the statute. There was a second count for money had and received. The plaintiff, before the distress, had assigned the goods seized to trustees, for the benefit of his wife. The plaintiff, his wife, and one of such trustees resided in the house: 9*l.* was in arrear for rent, when the defendant distrained for 18*l.* for rent in arrear and the costs, and seized goods to the value of 100*l.* The plaintiff offered to pay 9*l.* and costs and charges. This offer was refused, and the money distrained for, and costs and charges were paid under protest. The plaintiff suffered annoyance from these proceedings:—Held, that the declaration disclosed a good cause of action, and that there was sufficient evidence of an interest in the goods, on the part of the plaintiff, to go to the jury in respect of the first count; and that the plaintiff was entitled to recover the excess of the money paid under protest, and damages for the annoyance he had suffered. *Fell v. Whittaker*, 41 Law J. Rep. (N.S.) Q. B. 78; Law Rep. 7 Q. B. 120.

(5) *Special power to distrain on lands not included in the tenancy.*

[See LEASE 22.]

(6) *Seizure by sheriff.*

14.—Statute 8 Anne, c. 14, by section 1, provides that no goods or chattels being in or upon any messuage, lands or tenements which are or shall be leased for life, &c., shall be liable to be taken by virtue of any execution, unless the party at whose suit the execution is sued out shall before the removal of such goods from off the premises pay to the landlord, &c., all such sum or sums of money as shall be due for rent, &c., provided the said arrears of rent do not amount to more than one year's rent, and in case they do, the judgment may be executed after paying one year's rent:—Held, that the provision in the above section applies only to a case where there is a subsisting tenancy; and therefore where the sheriff seized goods after the tenancy had been determined he was held not liable to an action for selling the goods upon the land without paying over a year's arrears of rent to the landlord. *Cox v. Leigh*, 43 Law J. Rep. (N.S.) Q. B. 123; Law Rep. 9 Q. B. 333.

(C) VALUATION BETWEEN OUTGOING AND INCOMING TENANT.

15.—Where an agreement was made between an incoming and an outgoing tenant by which valuers were appointed, with the consent of the landlord, to value as between them certain tillages for which by the custom of the country the outgoing tenant was entitled to be paid by the landlord or the incoming tenant:—Held, that this agreement was subject to the right of the landlord to be paid arrears of rent due from the outgoing tenant, and that the incoming tenant having paid the amount of the valuation (which was less than the arrears of rent due) to the

landlord was not liable to be sued for such amount by the outgoing tenant. The outgoing tenant, having under his lease a right of converting the straw on the farm into manure with his cattle until the 25th of March next after the expiration of the term, gave up such right to the incoming tenant, whose cattle, in converting such straw, ate a portion of it, which was included in the valuation and valued at 33*l.*:—Held, that the outgoing tenant could recover this sum from the incoming tenant. *Stafford v. Gardner*, Law Rep. 7 C. P. 242.

(D) WARRANT OF POSSESSION BY LANDLORD.

16.—A warrant of possession obtained under 19 & 20 Vict. c. 108, s. 50, by a landlord proceeding in the County Court against his tenant, but not against the person actually in possession, is not conclusive against the latter, who may notwithstanding the warrant bring an action of trespass against the landlord, if the landlord had not in fact a right to the possession of the premises. *Hudson v. Walker*, 41 Law J. Rep. (N.S.) Exch. 51; Law Rep. 7 Exch. (nom. *Hodson v. Walker*).

So held by Channell, B., and Pigott, B.; *contra* by Martin, B. *Ibid.*

(E) ENCROACHMENT BY TENANT.

17.—Where a tenant takes in and encloses adjoining land during his tenancy, the presumption of law that he does it for his landlord, so that the land gained by such encroachment will have to be given up at the end of the tenancy as part of the originally demised premises, is not rebutted by the fact that the landlord expressly assented to the enclosure being made; and where such presumption exists the Statute of Limitations, 3 & 4 Will. 4. c. 27, s. 7, does not apply until the original tenancy has ended. *Whitmore v. Humphries*, 41 Law J. Rep. (N.S.) C. P. 43; Law Rep. 7 C. P. 1.

(F) IMPLIED DUTIES ARISING FROM THE RELATION OF LANDLORD AND TENANT.

18.—A., the tenant for life of an estate, in 1868 leased to B. a farm adjoining plantations in which yew trees were growing, and which the lessor reserved to himself. In March and September, 1869, sheep belonging to B. died from having eaten of the yew that protruded through the fence surrounding the plantations and clippings of yew that had been thrown over the fence by A.'s gardener. A. died in February, 1870; B. continued to hold the farm as the tenant of the trustees of the will by which the estate was settled. In September and October, 1870, four steers belonging to B. got over a ditch, which happened to be nearly dried up, on to land in the hands of the trustees, and died from eating yew there. A bill for the administration of A.'s estate was filed in February, 1871, and B. brought in under the decree a claim against A.'s executors for damages on account of the loss of his sheep and cattle so poisoned; the claim in respect of the steers



being made in this suit by arrangement:—Held, that the claim for the losses which occurred in A.'s life, if ever sustainable, was one in respect of an injury to property coming within statute 3 & 4 Will. 4. c. 42, s. 2, and was made too late. But semble, that it could not in any case have been sustained, for there is no implied warranty on the part of the lessor that his land is free from noxious plants. And as to the claim for the loss of the steers, held there was no obligation thrown by the law upon a landlord as between himself and his tenants to keep up his fences, and therefore the trustees were not liable—reversing the decision of the Master of the Rolls, *Erskine v. Adeane* (42 Law J. Rep. (N.S.) Chanc. 395; Law Rep. 8 Chanc. 759 n.). *Erskine v. Adeane*; *Ben- net's Claim* (No. 1), 42 Law J. Rep. (N.S.) Chanc. 835; Law Rep. 8 Chanc. 756.

#### (G) RIGHT TO MONIES UNDER FIRE POLICY.

19.—Where a lessee having an option of purchase exercised it,—Held, that the lessor could not insist on having moneys received in respect of a fire policy effected by the lessee applied in reinstating the premises. The lessor had, unknown to the lessee, himself insured the premises, and on their destruction by fire the policy moneys were apportioned:—Held, that the lessor was not entitled to retain for his own benefit the moneys received under his policy. *Reynard v. Arnold*, Law Rep. 10 Chanc. 386.

*Lease of shop in Scotland.* [See SCOTCH LAW, 29.]

*Scotch agricultural lease.* [See SCOTCH LAW, 30.]

### LANDS CLAUSES CONSOLIDATION ACT.

#### (A) PURCHASE AND TAKING OF LANDS.

- (a) *Power to take lands.*
  - (1) *For public improvements.*
  - (2) *Certificate of subscription of capital conclusive.*
- (b) *Notice to treat.*
  - (1) *Abandonment of notice.*
  - (2) *Description of tenant's interest.*
- (c) *Specific performance against railway company.*
  - (1) *Compulsory purchase.*
  - (2) *Purchase by agreement.*
- (d) *Vendor's lien.*
- (e) *What lands company can be compelled to take.*

#### (B) RIGHTS OF LANDOWNERS IN RESPECT TO COMPENSATION.

- (a) *Interest created after notice to treat.*
- (b) *Lands injuriously affected.*
- (c) *Injury from severance.*
- (d) *Tunnel under cul-de-sac forming public way.*
- (e) *Principle of assessing compensation for land devoted to religious purposes.*
- (f) *Right of action in respect of rights of common.*
- (g) *Right of landowner to interest.*

#### (C) ASSESSMENT OF COMPENSATION.

- (a) *By justices or jury.*
  - (1) *Computation of tenant's interest.*
  - (2) *Time for issuing summons.*
- (b) *Arbitration.*
  - (1) *Time for making offer.*
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#### (D) APPLICATION OF COMPENSATION.

- (a) *Re-investment in land.*
  - (1) *New buildings, repairs, and im-  
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  - (2) *Land in the Isle of Man.*
  - (3) *In leaseholds.*
  - (4) *Recompensing sums laid out on build-  
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- (b) *Payment out.*
  - (1) *Person absolutely entitled.*
  - (2) *To tenant in tail.*
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ance decree.*
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vested interests.*
- (c) *Interim investment.*
  - (1) *Right to dividends.*
    - (i) *Tenant for life of leaseholds.*
    - (ii) *Disused burial ground.*
  - (2) *Payment to charity.*
  - (3) *East India Stock.*
- (d) *Practice as to petitions.*
  - (1) *Service.*
  - (2) *Two funds.*

#### (E) SUPERFLUOUS LANDS.

#### (F) COSTS.

- (a) *Tenant for life.*
- (b) *Of reinvestment.*
  - (1) *Redemption of land-tax.*
  - (2) *Purchase-money of leaseholds.*
  - (3) *Purchase under open contract.*
  - (4) *Costs of mortgagees and annui-  
tants.*
  - (5) *Apportionment between different  
companies.*
  - (6) *Costs unnecessarily incurred.*
- (c) *Investment.*
  - (1) *On mortgage.*
  - (2) *Costs incurred by tenant for life.*
- (d) *Deposit under 85th section.*
  - (1) *Lien on, for costs.*
  - (2) *Costs of abortive proceedings.*
- (e) *Vendor's lien for costs of arbitration.*
- (f) *Special Act.*

#### (A) PURCHASE AND TAKING OF LANDS.

##### (a) *Power to take lands.*

- (1) *For public improvements.*

1.—A corporation being, as the sanitary authority for a city, duly empowered to take certain lands specified in the schedule to their provisional order, for the purpose of public improvements, served notice to treat in respect thereof upon the

trustees of a charity, who were the owners of the lands. The lands comprised in the notice were more than were actually required for the purpose of the works:—Held, that the cases deciding that a railway company cannot take compulsorily more land than is actually required for its works did not apply to a corporation taking lands for public improvements, and that the corporation were entitled to take compulsorily the whole of the lands comprised in the notice. *Quinton v. The Mayor, Aldermen and Burgesses of Bristol*, 43 Law J. Rep. (n.s.) Chanc. 783; Law Rep. 17 Eq. 524.

Observations upon *Galloway v. The Mayor of London* (2 De Gex, J. & S. 213, 639; on app. 35 Law J. Rep. (n.s.) Chanc. 477). *Ibid*.

(2) *Certificate of subscription of capital conclusive.*

2.—A certificate of two justices under section 17 of the Lands Clauses Consolidation Act, or of one police magistrate under 2 & 3 Vict. c. 71, s. 14, that the capital of a company is all subscribed, being made sufficient evidence by the Lands Clauses Act, is conclusive on all landowners with whom the company deals, unless it be proved to have been obtained by fraud. *The Ystalyfera Iron Company v. The Neath and Brecon Railway Company*, 43 Law J. Rep. (n.s.) Chanc. 476; Law Rep. 17 Eq. 142.

(b) *Notice to treat.*

(1) *Abandonment of notice.*

3.—Where a railway company duly serve a notice to treat before the expiration of the time limited for their compulsory powers, they cannot be considered to have abandoned that notice during such time as their power to execute their works continues, and this time includes not only the period limited in the company's original Act for the completion of the works, but any subsequent extension of such period under any Act of which the landowner has notice. *The Ystalyfera Iron Company v. The Neath and Brecon Railway Company*, Law Rep. 17 Eq. 142.

4.—In 1856 the G. W. and B. Company took possession of a piece of land, a portion of which, undefined by boundaries, belonged to F. Such possession was taken without F.'s consent, and without compliance with the provisions of the 84th and 85th sections of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and F. being unable to define the boundaries of her land, the company continued in possession, and constructed a railway on the land without F.'s consent, and refused to pay her anything in respect of her land. In 1868, the plaintiff claiming title under F., brought an action of ejectment against the company, and recovered judgment, and possession was delivered to him by the sheriff under a writ of possession. The company, however, continued to run their trains over the land, and the plaintiff filed a bill against them for an injunction to restrain the trespass. Thereupon, the company served the plaintiff with notice of their intention

to summon a jury for the purpose of ascertaining the value of the land, under a notice to treat served upon F. in 1856, but which notice had until then been treated by both parties as non-existent, and the plaintiff filed a second bill for an injunction to restrain the company from summoning a jury:—Held, reversing the decision of one of the Vice-Chancellors, that the plaintiff was entitled to both injunctions. Held also, that the case did not come within the 124th section of the Lands Clauses Consolidation Act, relating to interests omitted by mistake or inadvertence to be purchased. *Stretton v. The Great Western and Brentford Railway*, 40 Law J. Rep. (n.s.) Chanc. 50; Law Rep. 5 Chanc. 751.

(2) *Description of tenant's interest.*

5.—Agreement by landlord (himself a leaseholder) with tenant to lease premises at a certain rent payable quarterly, and not to give the tenant notice to quit so long as the rent was paid. A railway company contracted to purchase the tenant's interest, which was described as "held for any term at tenant's option, but not beyond the term of the landlord," which was specified:—Held, that the tenant's interest was sufficiently described. *In re King's Leasehold Estates; Ex parte the East of London Railway Company*, Law Rep. 16 Eq. 521.

(c) *Specific performance against railway company.*

(1) *Compulsory purchase.*

6.—Notice by a railway company to take land under their compulsory powers, and the subsequent fixing of the purchase and compensation money by arbitration together constitute a contract for sale and purchase, which the Court will enforce at the instance of the vendor. And where the lands so contracted for are leasehold the company must enter into the usual covenants by the purchaser to indemnify the vendor against the rents and covenants reserved and contained in the lease. *Harding v. The Metropolitan Railway Company*, 41 Law J. Rep. (n.s.) Chanc. 371; Law Rep. 7 Chanc. 154.

7.—A corporation gave notice to take part of premises under compulsory powers. Being required to take the whole they gave notice of application for the appointment of a surveyor to assess the value of both the part and the whole. They subsequently gave notice of abandonment of both notices:—Held, that specific performance of a contract to take the whole would not be decreed against them. *Grierson v. The Cheshire Lines Committee*, 44 Law J. Rep. (n.s.) Chanc. 35; Law Rep. 19 Eq. 83.

(2) *Purchase by agreement.*

8.—Where a railway company, who were liable under two previous agreements with a landowner to execute certain works, entered into a substituted agreement whereby an estimate was to be made and submitted to the landowner's agent "for approval, in case of differences the amount to be determined by B."—Held, that the submission of the

estimate to the agent was of the essence of the contract, and that the agent having died and the performance of the contract having become impossible, specific performance of the works would be decreed according to the original agreements. The company to pay interest from taking possession. *Firth v. The Midland Railway Company*, 44 Law J. Rep. (N.S.) Chanc. 313; Law Rep. 20 Eq. 100.

(d) *Vendor's lien.*

*For unpaid purchase-money.* [See RAILWAY COMPANY, 16, 17; VENDOR AND PURCHASER, 18, 19.]

(e) *What lands company can be compelled to take.*

9.—A piece of land two and a half acres in extent, with a small cottage built upon it, was occupied by a market gardener, and used for the purposes of trade; a company ran their tunnel under the house, and so that the line of the tunnel severed a portion of the land from the rest:—Held, that the owner of the land was not entitled, under section 92 of the Lands Clauses Act, 1845, to compel the company to take the whole of the land, but that he was entitled to compel them to take the whole cottage, with so much of the land as was used for ornament or otherwise in immediate connection with the cottage, and also the severed portion of the land, notwithstanding that the tunnel did not interfere with access. *Falkner v. The Somerset and Dorset Railway Company*, 42 Law J. Rep. (N.S.) Chanc. 851; Law Rep. 16 Eq. 458.

The premises were within the municipal boundaries of a town, but not surrounded by houses:—Held, that they were not in a town within the meaning of section 93. *Ibid.*

(B) RIGHTS OF LANDOWNERS IN RESPECT TO COMPENSATION.

(a) *Interest created after notice to treat.*

10.—An interest in property created after the service of a notice to treat is not a subject for compensation. *In re the Marylebone (Stingo Lane) Improvement Act*, 1868; *Ex parte Edwards*, 40 Law J. Rep. (N.S.) Chanc. 697; Law Rep. 12 Eq. 389.

(b) *Lands injuriously affected.*

11.—Where an Act of Parliament with compulsory powers incorporates the whole of the Lands Clauses Act, a right to compensation is without any other enactment conferred upon the persons interested in lands injuriously affected by the exercise of such powers:—So held, by the Court of Exchequer Chamber, supporting *Ferrar v. The Commissioners of Sewers of London*, 38 Law J. Rep. (N.S.) Exch. 17, 102. *The Queen v. The Vestry of St. Luke's, Chelsea*, 41 Law J. Rep. (N.S.) Q. B. 81; Law Rep. 7 Q. B. 148: affirming the decision of the Court of Queen's Bench, 40 Law J. Rep. (N.S.) Q. B. 305; Law Rep. 6 Q. B. 572.

By the Chelsea Improvement Act, 8 & 9 Vict. c. cxliii. the Lands Clauses Act, 1845, is incorporated

by these words, "So much of the Lands Clauses Consolidation Act, 1845, as is applicable and as is not modified by this Act, or as is not inconsistent with the provisions hereof, shall apply to the improvements by this Act authorised to be made, and shall be read as forming part of this Act." By sections 124, 127, compensation is expressly given where projections made before the passing of the Act are ordered to be removed, and where a house taken down to be rebuilt is ordered to be set back to the line of street. By section 104 power is given to alter the level of streets, but there is no provision as to compensation:—Held, notwithstanding the absence of any such provision, that the lessee of a house injuriously affected by the raising of the level of a street under the powers of section 104 was entitled to compensation. *Ibid.*

12.—Where works are constructed under the authority of an Act of Parliament, and by their construction, apart from the user of them, there is a physical interference with any right, public or private, which the owner or occupier of any land or house is entitled to make use of in connection with his property, and which right gives an additional marketable value to such property, apart from any uses the particular occupier might put it to, there is a title to compensation, if by reason of such interference the property as a property is permanently lessened in value. *The Metropolitan Board of Works v. McCarthy* (H. L.), 43 Law J. Rep. (N.S.) C. P. 385; Law Rep. 7 E. & I. App. 243.

*Chamberlain v. The West End of London and Crystal Palace Railway Company*, 2 B. & S. 605, 617; 36 Law J. Rep. (N.S.) Q. B. 205; and *Beckett v. The Midland Railway Company*, 37 Law J. Rep. (N.S.) C. P. 11; Law Rep. 3 C. P. 82, approved. *Ibid.*

The injury must have been actionable but for the statute. *Ibid.*

The plaintiff carried on business in premises consisting of a house, warehouse, stables, &c., near a draw-dock leading into the river Thames. The dock was free and public, but was principally used by the plaintiff and certain other persons whose premises were in proximity to it. A roadway existed between the edge of the dock and the plaintiff's premises, which had an enhanced market value by reason of their proximity to the dock. The defendants in making an embankment, under their private Acts, filled up and destroyed the dock; and thereby the plaintiff's premises became diminished in value in the market:—Held, affirming the judgment of the Court of Exchequer Chamber (42 Law J. Rep. (N.S.) C. P. 81; Law Rep. 8 C. P. 191), and the Court of Queen's Bench (Law Rep. 7 C. P. 508), that the plaintiff was entitled to compensation under 8 & 9 Vict. c. 18, s. 68, as his land had been injuriously affected by the defendants' works.

13.—A special Act, incorporating the Lands Clauses Consolidation Act, 1845, empowered the Railway Clearing Committee to acquire certain land, and to pull down the houses standing thereon, and to build on their site a building for the purposes of the clearing system:—Held, that the Act empowered the committee to build in such a man-

ner as to obstruct the ancient lights of an adjoining owner, giving him compensation as for lands injuriously affected. *The Duke of Bedford v. Dawson*, 44 Law J. Rep. (N.S.) Chanc. 549; Law Rep. 20 Eq. 353.

14.—A railway company under the powers of their special Acts constructed a bridge and foot-way across a river, at a distance of about six hundred yards from the landing-place of an ancient ferry, but without any physical interference with the passage of the ferry-boats. The bridge when completed was opened to foot-passengers on payment of tolls, and also used for conveyance of merchandise by the company's trains, causing a serious diminution in the profits of the ferry:—Held, that the owner of the ferry was entitled to compensation under the Railways Clauses Consolidation Act, 1845, s. 6, as being a person interested in land (which included a hereditament such as a ferry) injuriously affected by the company's works, for the injury to the ferry was the direct and immediate result of the construction of the bridge for the use of passengers. *Brand v. The Hammersmith Railway Company*, 38 Law J. Rep. (N.S.) Q. B. 265, distinguished. *The Queen v. The Cambrian Railways Company*, 40 Law J. Rep. (N.S.) Q. B. 169; Law Rep. 6 Q. B. 422.

15.—When lands are injuriously affected by the construction of works authorised by an Act of Parliament, the owner is entitled to compensation if an easement appurtenant to the lands is taken, just as he would be if part of the lands was taken. *The Duke of Buccleugh and Queensbury v. The Metropolitan Board of Works* (H. L.), 41 Law J. Rep. (N.S.) Exch. 137; Law Rep. 5 E. & I. App. 418.

16.—Where a railway company took lands from an owner who, on other lands, had built a reservoir for the purpose of supplying cotton-mills to be erected on the lands taken:—Held, that he was entitled to compensation for loss of prospective profits to be derived from supplying the water to the proposed mills, and that the umpire rightly received evidence as to such profits. *Ripley v. The Great Northern Railway Company*, Law Rep. 10 Chanc. 435.

17.—The sections of the Lands Clauses Consolidation Act, 1845, relating to the purchase of lands, are incorporated in the Elementary Education Act, 1870, for all purposes, and their application is not confined to cases where the relation of vendor and purchaser exists. Therefore the remedy of a person whose lands are injuriously affected by the works of the School Board, but no part of whose land is taken, is by proceeding for compensation under section 68 of the Lands Clauses Act, and not by bill for an injunction. *Clark v. The School Board for London*, 43 Law J. Rep. (N.S.) Chanc. 421; Law Rep. 9 Chanc. 120.

*Macey v. The Metropolitan Board of Works* (33 Law J. Rep. (N.S.) Chanc. 377) approved of and followed. *Ibid.*

18.—Diversion of part of a stream by a waterworks company whose special Act incorporates the Waterworks Clauses Act, 1847, is not such a "taking or using" as to give an owner of pro-

perty on the bank of the stream whose property is injured by the diversion a right to require the company to purchase his portion of the stream, under sections 84, 85 of the Lands Clauses Consolidation Act, 1845, but merely gives a right to compensation for "injuriously affecting" his lands, under section 68 of that Act. Decision of Jessel, M.R. (44 Law J. Rep. (N.S.) Chanc. 235; Law Rep. 19 Eq. 291) affirmed. *Bush v. The Trowbridge Water Company*, 44 Law J. Rep. (N.S.) Chanc. 645; Law Rep. 10 Chanc. 459.

19.—Statutory compensation cannot be claimed by reason of the noise or smoke of trains, whether part of the claimant's lands be taken or not. No claim can be made in respect of damage for which the claimant would not have had an action if the Railway Act had never passed, and the damage must be done by the construction of the works, and not afterwards. *The City of Glasgow Union Railway Company v. Hunter*, Law Rep. 2 Sc.App.78.

(c) *Injury from severance.*

20.—The plaintiffs, a volunteer corps, obtained leases of different plots of land for the erection of a rifle range of 800 yards. Immediately behind the butts was a field occupied by A., and beyond that some marsh land, which were required by the rifle corps for the purpose of making provision for the safety of the public during the time the butts were in use. The plaintiffs obtained a lease of this land, but only made a verbal agreement with A. for the use of his land during the rifle practice, in consideration of an annual payment of 49l. The defendants under their compulsory powers took portion of the marsh land occupied by the plaintiffs, and so used it as to put a stop to the use of the rifle range. At an inquiry under the Lands Clauses Act, ss. 38, 50, the jury assessed the value of the land taken, and damage for the injury to the rifle range:—Held, that there might be an injury from severance within the meaning of the Act, although the premises were not immediately contiguous, and that the fact that the plaintiffs had only a precarious interest in the field only affected the quantum of compensation to be awarded to them. *Holt v. The Gaslight and Coke Company*, 41 Law J. Rep. (N.S.) Q. B. 351; Law Rep. 7 Q. B. 728.

(d) *Tunnel under cul-de-sac forming public way.*

21.—In 1871 the plaintiff became the purchaser in fee simple of certain hereditaments, described in the deed of conveyance as "all that piece of ground with the sixteen messuages thereon." The houses were divided into two blocks by a cul-de-sac or passage open at one end only, which had been dedicated to the use of the public for twenty years, but the soil of which the plaintiff claimed as his private property by virtue of his conveyance. The defendants, a railway company, being about to tunnel under this cul-de-sac, gave the plaintiff a notice to treat in respect of three houses on each side of it, but not in respect of that part of the cul-de-sac which lay between them, the company contending it was a public way or street:—Held, that the cul-de-sac was a public

way or street, and that the company were entitled to tunnel under it without paying the plaintiff any compensation. *Souch v. The East London Railway Company*, 42 Law J. Rep. (N.S.) Chanc. 477; Law Rep. 16 Eq. 108.

(e) *Principle of assessing compensation for lands devoted to religious uses.*

**22.**—By the Metropolis Improvement Act, 1863, the Metropolitan Board of Works were, for the purpose of making a new street, empowered to take portions of the graveyards attached to certain parish churches. The plaintiff, the rector, claimed compensation under the Lands Clauses Consolidation Act, 1845 (incorporated with the Metropolis Improvement Act, 1863), in respect of the lands so taken, of which he was the owner:—Held, that he was entitled to be compensated for the loss which he suffered, but that he was not entitled to be compensated upon the principle of treating the lands as secularised, and therefore as being of greater value than they were while in his hands, and while they were appropriated to spiritual purposes. *Stebbing v. The Metropolitan Board of Works*, 40 Law J. Rep. (N.S.) Q. B. 1; Law Rep. 6 Q. B. 37.

(f) *Right of action in respect of rights of common.*

**23.**—Where the right in the soil of land subject to rights of common has been conveyed to the promoters of an undertaking by the lord of the manor under the Lands Clauses Act (8 Vict. c. 18), s. 100, but the compensation payable to the commoners has not been ascertained in the manner provided by the Act, any such commoner whose rights of common have been disturbed by the works of the promoters may maintain an action against them, and is not confined to proceedings for compensation under the Lands Clauses Act. *Stoneham v. The London, Brighton, and South Coast Railway Company*, 41 Law J. Rep. (N.S.) Q. B. 1; Law Rep. 7 Q. B. 1.

(g) *Right of landowner to interest.*

**24.**—When a railway company under their statutory powers enter into possession of land before assessment of the price, interest is payable on the amount subsequently ascertained from the date of the company's taking possession. *Rhys v. The Dare Valley Railway Company*, Law Rep. 19 Eq. 93.

(C) ASSESSMENT OF COMPENSATION.

(a) *By justices or jury.*

(1) *Computation of tenant's interest.*

**25.**—The Holborn Valley Improvement Act, 1867, which empowers the mayor, &c., of London to acquire certain houses, &c., incorporates the London Improvement Act, 1847, which empowers the mayor, &c., to take after six months' notice, to treat for the purchase, and in case of dispute to issue their precept to impanel a jury to assess the compensation, and directs persons in possession to give it up after six months' notice, and also incorporates the 121st section of the Lands Clauses

Consolidation Act, 1845, which directs that where the tenant's interest does not exceed a tenancy for a year, or from year to year, the compensation shall be assessed by justices. The mayor, &c., gave a tenant notice that they intended to take his house, that they were willing to treat in respect thereof, and that he must quit in six months:—Held, that for the purpose of determining whether his compensation was to be assessed by a jury or by justices, the length of his interest must be computed from the date of the notice, and not from the expiration of the six months. *Tyson v. The Lord Mayor of London*, 41 Law J. Rep. (N.S.) C. P. 6; Law Rep. 7 C. P. 18.

(2) *Time for issuing summons.*

**26.**—The adjudication by justices of assessment of compensation under section 22, for lands in respect of which no agreement has been come to, is not an order for payment of money within 11 & 12 Vict. c. 43, s. 11, and the summons to determine such question may be issued more than six months after the notice to treat. *The Queen v. Hannay*, 44 Law J. Rep. (N.S.) M. C. 27.

(b) *Arbitration.*

(1) *Time for making offer.*

**27.**—A company, on the 22nd of June, 1870, gave notice to F. under section 18 of the Lands Clauses Consolidation Act, 1845, that they required to take certain land, his property, and of their willingness to treat for the purchase thereof. On the 16th of August, F. sent to the company a claim for 28,100*l.* On the 18th of August, the company gave him notice, under the 38th section, of their intention to cause a jury to be summoned to settle the sum to be paid by them, and also that they offered to pay 15,237*l.* On the 27th, F. sent to the company a notice signifying his desire that the question of compensation should be settled by arbitration, and also agreeing that the valuer employed by him should meet the value of the company. The valuers did meet, but failed to settle the amount. On the 26th of October, F. received notice from the company that they had appointed their arbitrator, and that they were willing to pay the sum of 17,000*l.* On the 7th of November, F. sent notice of the appointment of his arbitrator. The two arbitrators appointed an umpire, who made his award, settling the sum of 16,400*l.* as the sum to be paid by the company:—Held, that the company had a right to make their second offer of 17,000*l.*, and that, inasmuch as the sum awarded was less than that sum, the company were not bound under the 34th section to bear the costs of F., incident to the arbitration. *In the matter of an Arbitration between Earl Fitzhardinge and The Gloucester and Berkeley Canal Company*, 41 Law J. Rep. (N.S.) Q. B. 316; Law Rep. 7 Q. B. 776.

(2) *Powers of umpire: reference by consent.*

**28.**—An umpire appointed to ascertain the amount of compensation under the Lands Clauses Consolidation Act, 1845, has no power to state a special case for the opinion of a superior Court;

and if by consent of the parties the time for making the award be extended and power to sit with the arbitrators be conferred upon the umpire, a reference under the foregoing statute will not become a reference by consent within the meaning of the Common Law Procedure Act, 1854, s. 5. *Rhodes v. The Airedale Drainage Commissioners*, 43 Law J. Rep. (n.s.) C. P. 323; Law Rep. 9 C. P. 508.

*Submission to arbitration made a rule of Court.* [See ARBITRATION, 2.]

(3) *Setting aside award.*

**29.**—Although it has been held that an arbitration under the Lands Clauses Consolidation Act is not a submission by consent within the meaning of the Common Law Procedure Act, nevertheless, when an award is made a rule of Court under section 36 of the Lands Clauses Consolidation Act, the Court has the same jurisdiction with respect to setting it aside and enforcing it as in other cases; that is to say, the jurisdiction conferred by the 9 & 10 Will. 3. c. 15, is let in. *In re Harper and The Great Eastern Railway Company*, 44 Law J. Rep. (n.s.) Chanc. 507; Law Rep. 20 Eq. 39.

It follows, therefore, that a motion to set aside the award must be made before the end of the term next after the publication of the award. *Ibid.*

When an arbitrator appointed under the Lands Clauses Act, and having power to assess the amount of damage, but no power to decide the question of liability, made an award containing an order for payment, but the recitals shewed the extent of the arbitrator's authority,—Held, that this was an error of form only, and that the award could not be set aside on account of it. *Ibid.*

(D) APPLICATION OF COMPENSATION.

(a) *Re-investment in land.*

(1) *New buildings, repairs, and improvements.*

**30.**—Money paid into Court under the Lands Clauses Consolidation Act, 1845, may, with the consent of the remainder-men, be expended on the erection of new buildings on the settled estates, but may not be expended on the repairs of or improvements to the mansion-house or other buildings already erected thereon. *In re Leigh's Estates*, 40 Law J. Rep. (n.s.) Chanc. 687; Law Rep. 6 Chanc. 887.

**31.**—Money to be invested in land under a public or private Act, or a settlement, will be ordered to be employed in the erection of new buildings on the settled land, but not in repairs or permanent improvements which do not place new buildings on the land. *Drake v. Trefusis*, Law Rep. 10 Chanc. 364.

**32.**—Money paid into Court by a railway company in respect of glebe lands was ordered to be applied towards necessary additions and improvements of the rectory house; the fund to be paid out to the bishop's secretary, he undertaking to apply it. *Ex parte The Rector of Claypole*, 42 Law J. Rep. (n.s.) Chanc. 776; Law Rep. 16 Eq. 574.

**33.**—A tenant for life petitioned that funds in Court should be laid out in improvements:—Held, that the remainder-men were entitled to be heard and ought to be served. *In re Leigh's Estate*, 40 Law J. Rep. (n.s.) Chanc. 442.

(2) *Land in the Isle of Man.*

**34.**—Money paid into Court under the Lands Clauses Act, 1845, was allowed to be re-invested in the purchase of land in the Isle of Man. *In re Taylor's Estate*, 40 Law J. Rep. (n.s.) Chanc. 454.

(3) *In leaseholds.*

**35.**—Upon the petition of the trustees of a freehold chapel taken by a railway company, the purchase-money was ordered to be invested in the purchase of a leasehold chapel in the vicinity, there being a difficulty in obtaining a suitable freehold site for a new chapel, and the price agreed to be paid for the leasehold chapel being less than its actual value. *In re Rehoboth Chapel*, 44 Law J. Rep. (n.s.) Chanc. 375; Law Rep. 10 Chanc. 180.

(4) *Recouping sums laid out on buildings by rector.*

**36.**—A railway company took part of the glebe land belonging to a rectory. The patron of the living and the bishop agreed with the rector that the purchase-money, when paid by the company, should be applied in paying part of the expense of rebuilding the rectory house, which was in a ruinous condition, the remainder of the money required being borrowed from Queen Anne's Bounty. The company neglected for some years to pay the money, and in order to complete the rebuilding the rector advanced a sum equal to the purchase-money himself. The company having paid the purchase-money, the rector, the patron, and the bishop petitioned that it might be paid to the rector to recoup his advance:—Held, that the Court had no power under section 69 of the Lands Clauses Act to direct such an application of the money. *Williams v. The Aylesbury and Buckingham Railway Company*, 43 Law J. Rep. (n.s.) Chanc. 825; Law Rep. 9 Chanc. 684.

(b) *Payment out.*

(1) *Person absolutely entitled.*

**37.**—Where the purchase-moneys of property subject to a trust for sale for the benefit of infant cestuis que trust and taken by a railway company were paid into Court by the company under the Lands Clauses Consolidation Act, 1845, the Court upon a petition by the trustees for sale and cestuis que trust for payment out to the trustees for sale, declined to treat the trustees for sale as persons "absolutely entitled" within the 69th section of the Act, and ordered the fund to be carried over to the separate account of the infants, directing the dividends to be paid to the trustees. *In re Reaston's Estate*, 41 Law J. Rep. (n.s.) Chanc. 832; Law Rep. 13 Eq. 564.

**38.**—Where the occupant of land taken by a railway company under the Lands Clauses Acts, had a possession which would have ripened into a

title by adverse possession, but for the dealings with the company, the Court allowed the purchase-money to be paid to such occupant. *In re Evans*, 42 Law J. Rep. (N.S.) Chanc. 357.

*To trustees of charity.* [See PRACTICE IN EQUITY, 99.]

(2) *To tenant in tail.*

39.—Purchase-money of land compulsorily taken paid in under the Lands Clauses Act will not be paid out to a tenant in tail until a disentailing deed has been executed by him. *In re Butler's Will*, Law Rep. 16 Eq. 479.

(3) *To vendors under specific performance decree.*

40.—A railway company were ordered to pay money to vendors under a decree for specific performance; they paid the money into Court instead. On petition of the vendors, the money was paid out to them. *Galliers v. The Metropolitan Railway Company*, 40 Law J. Rep. (N.S.) Chanc. 544; Law Rep. 11 Eq. 410.

(4) *To cestuis que trust attaining vested interests.*

41.—Land devised on trust for sale when the youngest of a class attained twenty-one, the proceeds to be divided amongst the class, was taken under the Lands Clauses Act, and the purchase-money paid into Court. On petition by the trustees and some only of the cestuis que trust, after the youngest of the class had attained twenty-one:—Held, that the company had no right to object to an order for the payment of their respective shares to the petitioning cestuis que trust, and to insist on the payment out of the whole to the trustees. *In re Soury*, Law Rep. 8 Chanc. 736.

(c) *Interim investment.*

(1) *Right to dividends.*

(i) *Tenant for life of leaseholds.*

42.—The testator bequeathed leaseholds held of an ecclesiastical corporation, giving certain life interests with remainder over. He directed his trustees, two years or sooner before the time for renewal, to bring a sufficient part of the rents into a fund to keep the estates always renewed. It was the practice to renew the leases every fourteen years, but it was not obligatory on the corporation to do so; they ceased to do so about 1866. Previously to that, notice had been given by a railway company to take the property. The purchases were completed, and the price paid into Court, and invested in consols. The investment gave a diminished income:—Held, that the tenants for life were only entitled to the income of the fund. No costs allowed to or against the railway company. *In re Wood's Estate*, 40 Law J. Rep. (N.S.) Chanc. 59; Law Rep. 10 Eq. 572.

[And see TENANT FOR LIFE.]

(ii) *Disused burial ground.*

*Compensation for disused burial ground: right to dividends.* [See BURIAL, 2, 3.]

DIGEST, 1870-1875.

(2) *Payment to charity.*

43.—On petition for investment of proceeds of charity lands under the Lands Clauses Act, order made for payment to the secretary for the time being, there being no treasurer. *In re Codrington's Charity*, Law Rep. 18 Eq. 658.

(3) *East India stock.*

44.—Purchase-money paid into Court for lands taken under the Lands Clauses Act is cash under the control of the Court, and may be invested in East India 4 per Cent. Stock. *In re Fryer's Settlement. Fryer v. The Salisbury and Dorset Junction Railway Company*, Law Rep. 20 Eq. 468.

(d) *Practice as to petitions.*

(1) *Service.*

45.—On petition by a tenant for life under the Lands Clauses Act for interim investment and payment of the dividends to him, persons having charges on the inheritance prior to the life estate, need not be served, and their costs will not be allowed as against the company. *In re Morris's Settled Estates*, Law Rep. 20 Eq. 470.

*Service of remainder-men.* [See supra No. 33.]

(2) *Two funds.*

46.—Where two funds had been paid into Court under the Lands Clauses Act, and dealt with in different branches of the Court, leave was given to present one petition in both matters in one branch of the Court. *In re Lord Arden's Estates*, Law Rep. 10 Chanc. 445.

[And see infra Nos. 56-59.]

(E) SUPERFLUOUS LANDS.

47.—Lands acquired by a railway company, under their compulsory powers, which at the expiration of the time prescribed by s. 127 of 8 & 9 Vict. c. 18, are not required for the permanent purposes of the undertaking, are superfluous lands within the meaning of that section, though they may within that time have been used for temporary purposes of the undertaking. *The Great Western Railway Company v. May* (H.L.), 43 Law J. Rep. (N.S.) Q. B. 233; Law Rep. 7 E. & J. App. 283, reported in the Court of Exchequer Chamber, 42 Law J. Rep. (N.S.) Q. B. 6; Law Rep. 8 Q. B. 26; and in the Court of Queen's Bench, 41 Law J. Rep. (N.S.) Q. B. 104; Law Rep. 7 Q. B. 364.

The employment of such lands by the depositing upon them earth and spoil, from a neighbouring cutting, which is allowed and intended to remain there without being of any further use to the railway, is, after the depositing of such earth and spoil has ceased, a user for a temporary purpose. *Ibid.*

If superfluous lands are not sold within the prescribed time, they, at the expiration of that time, vest in the owners of the adjoining lands, and no act is necessary on the part of such owners indicating their acceptance of such lands. *Ibid.*

Where lands had so vested in the adjoining

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owners at the expiration of the time prescribed by the 127th section, an Act of Parliament, passed in the following year, extending the time for the sale of superfluous lands belonging to the company, was held not to apply to those lands, though they were at the passing of the Act in the ostensible possession of the company, or their lessees, being used as market gardens. *Ibid.*

Where lands are included in the plans and books of reference scheduled to the company's Act, and are purchased after a notice from the company to treat, they are liable to vest in the owners of adjoining lands as superfluous lands, although they may not be included within the limits of deviation delineated on the company's plans, and although they may have been purchased at a price settled by private agreement and without arbitration. *Ibid.*

Semble—if, at the expiration of the ten years mentioned in the 127th section, or of the time prescribed by the special Act, the company can aver and prove that the lands, though not at that time employed for the permanent purposes of the undertaking, are yet required and are intended to be applied for such permanent purposes; or that at that time they are still being employed, or are likely to be required, as a place for the continuous depositing of spoil or for the correlative purpose of making and carrying away of ballast or bricks for the purposes of the railway, such lands would not be liable to vest as superfluous lands in the owners of adjoining lands. *Ibid.*

If lands are not liable to vest at the expiration of the time mentioned in the 127th section, they are entirely exempt from the provisions of the Act applicable to the sale or to the vesting of superfluous lands. *Ibid.*

48.—The clauses as to superfluous lands in the Lands Clauses Consolidation Act (Scotland), which are similar to those in the English Act, do not apply to lands acquired by voluntary agreement for extraordinary purposes. *The City of Glasgow Union Railway Company v. The Caledonian Railway Company*, Law Rep. 2 Sc. App. 160.

49.—Lands acquired by a railway company under their Act and ever since retained *bonâ fide* for the purposes of the Act in the belief that they will be required at some future time for such purposes, and with the intention of so applying them, are not "superfluous lands" within section 127 of the Lands Clauses Act, 1845, though they have never been actually used for the purposes of the Act during the time specified in that section. *Betts v. The Great Eastern Railway Company*, 43 Law J. Rep. (N.S.) Exch. 4; Law Rep. 8 Exch. 294.

*Surplus lands: powers of railway company to deal with under special Act.* [See RAILWAY, 6.]

#### (F) COSTS.

##### (a) Tenant for life.

50.—The tenant for life of a settled estate is not entitled to throw upon the estate his costs of opposing in Parliament a bill brought in by a

public company for taking part of the estate. But he is entitled to charge the estate with the costs, charges, and expenses properly incurred by him in or about an arbitration entered into between him and the company under the provisions of the Lands Clauses Consolidation Act regarding the value of the land, on the ground that under the Act he is made the fiduciary agent for such purposes on behalf of the estate. *In re Berkley's Will*, 44 Law J. Rep. (N.S.) Chanc. 3; Law Rep. 10 Chanc. 57.

And see *infra* No. 63.

##### (b) Of reinvestment.

##### (1) Redemption of land-tax.

51.—When lands have been taken by a railway company under its compulsory powers, and the purchase-money has been paid into Court, the costs of applying the money in redemption of land-tax on other parts of the vendor's property, are costs payable by the company under section 80 of the Lands Clauses Act. *In re Bethlem Hospital*, 44 Law J. Rep. (N.S.) Chanc. 406; Law Rep. 19 Eq. 457.

##### (2) Purchase-money of leaseholds.

52.—Where all parties interested were *sui juris*, a railway company was ordered to pay the costs of investing the purchase-money of a leasehold in freehold estate. *In re Parker's Estate*, 41 Law J. Rep. (N.S.) Chanc. 473; Law Rep. 13 Eq. 495.

##### (3) Purchase under open contract.

53.—On re-investment under the Lands Clauses Act, under a contract throwing upon the purchasers costs which under an open contract would be borne by the vendor, the costs to be paid by the railway company will be limited to those which in an open contract would be purchasers' costs. *Ex parte the Governors of Christ's Hospital*, Law Rep. 20 Eq. 605.

##### (4) Costs of mortgagees and annuitants.

54.—Whenever there is a simple petition for the re-investment of purchase-money in land the proper course is to serve such persons as mortgagees and annuitants with a copy of the petition, and to pay them 40s. for costs, with an intimation that if they appear at the hearing they will probably not get their costs. Unless this is done, such persons will be entitled to their costs. *In re Gore Langton's Estates*, 44 Law J. Rep. (N.S.) Chanc. 405; Law Rep. 10 Chanc. 328.

55.—And this rule was applied where payment out was directed to persons entitled, subject to incumbrances, but a sum sufficient to cover the costs of an affidavit of service was allowed to the petitioners in addition. *In re Halstead United Charities*, Law Rep. 20 Eq. 48.

##### (5) Apportionment between different companies.

56.—Lands were taken by four railway companies, two of which were absorbed by the third, the Great Western Company. The purchase-



moneys in respect of their three purchases were paid by the Great Western Company to three separate accounts, namely, of itself and of the two original companies:—Held, that the costs of re-investment of the whole must be borne in moieties by the Great Western Company and the fourth company. *In re Maryport Railway Act* (32 Law J. Rep. (n.s.) Chanc. 811) disapproved of. *Ex parte Corpus Christi College, Oxford*, 41 Law J. Rep. (n.s.) Chanc. 170; Law Rep. 13 Eq. 334.

57.—The rule that the costs of re-investment in land of funds paid in for the purchase of lands under the Lands Clauses Act by several companies must be borne by them equally, does not apply where there is great inequality in the amounts, and in such a case they will be apportioned rateably. *Ex parte Bishop of London* (2 D. F. & J. 15) considered. *Ex parte Governors of St. Bartholomew's Hospital*, Law Rep. 20 Eq. 369.

(6) *Costs unnecessarily incurred.*

58.—Parts of certain settled estates were taken by two companies, and the purchase-money paid into Court under the Lands Clauses Act. Two separate petitions for re-investment in land were presented by the tenant for life of the estates, and served on certain portion trustees and persons having charges on the estates. At the hearing of the petitions the counsel for the petitioner and respondents held separate briefs on each petition:—Held, affirming the decision of one of the Vice-Chancellors (44 Law J. Rep. (n.s.) Chanc. 198)—that the companies must pay the costs of one petition only. *In re Gore Langton's Settled Estates*; *In re the Bath Act*, 1870; *In re the Bristol and North Somerset Railway Company*, 44 Law J. Rep. (n.s.) Chanc. 405; Law Rep. 10 Chanc. 328.

59.—Where, owing to a mistake of the petitioner, the tenant for life, in not originally serving the remainder-men, there have been two hearings of a petition in the Court below, public bodies who paid the money into Court and did not object to an improper order being made in the absence of the remainder-men, will only have to pay so much costs as would have been incurred if there had been only one hearing, and that amount will be divided equally between them. *In re Leigh's Estates*, 40 Law J. Rep. (n.s.) Chanc. 687; Law Rep. 6 Chanc. 887.

(c) *Investment.*

(1) *On mortgage.*

60.—The Court ordered the interim investment of purchase-money on mortgage of real estate at the cost of the company. *In re Fflemion's Trusts*, 40 Law J. Rep. (n.s.) Chanc. 86; Law Rep. 10 Eq. 612.

There having been a prior investment in the funds, it was held that the costs of no subsequent investment in land were to be borne by the company. *Ibid.*

61.—Where purchase-money paid in under the Lands Clauses Act had been invested in consols, the company were ordered to pay the costs of an

application for its re-investment on mortgage, without any condition as to the costs of future applications. *In re Blyth's Trusts*, Law Rep. 16 Eq. 468.

62.—In an order for investment on mortgage of purchase-money under the Lands Clauses Act, it is not now the practice to insert a direction that the company are not to be required to pay the costs of a subsequent investment. *In re Sewart's Estate*, Law Rep. 18 Eq. 278.

(2) *Costs incurred by tenant for life.*

63.—Where a railway company served notices to treat for certain lands, but abandoned their undertaking as to part of the lands, and costs, &c., were incurred by the tenant for life before the abandonment, as well as subsequent costs in an unsuccessful attempt to obtain compensation:—Held, on petition for investment of a fund in Court, the proceeds of the lands taken, that the costs, &c., might be properly paid out of the fund before investment. *In re Strathmore Estates*, Law Rep. 18 Eq. 338.

(d) *Deposit under 85th section.*

(1) *Lien on, for costs.*

64.—A landowner has no claim against a fund deposited as security under section 85 of the Lands Clauses Consolidation Act, for his costs under the Act. *Ex parte Neath and Brecon Railway Company*, 43 Law J. Rep. (n.s.) Chanc. 277; Law Rep. 9 Chanc. 263.

(2) *Costs of abortive proceedings.*

65.—Section 80 of the Lands Clauses Act, 1845, applies where a deposit has been made under the 85th section. *Ex parte Morris*, 40 Law J. Rep. (n.s.) Chanc. 543; Law Rep. 12 Eq. 418.

A company having deposited the probable value of the land entered into possession under the 85th section. Subsequently an agreement was come to by which the company agreed to pay a certain price and all costs properly incurred under the Lands Clauses Act:—Held, that costs of abortive proceedings before the jury summoned under the 85th section, and other costs, should be taxed and paid under the 80th section. *Ibid.*

66.—After a fund which represents purchase-money paid by a railway company has been invested and transferred to an account not entitled in the matter of the railway company, the liability of the company to pay costs ceases in respect of any subsequent investment or petition for payment of the fund. *Fisher v. Fisher*, 43 Law J. Rep. (n.s.) Chanc. 262; Law Rep. 17 Eq. 340.

(e) *Lien for costs of arbitration.*

67.—When land is taken by a railway company under the Lands Clauses Act, and the price is settled by arbitration, the costs of the arbitration and award payable to the vendor under section 34 of the Act do not stand on the same footing as the purchase-money, and the vendors

have no lien on the land for such costs. *Ferrers v. The Stafford and Uttoxeter Railway Company*, 41 Law J. Rep. (N.S.) Chanc. 362; Law Rep. 13 Eq. 524.

(f) *Special Act.*

*Costs of re-investment under special Act.*  
[See COSTS IN EQUITY, 32.]

LARCENY.

(A) WHAT AMOUNTS TO LARCENY.

- (a) *Taking money paid under a mistake by a Post-office clerk.*
- (b) *Taking and depositing rabbits, and subsequently removing them.*
- (c) *Forcibly taking warrants from bailiff of Court.*
- (d) *Money obtained by servant on pretence of paying fellow servant.*
- (e) *Wrongful refusal to return change out of money paid.*

(B) INDICTMENT.

(C) NOTICE OF ACTION UNDER LARCENY ACT, 1861.

(A) WHAT AMOUNTS TO LARCENY.

- (a) *Taking money paid under a mistake by a Post-office clerk.*

1.—The prisoner was a depositor in a post-office savings bank, in which a sum of eleven shillings stood to his credit. He gave notice to withdraw ten shillings, stating the number of his depositor's book, the name of the post-office, and the amount to be withdrawn. A warrant for ten shillings was duly issued to the prisoner, and a letter of advice sent to the post-office to pay the prisoner ten shillings. He went to the post-office, and handed in his depositor's book and his warrant to the clerk, who, instead of referring to the proper letter of advice, referred by a mistake to another for 8*l.* 16*s.* 10*d.*, and placed that sum upon the counter. The clerk entered that amount as paid in the prisoner's book and stamped it, and the prisoner took up the money and went away. When the mistake was discovered, the prisoner was brought back, and then said that he had burnt his depositor's book. The prisoner was charged with larceny of the 8*l.* 16*s.* 10*d.* The jury found that the prisoner had the animus furandi at the moment of taking up the money from the counter, and the prisoner was convicted:—Held, by a majority of the Judges, that the conviction was right. *The Queen v. Middleton*, 42 Law J. Rep. (N.S.) M. C. 73; Law Rep. 2 C. C. R. 38.

*The Queen v. Prince* (38 Law J. Rep. (N.S.) M. C. 8; Law Rep. 1 C. C. R. 150) distinguished by the majority; but held to be undistinguishable by Martin, B., Bramwell, B., Brett, J., and Cleasby, B. Ibid.

Held, by Cockburn, C.J., Blackburn, J., Mel-

lor, J., Lush, J., Grove, J., Denman, J., and Archibald, J., that assuming the clerk to have an authority equal to, and to represent, the Postmaster-General, and to have meant that the prisoner should take up the money, though he only so meant because of a mistake which he made as to the identity of the prisoner with the person really entitled to the money, the prisoner being aware of the mistake, and taking up the money animus furandi, was guilty of taking and stealing the money. Ibid.

And also, that, although the clerk, and therefore the Postmaster-General, intended that the property in the money should belong to the prisoner, yet as he so intended in consequence of a mistake as to his identity, and the prisoner knew of the mistake, and had the animus furandi at the time, the prisoner was guilty of larceny. Ibid.

Held, by Bovill, C.J., Kelly, C.B., and Keating, J., that the clerk had no property in the money or power to part with it to the prisoner, but only possession; that the authority of the clerk was a special authority not pursued, and that on that ground only the conviction should stand. Ibid.

By Pigott, B., that possession of the money was never given by the clerk to the prisoner, who while it lay on the counter and before he got manual possession of it, conceived the animus furandi, and took it, and therefore it was larceny. Ibid.

Martin, B., Bramwell, B., Brett, J., and Cleasby, B., *dissentientes*, held that the money was not taken invito domino, and that there was no trespass involved in the taking by the prisoner, and therefore there was no larceny. Ibid.

Held by Bramwell, B., and Brett, J., that the authority of the clerk extended to authorise him to part with the possession and property of the larger sum. Ibid.

- (b) *Taking and depositing rabbits, and subsequently removing them.*

2.—Poachers killed rabbits on Crown land, put some in bags and some in bundles, strapped them together by the legs, and concealed them in a ditch on the same land, as a place of deposit till they could conveniently remove them, before eight o'clock in the morning. The prisoner at about a quarter to eleven o'clock on the same day went with two others to the ditch, and began to remove the rabbits. The prisoner knew of the manner in which the rabbits had been killed. It was to be taken as fact that the poachers had no intention to abandon the wrongful possession of the rabbits:—Held, that the killing and placing the rabbits in the ditch, and subsequently removing them, constituted one inseparable act of taking and carrying away, and therefore there was no larceny. *The Queen v. Townley*, 40 Law J. Rep. (N.S.) M. C. 144; Law Rep. 1 C. C. R. 315.

- (c) *Forcibly taking warrants from bailiff of Court.*

3.—A warrant of execution on each of two judgments against the prisoner in two plaints

in the County Court had issued against him, under which a levy had been made by the high bailiff of the Court, and the warrants were handed to the under bailiff, who was then left in possession of the prisoner's goods. The prisoner, a day or two afterwards, forcibly took the warrants out of the deputy bailiff's hands, kept them, and then ordered him away as having no longer authority to remain there, and on his refusal to leave, forcibly turned him out of the house in which the goods were. For these acts the prisoner was indicted, and convicted upon an indictment framed upon the 24 & 25 Vict. c. 96, s. 30, which charged in the first count a stealing of the warrants of execution, and in the second a taking of the same from a person having the legal custody of the same for a fraudulent purpose:—Held, that the facts did not afford any evidence of a larceny of the documents, but did disclose a fraudulent purpose within the meaning of the statute, and that the conviction must be supported on the second count. *The Queen v. Bailey*, 41 Law J. Rep. (n.s.) M. C. 61; Law Rep. 1 C. C. R. 347.

(d) *Money obtained by servant on pretence of paying fellow servant.*

4.—It was the duty of the prisoner, as confidential foreman of the prosecutor over his workmen, to enter weekly on a pay-sheet the amount due to each workman for the week's wages, and having presented this pay-sheet to the cashier, and the total amount due to the several workmen having been reckoned up, he would obtain the total amount from the cashier to pay thereout the amount due respectively to the workmen. The prisoner, intending at the time to defraud his master, falsely represented on the pay-sheet that 1*l.* 10*s.* 4*d.* was due to a certain workman, whereas, in truth, a sum of 1*l.* 8*s.* was due to him, and having obtained the total amount for the week from the cashier, which included such larger sum, fraudulently appropriated the difference of 2*s.* 4*d.* to his own use:—Held, that he was guilty of larceny of the 2*s.* 4*d.* *The Queen v. Cooke*, 40 Law J. Rep. (n.s.) M. C. 68; Law Rep. 1 C. C. R. 295.

*The Queen v. Thompson* (L. & C. 233; 32 Law J. Rep. (n.s.) M. C. 57) discussed. *Ibid.*

(e) *Wrongful refusal to return change out of money paid.*

5.—The prisoner was the daughter of the proprietor of a "merry-go round," and was in charge thereof, and the price of a ride thereon was one penny for each person. The prosecutrix got into the machine and handed to the prisoner a sovereign in payment of the ride, asking for the change. The prisoner gave the prosecutrix eleven-pence, and the merry-go-round being about to start, said she would give her the rest of the change when the ride was over. The prosecutrix assented to this, and about ten minutes after, when the ride was over, found the prisoner attending to a shooting gallery, and asked her for her change, when the prisoner replied that she

had only received a shilling from her, and declined to give any more. The indictment charged the prisoner with stealing nineteen shillings in money of the moneys of the prosecutrix. The prisoner was convicted of stealing the nineteen shillings:—Held, by a majority of the Judges, that the conviction was wrong and must be quashed. *The Queen v. Bird*, 42 Law J. Rep. (n.s.) M. C. 44.

(B) INDICTMENT.

*Amendment of indictment for larceny: variance: pleadings.* [See INDICTMENT, 2.]

(C) NOTICE OF ACTION UNDER LARCENY ACT, 1861.

*Notice of action: ground for believing that theft was being committed.* [See ACTION, 11.]

LEASE.

(A) AGREEMENT FOR LEASE.

- (a) *Usual clauses.*
- (b) *Agreement for sub-lease by reference to original lease.*
- (c) *Option as to term of lease.*
- (d) *Separable contract for building leases.*
- (e) *Collateral parol agreement.*

(B) LEASE.

- (a) *Reservation of right to kill game.*
- (b) *General words: implied contract as to lights.*
- (c) *Rates, taxes, and assessments.*
- (d) *Repairs.*
  - (1) *As between landlord and tenant.*
  - (2) *As respects injury to stranger.*
- (e) *Covenant not to assign.*
  - (1) *Breach of covenant.*
  - (2) *Right of landlord to refuse consent to assignment.*
- (f) *Covenants as to user of premises.*
  - (1) *To use as post-office.*
  - (2) *Not to permit sale by auction.*
- (g) *Compensation for goodwill of alehouse.*
- (h) *Power of distress.*
- (i) *Power of re-entry.*
  - (1) *Severance of reversion.*
  - (2) *Demand of rent.*
- (k) *Forfeiture: waiver.*
- (l) *Notice to quit.*
- (m) *Unsealed lease not binding on assignee of reversion.*
- (n) *Variation of lease by collateral parol agreement.*

(C) DISCLAIMER IN BANKRUPTCY.

(D) RENEWABLE LEASEHOLDS.

(E) ASSIGNMENT.

(F) SURRENDER.

- (a) *Rights of sub-lessee.*
- (b) *By trustee in bankruptcy as against purchaser of fixtures.*

## (A) AGREEMENT FOR LEASE.

(a) *Usual clauses.*

1.—A proviso for re-entry on non-observance of the lessee's covenants is not a usual clause in a mining lease, to be inserted in the absence of express stipulation. *Hodgkinson v. Crowe*, 44 Law J. Rep. (N.S.) Chanc. 680; Law Rep. 10 Chanc. 622.

2.—Clauses of forfeiture on bankruptcy or composition, and in restraint of alienation, without the consent of the lessor, are not included in the words "usual and customary mining clauses," contained in an agreement for a lease. *Hodgkinson v. Crowe*, 44 Law J. Rep. (N.S.) Chanc. 238; Law 19 Eq. 591.

(b) *Agreement for sub-lease by reference to original lease.*

3.—Where an assignee of a lease, which contained six covenants and a proviso for re-entry on breach of any of them, but no covenant not to underlet, agreed with the defendant for a sub-lease, the sub-lease to contain an extract of the covenants in the original lease, and not to be parted with or underlet without the sub-lessor's consent:—Held, that the agreement for the sub-lease could not be read as having the proviso for re-entry attached to the new stipulation not to underlet, and that such proviso could not be implied. *Shaw v. Coffin* (14 C. B. N. S. 372) followed. *Crawley v. Price*, Law Rep. 10 Q. B. 302.

4.—A lease of mines was granted by S to W., his executors, administrators, and assigns (described as the "lessee or lessees"), W. covenanting that the lessee or lessees would not assign or underlet without the consent of S., his heirs or assigns. There was a proviso of re-entry in case they did so. W. died, and his executor agreed, with the consent of S., to underlet a part of the property comprised in the lease to B., the underlease to contain "the like provisions and conditions" as were contained in the original lease. W.'s interest in the original lease was then assigned to C., subject to the agreement with B. A question was raised by C., as underlessor, whether the lease to B. ought to be so framed as to require the consent of the original lessor or of the underlessor to any assignment or underlease by B.:—Held (reversing the decision of Bacon, V. C., 43 Law J. Rep. (N.S.) Chanc. 382; Law Rep. 17 Eq. 549), that the lease must be so framed as to require only the consent of the underlessor, and also that upon the true construction of the original lease, the consent of S. was not required to any assignment or underlease made by an underlessee of whom S. had approved. Held also, that the original lessor could not, by the terms of a license to underlet, enlarge the proviso for re-entry reserved by the original lease. *Williamson v. Williamson*, 43 Law J. Rep. (N.S.) Chanc. 738; Law Rep. 9 Chanc. 729.

(c) *Option as to term of lease.*

5.—It is a settled rule of law that an agreement for a lease for seven or fourteen years means

a lease for fourteen years determinable by the lessee, but not by the lessor at the end of seven years. *Powell v. Smith*, 41 Law J. Rep. (N.S.) Chanc. 734; Law Rep. 14 Eq. 85.

A land agent having no power to grant leases without reserving to his principal the power of determining them at the expiration of every seven years, entered into an agreement for a grant to an intending tenant of a lease for seven or fourteen years. The tenant was put into possession of the farm, and took the stock on it from the outgoing tenant at a valuation. The lessor, who did not know the rule of law above mentioned, refused to grant a lease without reserving to himself the right to terminate it at the end of seven years, as well as giving such right to the tenant:—Held, that the lessor was not entitled to have a power of determining the lease at the end of seven years, for his ignorance of the law was no excuse, and he could not repudiate his agent's act after letting the plaintiff take possession of the farm on the faith of it. *Ibid.*

(d) *Separable contract for building leases.*

6.—Where the conditions of an agreement between landlord and builder, whereby the landlord agrees to grant leases of successive plots of land as the houses upon each of them are built to a certain stage, are by the terms of the contract separable, there is no rule of equity to prevent them from being separately enforced by way of specific performance. Therefore, where the assignee of the builder's interest had completed the houses upon some only of the plots agreed to be built upon,—Held, reversing the decision of Wickens, V. C., upon bill for specific performance, that he was entitled to the leases of those plots, even though disclaiming all interest in the remaining plots. *Wilkinson v. Clements*, 42 Law J. Rep. (N.S.) Chanc. 38; Law Rep. 8 Chanc. 96.

(e) *As to variation of lease by collateral parol agreement.*

[See *infra*, 27, 28.]

*Specific performance of agreement for lease.*

[See SPECIFIC PERFORMANCE, 10.]

## (B) LEASE.

(a) *Reservation of right to kill game.*

[See GAME, A.]

(b) *General words: implied contract as to lights.*

7.—A lease of a house for twenty-one years was made by the defendant to the plaintiff, by a deed containing general words including "lights." At the date of the lease, the defendant was entitled, as under-lessee, for a term of which rather more than four years were then unexpired, to certain premises adjoining the house so leased to the plaintiff, and over which light found access to the said house. Nine years after the date of the lease, the defendant having purchased the fee of these adjoining premises, commenced building thereon so as to interfere with the light of the plaintiff's house. In a suit by the plaintiff for

an injunction to restrain the defendant from so building as to interfere with the light thus coming to his house.—Held, that no warranty or bargain could be implied from the general words that the plaintiff should have the access of light over the defendant's premises unimpeded for a longer time than that for which the defendant was, at the date of the lease, entitled to the said adjoining premises, and the plaintiff's bill was dismissed with costs. But held, that during the period for which the defendant was entitled as under-lessee to the adjoining premises, he could not lawfully have interfered with the plaintiff's light coming across the said adjoining premises. *Booth v. Alcock*, 42 Law J. Rep. (n.s.) Chanc. 557; Law Rep. 8 Chanc. 663.

(c) *Rates, taxes, and assessments.*

8.—A. let land to B. at a specified rent, payable without any deduction, except level tax, property tax, and land tax; B. covenanted to pay all taxes and assessments, except such specified taxes; A., besides being owner of the land, was owner of the tithe rent-charge thereon:—Held, that B. was not liable in an action on such covenant for not paying the tithe rent-charge in addition to the specified rent. *Jeffrey v. Neale*, 40 Law J. Rep. (n.s.) C.P. 191; Law Rep. 6 C.P. 240.

9.—By a lease, the tenant agreed to pay the rent, "without any deduction in respect of any taxes, rates, assessments, or charges whatsoever, the landlord's property tax only excepted:—Held, that the tenant was bound to pay the tithe rent-charge imposed upon the demised hereditaments. *Lockwood v. Wilson*, 43 Law J. Rep. (n.s.) C.P. 179.

10.—The lessee of a house which was demised for twenty-one years at an annual rent covenanted with his lessor during the term "to bear, pay, and discharge the sewers rate, tithes, rent-charge in lieu of tithes, and all other taxes, rates, assessments, and outgoings whatsoever, which at any time or times during the said demise should be taxed, rated, charged, assessed, or imposed upon the said demised premises, or any part thereof, or upon the landlord or tenant in respect thereof, or on the rent thereby reserved (except as aforesaid.)" Under section 10 of the Sanitary Act, 1866, the local board of the district were empowered to require the owner of the house to connect the house-drains with a main-sewer belonging to the board, and on his default to do the work, and recover the expenses from the owner in a summary manner. The local board having, during the demise, required the connection to be made,—Held, that the lessee was bound by his covenant to pay the expense of making it. *Crosse v. Raw*, 43 Law J. Rep. (n.s.) Exch. 144; Law Rep. 9 Exch. 209.

(d) *Repairs.*

(1) *As between landlord and tenant.*

11.—Where a railway company give the lessee for years of a house notice to treat, an award is

made, and eventually a conveyance executed, and thereupon possession given to them, such lessee is liable to his landlord at all events up to that time, on a covenant to repair and keep in repair, and the measure of damages is the diminution of the market value of the reversion at that time. *Mills v. The Guardians of the East London Union*, 42 Law J. Rep. (n.s.) C.P. 46; Law Rep. 8 C.P. 79.

12.—Notice of want of repair is necessary before a lessor can be sued on his covenant to repair the interior of the demised premises. So held by Bramwell, B., and Channell, B.; *contra* by Martin, B. *Makin v. Watkinson*, 40 Law J. Rep. (n.s.) Exch. 33; Law Rep. 6 Exch. 25.

*Breach of covenant to repair: damages: injury done to reversion: repairs done by landlord before action.* [See DAMAGES, 14.]

(2) *As respects injury to stranger.*

13.—Lease of a house to a tenant who covenanted to repair. Damage to a passer-by having been occasioned by reason of the insecure state of the coal-plate of the tenant's cellar, which was insecure at the time of the demise:—Held, that the tenant was liable, and not the landlord. *Pretty v. Bickmore*, Law Rep. 8 C.P. 401.

14.—As between landlord and tenant who is under covenant to repair, the tenant and not the landlord is liable for damage to a stranger occasioned by the premises being insecure for want of repair, notwithstanding such want of repair existed at the time of the demise. *Gwinnet v. Eamer*, Law Rep. 10 C.P. 658.

(e) *Covenant not to assign.*

(1) *Breach of covenant.*

15.—Where one of two parties, who were assignees of a lease which contained a covenant by the lessee for himself and his assigns not to assign without the lessor's consent, assigned to his co-partner on the dissolution of the partnership:—Held, a breach of the covenant. *Varley v. Coppard*, Law Rep. 7 C.P. 505.

16.—The plaintiff demised to the defendant certain land upon condition that the defendant should not, without the plaintiff's consent in writing, underlet any part of the land or permit any other person to occupy it. The plaintiff had power to re-enter for breach of the conditions. The defendant, without the plaintiff's consent, underlet for a definite period, some of the land which he held of the plaintiff. The latter was informed of the under-tenancy, but he subsequently received rent and also levied a distress. He afterwards brought ejectment, alleging that the lease had been forfeited by reason of the occupation of the under-tenant:—Held, that the under-tenancy was a breach of the condition not to underlet, and could not be treated as a breach of the condition not to permit another person to occupy; that there was no continuing breach; that the breach of the condition not to underlet had been waived by acceptance of rent and the distress, and that ejectment

could not be maintained. *Walrond v. Hawkins*, 44 Law J. Rep. (N.S.) C. P. 116; Law Rep. 10 C. P. 342.

(2) *Right of landlord to refuse consent to assignment.*

17.—The plaintiff was tenant of a messuage which the defendant had by deed demised to him for a term of years. The lease contained, first, a covenant by the lessee not to let the premises without the consent of the lessor, "such consent not being arbitrarily withheld;" second, a proviso for re-entry if the lessee underlet without the consent of the lessor, stipulating "but such consent is not to be arbitrarily withheld." The lessor refused his consent to an underlease because there was a probability that the premises would be compulsorily purchased by a public body, who, having obtained statutory powers so to do, had already bought some houses near. The lessee sued his lessor, declaring upon a covenant by the defendant not to arbitrarily withhold his consent, and alleging as a breach an arbitrary refusal:—Held, that there was no such covenant by the lessor expressed or implied in the above-mentioned clauses of the lease; and, per Kelly, C.B., and Pollock, B., moreover, that the refusal of consent was not arbitrary. *Treloar v. Bigg*, 43 Law J. Rep. (N.S.) Exch. 95; Law Rep. 9 Exch. 151.

[As to insertion of covenant against assignment in underlease under agreement referring to original lease, see supra No. 4.]

(f) *Covenants as to user of premises.*

(1) *To use as post-office.*

18.—In a lease to the Postmaster-General and his successors, the Postmaster-General covenanted that he and his successors would, during the term, "use the premises as a post-office for the parish and district of Clifton, and should not use the same for any other purpose." The premises were used for receiving excise duties, and granting excise licenses under 32 & 33 Vict. c. 14, s. 18:—Held, that ejectionment could not be brought upon a proviso on re-entry on breach of covenant, as there could be no reasonable doubt that the parties to the lease had contemplated that there would be from time to time alterations in the business transacted by the defendants, and the sale of excise licenses was so far analogous to the business of the post-office that it could not be said to be a breach of the covenant. *Wadham v. The Postmaster-General*, 40 Law J. Rep. (N.S.) Q. B. 310; Law Rep. 6 Q. B. 644.

(2) *Not to permit sale by auction.*

19.—The plaintiff demised a house to C, who covenanted not to permit or suffer any sale by auction to take place on the premises. C subsequently granted a bill of sale under seal assigning his goods in the house as security for a loan, and empowering the grantees to sell them by auction on the premises in default of repayment. He next mortgaged the house by an under-lease to the defendant, and, finally, executed a deed of assignment conveying all his estate to trustees for his

creditors; he nevertheless remained in possession. The grantees of the bill of sale sold the goods by auction on the premises. The plaintiff brought an action of ejectionment, and, in compliance with a Judge's order, delivered particulars of the following breaches of covenant, upon which she relied as causing a forfeiture of the lease, namely, first, non-payment of rent accrued since the day of the sale; secondly, the permitting and suffering a sale by auction to take place on the premises. Pursuant to an order under the Common Law Procedure Act, 1852, s. 212, and the Common Law Procedure Act, 1860, s. 1, the arrears of rent were tendered to the plaintiff, and being refused were paid into Court, whereupon the proceedings on the first breach were stayed, but the action went to trial on the second. The jury found that C. permitted the sale:—Held, that he had power to do so, notwithstanding the conveyance of his estate, and, having done so, had committed an act of forfeiture which was not waived by the plaintiff stating in the particulars of breaches, the non-payment of subsequent rent. *Toleman v. Portbury* (Exch. Ch.), 41 Law J. Rep. (N.S.) Q. B. 98; Law Rep. 7 Q. B. 344.

(g) *Compensation for goodwill of alehouse.*

20.—A lease for years of an alehouse granted to the plaintiff provided that, "at the expiration or other sooner determination of the said term hereby created, all such sum and sums of money as shall or can be procured for the goodwill of the business of a licensed victualler, in respect of the said premises, from an incoming tenant, shall be received by and belong to" the plaintiff. The term having expired, the defendant, who was owner of the reversion and executrix of the lessor, let the house upon lease to a fresh tenant, by whom she was paid 1,300*l.* as premium: she received nothing for goodwill from the new lessee, and she was willing that the plaintiff should get from him compensation for the goodwill. The plaintiff sued the defendant to recover 1,300*l.*:—Held, that an action was maintainable under the proviso, but that the sum of 1,300*l.* was not to be taken as the amount payable by virtue thereof to the plaintiff; that the value of the goodwill of the alehouse was to be fixed by ascertaining what sum would be paid by an incoming to an outgoing tenant in respect thereof. *Llewellyn v. Rutherford*, 44 Law J. Rep. (N.S.) C. P. 281; Law Rep. 10 C. P. 456.

(h) *Power of distress.*

21.—A proviso in a lease of a seam of coal under certain lands therein described, empowered the lessor to distrain for rent the chattels, effects, goods, &c., employed upon or under the said lands, in connexion with the working of the coal, as well within the limits of the said lands, as also in, or under or about any other lands in which there should be any pits or openings, through which the coal demised should be for the time being in course of working by the lessees, their executors, administrators and assigns, and for that purpose to enter into and upon such other lands:—Held, that such a proviso or covenant could not attach to land in

which the lessor had no interest, and that he could not by virtue of it distrain on any "such other lands" after an assignment of the lessees' interest therein. *Daniel v. Stepney*, 41 Law J. Rep. (N.S.) Exch. 208; Law Rep. 7 Exch. 327.

Reversed on appeal, the Court holding that whether or not the power of distress was valid, the plaintiffs taking as assignees with notice were bound. *Daniel v. Stepney*, Law Rep. 9 Exch. 185.

(i) *Power of re-entry.*

(1) *Severance of reversion.*

**22.**—Lease of 5A. 2R. 20P. of ground at a rent of 100*l.* with a proviso empowering the lessor upon giving three months' notice to resume possession of "any portion" of the demised premises, and providing that if any portion were resumed the rent should be reduced at the rate of 20*l.* per acre. The lessor subsequently by deed conveyed his reversion to the use of himself and another as tenants in common, and shortly afterwards the tenants in common served notice of their intention to resume the whole of the lands:—Held, that they had a right to resume the whole (although the sum to be allowed in debate did in that event exceed the entire rent), that actual entry was not necessary under the notices, and that the severance of the reversion did not destroy their right. *Liddy v. Kennedy*, Law Rep. 5 E. & I. App. 134.

(2) *Demand of rent.*

**23.**—By an agreement under which premises were let at a rent payable on the usual quarter-days, a right of re-entry was reserved to the landlord if default should be made "in payment of the rent or any part thereof within twenty-one days after the same shall become due (being demanded)":—Held, that to entitle the landlord to bring ejectment on such a right of re-entry there must be a demand of the rent after such twenty-one days have elapsed, and a demand made during such twenty-one days was not sufficient. *Phillips v. Bridge*, 43 Law J. Rep. (N.S.) C.P. 13; Law Rep. 9 C.P. 49.

(k) *Forfeiture: waiver.*

*As to waiver of forfeiture.* [See No. 19.]

[And see LANDLORD AND TENANT, 10.]

(l) *Notice to quit.*

**24.**—The defendant became tenant to the plaintiff under an agreement dated the 20th of December, 1872, by which certain premises were let to him, "for one year certain, and so on from year to year, until half a year's notice to quit be given, by or to either party, at the yearly rent of 50*l.*, payable quarterly, the first payment to be made on the 25th of March next":—Held, that the tenancy commenced from the 25th of December, 1872, and therefore a half year's notice to quit, expiring on the 25th of December, 1874, was a good notice to put an end to the tenancy. *Sandell v. Franklin*, 44 Law J. Rep. (N.S.) C.P. 216; Law Rep. 10 C.P. 377.

DIGEST, 1870-1875.

**25.**—Service of a notice on a servant living at the house of a lessee who promised to give it to him on his return home in a few days held sufficient. *Liddy v. Kennedy*, Law Rep. 5 E. & I. App. 134.

[And see LANDLORD AND TENANT, 5.]

(m) *Unsealed lease not binding on assignee of reversion.*

**26.**—The principle, that the assignee of a reversion is not bound by the terms in a lease not under seal, applies where the demise is of three windows in a factory, with the stipulation that the lessor shall provide steam-power. *Smith v. Eggington*, 43 Law J. Rep. (N.S.) C.P. 140; Law Rep. 9 C.P. 145.

The question whether the assignee of a reversion has adopted the terms of the demise entered into by his assignor, is one of fact, and is to be disposed of by the jury. *Ibid.*

B. demised, by an instrument not under seal, three windows in a factory to the plaintiffs and stipulated to supply steam-power. B. at the time of the demise was mortgagor in possession. His mortgagees sold to the defendant, who did not accept rent from the plaintiffs, but continued to supply steam-power. Subsequently a dispute arose as to the terms upon which the plaintiffs should continue tenants of the defendant, who thereupon cut off the steam-power. The plaintiffs having sued the defendant for cutting off the steam-power, —Held, that no action would lie against the defendant. *Ibid.*

(n) *Variation of lease by collateral parol agreement.*

**27.**—A. leased a farm to B.; before taking it, B. complained to A. of the quantity of game upon it, and A. thereupon told B. that he was about to kill and to keep down the game, and to dismiss most of his keepers, and discontinue letting the shooting, but said that he did not wish this arrangement to be inserted in the lease. The lease was accordingly drawn up and executed, without containing any reference to A.'s undertaking, but it reserved to A., his friends and agents, the game and right of sporting over the farm. The shooting was afterwards re-let during B.'s lease, and a large head of game kept up. A. died, and in a suit to administer his estate, B. brought in as a creditor a claim on account of damage done to his crops by the game:—Held, that the evidence established the fact that there had been a parol agreement collateral to the lease, and upon the faith of which the lease had been executed, that such agreement was valid, and B.'s claim must be admitted. *Erskine v. Adeane—Bennett's Claim* (No. 2), 42 Law J. Rep. (N.S.) Chanc. 849; Law Rep. 8 Chanc. 756.

**28.**—The Goldsmiths' Company entered into an agreement with the plaintiffs to grant them a long lease of ground on which they were about to erect new buildings. The agreement contained a proviso that nothing therein should give the plaintiffs any rights of light and air over certain adjoining ground and buildings. A form of lease

T T

was annexed to the agreement, and the lease was afterwards granted according to the form, and contained an express demise of "lights;" but there was no proviso in the lease similar to the one in the agreement. The Goldsmiths' Company afterwards demised the adjoining ground to the defendants, who commenced building so as to intercept the plaintiffs' light. On motion by the plaintiffs for an injunction,—Held, refusing the motion, that the lease must be read as if the proviso in the agreement was inserted in the lease. *Salaman v. Glover*, 44 Law J. Rep. (N.S.) Chanc. 551; Law Rep. 20 Eq. 444.

#### (C) DISCLAIMER IN BANKRUPTCY.

**29.**—A lessee of a messuage and premises for a term of years assigned the unexpired residue to one who was afterwards adjudicated bankrupt under the Act of 1869. The trustee in bankruptcy disclaimed the lease under section 23 of that Act:—Held, that the lessor could maintain an action on the covenants in the lease against the lessee for the rent which became due between the adjudication and the disclaimer. *Smyth v. North*, 41 Law J. Rep. (N.S.) Exch. 103; Law Rep. 7 Exch. 242.

Semble—per Martin, B., and Pigott, B., that the Court of Bankruptcy having made no order as to the possession of the property disclaimed, this action would be maintainable for rent due after the disclaimer; Contra, per Bramwell, B. *Ibid*.

**30.**—By an indenture of lease G. demised a house to P. for a term of years at an annual rent. The lease contained various stringent covenants on the part of the lessee, and the usual proviso for re-entry on breach of covenant. By an agreement in writing, and in consideration of a premium, P. agreed to under-let part of the house to T. at an annual rent. The agreement contained covenants on the part of the under-lessee less stringent than the lessee's covenants in the original lease, and there was no proviso for re-entry. P. subsequently became bankrupt, whereupon his assignees, under section 23 of the Bankruptcy Act, 1869, and Bankruptcy Rule 28, 1871, executed a disclaimer of his interest in the original lease. G. having declined to admit T.'s tenancy, a bill was filed by T. against G. for the execution of a lease in accordance with the terms of the agreement for an under-lease, but was dismissed with costs. *Taylor v. Gillott*, 44 Law J. Rep. (N.S.) Chanc. 740; Law Rep. 20 Eq. 682.

Quære—whether, if the case had been one of an under-lease of the whole of the property comprised in the original lease, and the covenants in the lease and under-lease had been identical, the under-lease would have remained unaffected by the disclaimer. *Ibid*.

#### (D) RENEWABLE LEASEHOLDS.

*Renewable leaseholds: tenant for life and remainderman.* [See TENANT FOR LIFE, 18–20.]

#### (E) ASSIGNMENT.

**31.**—A lessee of a farm for an unexpired term at a yearly rent payable quarterly, gave up pos-

session to the defendant, under an invalid assignment of the unexpired residue of the lease. The defendant entered, occupied, and paid the reserved rent quarterly to the lessor for the lessee. The lessor never accepted or objected to the defendant as his tenant. The defendant quitted on a quarter-day without giving the lessee any notice to quit:—Held, that a promise by the defendant to indemnify the lessee against the rent for any period after the defendant had ceased to occupy, could not be inferred as a matter of law. *Crouch v. Tregoning*, 41 Law J. Rep. (N.S.) Exch. 97; Law Rep. 7 Exch. 88.

**32.**—The plaintiff being lessee of certain premises assigned his lease to A. B., who assigned to the defendants, who committed breaches of covenant and then assigned over. The plaintiff was subsequently sued by the lessor for the breaches of covenant committed while the defendants were assignees, and was compelled to pay:—Held (affirming the decision of the Court of Exchequer), that the plaintiff was entitled to recover from the defendants the amount he had been compelled to pay to his lessor. *Moule v. Garrett* (Exch. Ch.), 41 Law J. Rep. (N.S.) Exch. 62; Law Rep. 7 Exch. 101.

*Covenants for title and quiet enjoyment.*

[See COVENANT, 6, 7.]

*Notice of power of distress over lands not comprised in the demise.* [See supra No. 22.]

#### (F) SURRENDER.

##### (a) Rights of sub-lessee.

**33.**—The principle that a voluntary surrender by a lessor cannot affect the interest of his under-lessee maintained and applied. Under a revocable license a licensee is entitled to notice of revocation and a reasonable time to remove his goods. *Cornish v. Stubbs* (39 Law J. Rep. (N.S.) C. P. 202; Law Rep. 5 C. P. 334) followed. *Mellor v. Watkins*, Law Rep. 9 Q. B. 400.

##### (b) By trustee in bankruptcy as against purchaser of fixtures.

**34.**—A trustee in liquidation of the affairs of the tenant for years of leasehold premises upon which were certain fixtures, sold the fixtures by auction, and subsequently, without any formal disclaimer, surrendered the premises to the landlord prior to the expiration of the term and before the purchaser of the fixtures had removed them. The landlord having let the premises with the fixtures thereon to an incoming tenant,—Held, that the purchaser was nevertheless entitled to the fixtures, as the trustee, having sold them to him, could not deprive him of his right by afterwards surrendering the lease. *Saint v. Pilley*, 44 Law J. Rep. (N.S.) Exch. 33; Law Rep. 10 Exch. 137.

*Lease of shop in Scotland.* [See SCOTCH LAW, 29.]

*Scotch agricultural lease.* [See SCOTCH LAW, 30.]



## LEGACY.

- (A) WHO TAKE AS LEGATEES.
  - (a) *Misdescription of legatee: evidence.*
  - (b) *Legacy to executor.*
- (B) WHAT PROPERTY PASSES.
  - (a) *Share of leaseholds held in partnership.*
  - (b) *Railway shares.*
  - (c) *Shares standing in specified names: falsa demonstratio.*
  - (d) *Securities for money.*
  - (e) *Money due.*
  - (f) *Legacy for infant's maintenance.*
- (C) WHAT INTEREST LEGATEE TAKES.
  - (a) *Separate use with direction to settle.*
  - (b) *Absolute gift by implication.*
  - (c) *Gift cum onere.*
- (D) VESTED OR CONTINGENT.
- (E) SPECIFIC, DEMONSTRATIVE, OR GENERAL.
- (F) CUMULATIVE OR SUBSTITUTIONAL.
- (G) CONDITIONAL.
  - (a) *Non-compliance through ignorance.*
  - (b) *Impossible condition.*
- (H) ADEMPMENT AND SATISFACTION.
  - (a) *By advancement to child.*
  - (b) *Legacy for particular purpose.*
  - (c) *Gift of balance.*
  - (d) *Payment of debt.*
  - (e) *Conversion of property specifically bequeathed.*
  - (f) *Adeemed devise: intermediate rents.*
- (I) PERPETUITY.
- (K) INTEREST ON LEGACY.
- (L) LEGACY FREE OF DUTY.
- (M) WHAT PROPERTY IS APPLICABLE TO THE PAYMENT OF LEGACIES.

## (A) WHO TAKE AS LEGATEES.

(a) *Misdescription of legatee: evidence.*

1.—A legacy was given by a testatrix “to the treasurer for the time being of the fund for the relief of the widows and orphans of the clergy of the diocese of Worcester, to be applied by him for the benefit of that charity.” There were two societies, one for the clergy and orphans of the archdeaconry of Worcester, the other for that of Coventry. They were both founded in 1777. Before 1837 the archdeaconry of Worcester constituted the whole diocese of Worcester, and the former society had a name referring to the diocese of Worcester. In 1848 its name was changed so as to refer only to the archdeaconry of Worcester. Both societies claimed the legacy:—Held, overruling one of the Vice-Chancellors, that the legacy was a gift to a society and not a trust for widows and orphans, and that parol evidence was admissible to determine which was entitled. And held, further, that evidence shewing that the testatrix’s father and mother had for a large number of years been a subscriber to the Worcester society, and that the testatrix after the death of the survivor of them had continued the subscription until her own death, was decisive in favour of the claim of

the Worcester society, there being no evidence that she or any member of her family had subscribed to the Coventry society. *In re Kilvert’s Trusts*, 41 Law J. Rep. (N.S.) Chanc. 351; Law Rep. 7 Chanc. 170.

2.—A will and three codicils of a testator had been proved. The will contained a gift of 2,500*l.* each to the York and Leeds Hospitals, the second codicil reciting the gifts in the will added 1,500*l.* to each of these gifts, the third codicil purported to revoke the last will, except a gift therein of 1,000*l.* to St. Catherine’s College, which it purported to confirm. The will contained no such gift. By the third codicil the testator gave 25*l.* to W., describing him as curate of Holy Trinity Church. W. had never been curate of Trinity Church:—Held, that the will which had been admitted to probate was revoked by the third codicil, although inaccurately referred to, that the intervening codicils were not revoked, that St. Catherine’s College was entitled to the legacy of 1,000*l.*, which the testator purported to confirm by the third codicil. That W. was entitled to the legacy of 25*l.*, although wrongly described, and that neither the instructions for the will nor any evidence of intention could be adduced to shew that he was not the person for whom the legacy was intended. *Farrer v. St. Catherine’s College, Cambridge*, 42 Law J. Rep. (N.S.) Chanc. 809; Law Rep. 16 Eq. 19.

3.—A bequest of 10*l.* and furniture was made to each of the three children of W. and E. B. They had four children:—Held, that each of the four was entitled to 10*l.* and a share of the furniture. *Perkins v. Fladgate*, 41 Law J. Rep. (N.S.) Chanc. 681; Law Rep. 14 Eq. 54.

[And see WILL, CONSTRUCTION, G 4-6.]

(b) *Legacy to executor.*

4.—Legacy “as a remembrance” to testator’s “friend” P. whom he appointed executor, but who did not act:—Held, that P. was entitled without proving as executor. *Bubb v. Yelverton*, Law Rep. 13 Eq. 131.

*Charitable legacies.* [See WILL, CONSTRUCTION, H 1-3; CHARITY, 12-24.]

## (B) WHAT PROPERTY PASSES.

(a) *Share of leaseholds held in partnership.*

5.—By his will the testator bequeathed all his share of the leasehold premises in which his business was carried on to his partner L. The leasehold premises were assets of the partnership between the testator and L. held by them as joint tenants. The partnership assets proved insufficient to pay the partnership debts. The estates of both partners being, however, solvent,—Held, that L. was not entitled to the value of the testator’s share of the leasehold premises out of his general estate, but that the bequest in fact conferred no benefit on him. *Farquhar v. Haddon*, 41 Law J. Rep. (N.S.) Chanc. 260; Law Rep. 7 Chanc. 1.

(b) *Railway shares.*

6.—A bequest of the testator's shares in a railway will carry his railway stock. *Oakes v. Oakes* (9 Hare, 666) overruled. *Morrice v. Aylmer*, 44 Law J. Rep. (N.S.) Chanc. 212; Law Rep. 10 Chanc. 148; affirmed, on appeal to the House of Lords, Law Rep. 7 E. & I. App. 717.

(c) *Shares standing in specified names: falsa demonstratio.*

7.—Gift of "all my shares in the P. Company, now standing in the names of H. L. and A. B." (the testator):—Held (there being no shares standing in both names) to carry shares standing in the name of A. B. as executor of H. L., and to which the testator was beneficially entitled, as well as shares standing in his name in his own right. *Coltman v. Gregory*, 40 Law J. Rep. (N.S.) Chanc. 352.

(d) *Securities for money.*

8.—Banker's deposit notes in the following form—"Received of A. B. 150*l.* to account for or on demand" are not "securities for money" so as to pass under a bequest in a will of all the testator's "bonds, promissory notes and other securities for money and the money secured thereon." *Hopkins v. Abbott*, 44 Law J. Rep. (N.S.) Chanc. 316; Law Rep. 19 Eq. 222.

(e) *Money due.*

9.—Bequest of "all and every sum or sums of money which may be due to me at my decease:"—Held, to pass a sum of money recovered by way of damages in an action by the testator's executor for a breach of covenant committed by a lessee of the testator in the testator's lifetime. *Bide v. Harrison*, 43 Law J. Rep. (N.S.) Chanc. 86; Law Rep. 17 Eq. 76.

[And see WILL, CONSTRUCTION, D 13-19.]

(f) *Legacy for infant's maintenance.*

[And see INFANT.]

10.—Legacy to trustees to be expended by them for the benefit and advancement of an infant as they should think fit:—Held, on the infant's attaining twenty-one that he was absolutely entitled to the balance unapplied. *Furley v. Hyder*, 41 Law J. Rep. (N.S.) Chanc. 583.

*Articles in or about house and premises.* [See WILL, CONSTRUCTION, D 10.]

*Furniture.* [See WILL, CONSTRUCTION, D 12.]

*Personal estate and effects.* [See WILL, CONSTRUCTION, D 20.]

## (C) WHAT INTEREST LEGATEE TAKES.

[And see WILL, CONSTRUCTION, I.]

(a) *Separate use with direction to settle.*

11.—A testator by will dated the 2nd of July, 1870, gave a legacy to a married woman for her separate use without power of anticipation, and

directed that "for the purpose of securing to her the separate enjoyment without power of anticipation against any husband for the time being, the trustee should settle the legacy in such manner as would carry out the said purpose." Previously to the date of the will the legatee had been judicially separated from her husband, and had ever since lived apart from him:—Held, that she was entitled to have the legacy paid to her. *Munt v. Glynes*, 41 Law J. Rep. (N.S.) Chanc. 639.

(b) *Absolute gift by implication.*

12.—A legacy was directed to be held on trust for D., "should he survive my sister T.; should he not survive her nor attain his twenty-first year," over:—Held, an absolute gift by implication to D. at twenty-one. *In re Thomson's Trusts*, Law Rep. 11 Eq. 146.

(c) *Gift cum onere.*

13.—Shares in a company were given, together with other property, and were onerous:—Held, that the legatees could repudiate the shares, and take the rest of the gift. *Aston v. Wood*, 43 Law J. Rep. (N.S.) Chanc. 715.

[And see WILL, CONSTRUCTION, D 5; E 4.]

## (D) VESTED OR CONTINGENT.

14.—A testator bequeathed money in trust for A. for life, and after her decease for the children of A., when and as they should attain the age of 21 years; but if A. should die without lawful issue, then over:—Held, that the gift to the children of A. was contingent upon their attaining the age of 21 years. *Bree v. Perfect* (1 Coll. C.C. 128) not followed. *Kidman v. Kidman*, 40 Law J. Rep. (N.S.) Chanc. 359.

Where a legacy is severed from the residue, for the benefit of a tenant for life and a remainderman, the residuary legatees cannot claim the income accruing after the death of the tenant for life, though the remainderman has not yet attained a vested interest in the legacy. *Ibid.*

## (E) SPECIFIC, DEMONSTRATIVE, OR GENERAL.

[And see WILL, CONSTRUCTION, D 6, 14, 16; F.]

15.—A testator after stating by his will that he was contingently entitled to a sum of 5,600*l.* stock, or the securities representing the same, gave to his son "the sum of 2,000*l.* consols, part thereof, or a sum equal thereto, to be transferred or paid to him when the same should be received by his executors:"—Held, that this was a specific legacy of part of the 5,600*l.* stock, and was adeemed, the testator having received the stock and converted it into money during his lifetime. *Oliver v. Oliver*, 40 Law J. Rep. (N.S.) Chanc. 189; Law Rep. 11 Eq. 506.

16.—A testator made a general and absolute bequest of his personalty, followed by a specific devise of realty for payment of his debts. The realty so specifically devised being insufficient for the payment of debts,—Held, that the residuary real estate must contribute with the personalty.

*Powell v. Riley*, 40 Law J. Rep. (N.S.) Chanc. 533; Law Rep. 12 Eq. 175.

17.—A married woman having a testamentary power of appointment over a certain settled sum of stock by her will appointed the stock, "or the stocks or funds which might at her death represent such trust funds," to certain legatees:—Held, that the legacies were specific, not general. *Davies v. Fowler*, 43 Law J. Rep. (N.S.) Chanc. 90; Law Rep. 16 Eq. 308.

Testatrix not having exhausted the whole of the stock, appointed the residue thereof to trustees upon trust to sell and divide the proceeds, after payment thereof of her debts and funeral and "testamentary expenses," between her nephews and nieces:—Held, that the gift of the residue was also specific, but that the probate duty was chargeable exclusively on the residue. *Ibid*.

18.—A testatrix bequeathed all "her" money which should be "invested" at her decease to a trustee upon trust, in the first place to pay thereout her debts and funeral and testamentary expenses, and in the next place to pay to her nephew H., for his life, "the sum of 3,000*l.* invested in Indian security." At the date of her will the testatrix had bonds of the East Indian Loan of the value of 3,000*l.*, but these were redeemed by the Indian Government before her death, and at her death she had no money invested in Indian securities:—Held, that the legacy was demonstrative, and not specific. *Mytton v. Mytton*, 44 Law J. Rep. (N.S.) Chanc. 18; Law Rep. 19 Eq. 30.

19.—A gift of "all my shares and stock" in a will made since the Wills Act, 1 Vict. c. 26, is a specific gift. Such a gift in a will made before the Act would have been a specific gift of all the shares and stock possessed by the testator at the date of his will, and the effect of the Act is to import into the gift all the stock and shares acquired by the testator before his death. *Bothamley v. Sherson*, 44 Law J. Rep. (N.S.) Chanc. 589; Law Rep. 20 Eq. 304.

*Apportionment of dividends.* [See APPORTIONMENT, 5, 6.]

#### (F) CUMULATIVE OR SUBSTITUTIONAL.

20.—A testator made two codicils to his will. By the second he gave to five legatees, named in the first codicil, legacies of the same amount that they took under the first codicil, and to three legatees, named in the first codicil, legacies of half the amount they took under the first. By the first he gave a legacy to one legatee not named in the second, and by the second a legacy to one legatee not named in the first. By each codicil he gave to his servants one year's wages, but by the second he directed that this gift was to be liberally interpreted. The legacies given by the second codicil were to be free of legacy duty; there was no such provision regarding the legacies given by the first codicil. The language of both codicils was almost identical, and they both commenced with the words, "This is a codicil to the will of" &c.:—Held (affirming a decision of Bacon, V.C., 40 Law J. Rep. (N.S.) Chanc. 709; Law Rep. 12 Eq. 525),

that the legacies given by the second codicil were cumulative and not substitutionary. *The Duke of St. Albans v. Beauclerk* (2 Atk. 636); and *Heming v. Clutterbuck* (1 Bligh, N.S. 479), commented on. *Wilson v. O'Leary*, 41 Law J. Rep. (N.S.) Chanc. 342; Law Rep. 7 Chanc. 448.

The testator gave a legacy to his "servant and friend" S. He also bequeathed a year's wages to all his servants:—Held, by Bacon, V.C., that S. took under the bequest to servants, as well as the legacy to himself individually. *Ibid*.

21.—A testator having executed his will in duplicate, subsequently executed on the same day two codicils, almost in identical words, giving by each a legacy of 5,000*l.* to D. for life, remainder to her children, with remainder over. He then deposited one codicil with D., the other with his solicitor. A short time afterwards he executed a further codicil, whereby he confirmed his will, "except so far as the same is altered by a codicil thereto, dated the 2nd day of April, 1868, which last mentioned codicil" he thereby confirmed. In 1871 he took away from his solicitor the codicil he had deposited with him and handed it to D., and, at his death, D. was in possession of both. Both were admitted to probate:—Held, that the codicils were merely duplicates of each other, and that D. was only entitled to one legacy of 5,000*l.* *Whyte v. Whyte*, 43 Law J. Rep. (N.S.) Chanc. 104; Law Rep. 17 Eq. 50.

#### (G) CONDITIONAL.

##### (a) Non-compliance through ignorance.

22.—A testator bequeathed a sum of stock in trust for, and for the benefit of, A. B., adding, that if A. B. did not do certain specified acts within a definite time a portion of the stock was to fall into the testator's residuary estate, and be disposed of accordingly in favour of other persons. A. B. was not aware of the conditions imposed upon him, and did not comply with them within the required period:—Held, that the residuary legatees were entitled to the portion of the stock. *In re Hodges's Trust*, 42 Law J. Rep. (N.S.) Chanc. 452; Law Rep. 15 Eq. 92.

23.—Gift of legacy with direction that the same should lapse if not duly claimed within three months. The legatee having had no notice of the legacy, and not having heard of the testator's death till two years afterwards, did not claim:—Held, nevertheless, that the legacy lapsed. *Powell v. Rawle*, Law Rep. 18 Eq. 243.

##### (b) Impossible condition.

24.—A testator bequeathed personal estate to University College, London, for the purpose of founding in it a new professorship of archaeology, for the regulation of which professorship he proposed preparing a code of rules and regulations which he intended to authenticate under his hand; and he directed his executors to communicate to the college the fact of the bequest, and a copy of the rules and regulations, the acceptance of which was to be signified by the college within twelve months after such communication, and he declared

that if the college should decline or refuse to accept the rules, or should not within the said twelve months signify their acceptance of the same, the bequest should be wholly null and void. The testator died without having authenticated any code of rules and regulations:—Held, reversing the decision of one of the Vice-Chancellors, that the college were entitled to the legacy. *Yates v. The University College, London*, 42 Law J. Rep. (n.s.) Chanc. 566; Law Rep. 8 Chanc. 454: affirmed, on appeal to the House of Lords, 45 Law J. Rep. (n.s.) Chanc. 137; Law Rep. 7 E. & I. App. 438.

#### (H) ADEMPMENT AND SATISFACTION.

##### (a) By advancement to child.

**25.**—Bequest of legacies of 500*l.* each to testator's three sons T., J., and P. and to his daughter 200*l.*, with a direction that neither of his sons whom he should have advanced in his lifetime should be entitled to receive his said legacy without bringing the advances into hotchpot, and bequest of residue to testator's four sons, C., T., J., and P., and the daughter. The testator had *before the date of his will*, made advances exceeding 700*l.* to C., and *after the date of his will* had advanced 500*l.* and 380*l.* to T.:—Held, that the advances to C. should not be taken into account against him; but that, as to T., the 500*l.* must go against his legacy and the 380*l.* against his share of residue. *In re Peacock's Estate*, Law Rep. 14 Eq. 236.

**26.**—A testator by will gave specific estates to trustees for each of his children for life, remainder to their issue in tail with cross-remainders. He gave each tenant for life power to appoint an annuity not exceeding one-third of the estates specifically devised to him or her to a husband or wife surviving. After directing payment of his debts he gave the residue of his real and personal estate to the trustees to divide between his children, and hold on the same trusts as the specifically devised estates. On the marriage of a daughter subsequent in date to his will, he by the marriage settlement covenanted to pay to the trustees a sum of 4,000*l.* to be held upon trusts as to half for the wife for life, half for the husband for life, the whole for the survivor with remainder to the children of the marriage, and in default for the settlor absolutely. At the same time he made a gift of 1,000*l.* to the husband absolutely, which was recited in the marriage settlement as being part of her portion of 5,000*l.*:—Held, first, that the referential trusts of the residue included all the powers given over the specifically devised estates and gave powers to each tenant for life to appoint an annuity of one-third of the income of his or her share of residue, as well as of the specifically devised estate to a husband or wife surviving. Held, also, that the covenant to settle 4,000*l.* was *pro tanto* an ademption of the share or residue taken by the daughter, but that the 1,000*l.* paid to the husband was not. *Cooper v. Macdonald* (No. 1), 42 Law J. Rep. (n.s.) Chanc. 533; Law Rep. 16 Eq. 258.

**27.**—Where a father after giving by his will a portion to his child advanced to such child a por-

tion without any deed or instrument, such provision in the absence of circumstances negating the presumption, was held an ademption *pro tanto*. *Leighton v. Leighton*, 43 Law J. Rep. (n.s.) Chanc. 594; Law Rep. 18 Eq. 458.

The occasion of a subsequent advancement satisfying or redeeming a previous one need not be the marriage of the child or any other occasion calling specially for the advancement of the child. *Ibid.*

**28.**—The presumption that a legacy or a gift of residue is adeemed or satisfied by a subsequent advancement made by the testator to the legatee, arises only in the case of children or persons towards whom the testator stands *in loco parentis*. Therefore, if a testator has placed himself *in loco parentis* to one member only of a family, there can be no presumption as against that one that a provision made for him in common with the others by the testator's will is satisfied or adeemed by a subsequent advancement to him by the testator in his lifetime. *Fowkes v. Pascoe*, 44 Law J. Rep. (n.s.) Chanc. 367; Law Rep. 10 Chanc. 343.

Observations on *Pym v. Lockyer*, 5 M. & C. 29. *Ibid.*

##### (b) Legacy for particular purpose.

**29.**—A testator by his will gave his wife a legacy of 200*l.* to be paid within ten days after his decease. Subsequently, during his last illness, he, at the request of his wife, who did not know the contents of his will, gave her 200*l.* that she might have a sum of money upon his death which she could control without the executor's interference:—Held (affirming the Master of the Rolls), that the legacy was not satisfied by the gift, the case not coming within the rule that where a testator gives a legacy for a particular purpose, and afterwards accomplishes the purpose, the legacy is satisfied. *Pankhurst v. Howell*, Law Rep. 6 Chanc. 136.

##### (c) Gift of balance.

**30.**—A gift of a balance due to the testator from his partnership at a particular date was held to be adeemed, *pro tanto*, by drawings made before his death, and partly before the date of the will. *Aston v. Wood*, 43 Law J. Rep. (n.s.) Chanc. 715.

##### (d) Payment of debt.

**31.**—Testator by his will said, "Whereas there is due to me from my son 1,440*l.* or thereabouts, secured by bills or notes or otherwise, I release my said son from the payment of any interest up to the time of my death, and I direct that he shall have time for payment of the said sum by paying one-sixth in every year next after my death." He afterwards made a codicil, whereby he confirmed his will. The son paid the debts due at the date of the will, amounting to about 1,440*l.*, and afterwards incurred fresh debts to the amount of about 1,300*l.*, which were due at the date of the codicil and at the death of the testator:—Held, that the legacy was specific, that it was adeemed by payment of the debt, and

that the confirmation of the will by the codicil did not give the son any benefit in respect of the debts then due. *Sidney v. Sidney*, 43 Law J. Rep. (N.S.) Chanc. 15; Law Rep. 17 Eq. 65.

(e) *Conversion of property specifically bequeathed.*

[See *supra* Nos. 15, 18.]

(f) *Adeemed devise: intermediate rents.*

32.—Where a testator had specifically devised certain lands, but such lands were contracted to be sold in his lifetime, so that the devise was adeemed,—Held, that the rents received between the death of the testator and the conveyance of the property passed to the devisee. *Watts v. Watts*, 43 Law J. Rep. (N.S.) Chanc. 77; Law Rep. 17 Eq. 217.

(I) PERPETUITY.

33.—Testatrix by will gave money to be applied in building almshouses "when land should be given for the purpose :"—Held, that the gift was bad as tending to a perpetuity. *Chamberlayne v. Brockett*, 41 Law J. Rep. (N.S.) Chanc. 789.

[And see WILL, CONSTRUCTION, R.]

(K) INTEREST ON LEGACY.

34.—A testator by his will directed that certain pecuniary legacies thereby given should be paid out of the proceeds of sale of his real estate. The testator's estate became the subject of an administration suit, upon the further consideration of which the question arose from what time the interest on the said legacies was payable:—Held, that the interest ran from a year after the testator's death. *Turner v. Buck*, 43 Law J. Rep. (N.S.) Chanc. 583; Law Rep. 18 Eq. 301.

(L) LEGACY FREE OF DUTY.

35.—Gift of legacies, duty free, with a direction that the duty should be paid out of the testator's residue. There being no residue available for payment of the duty,—Held, that the gift of the duty failed *pro tanto*, and that the legatees must bear the duties themselves. *Wilson v. O'Leary*, Law Rep. 17 Eq. 419.

(M) WHAT PROPERTY IS APPLICABLE TO THE PAYMENT OF LEGACIES.

[See ADMINISTRATION.]

## LEGACY AND SUCCESSION DUTY.

(A) LEGACY DUTY.

(a) *Money to be laid out in land.*

(b) *Legitimated child of foreigner.*

(c) *Foreign domicil: estate pur autre vie.*

(B) SUCCESSION DUTY.

(a) *When payable.*

(1) *Testator domiciled abroad.*

(2) *Assignees of insured person.*

(3) *Accumulations of income.*

(b) *Succession: alienation by remainderman to corporation.*

(c) *Charge of, upon proceeds of sale.*

(d) *Value of succession: allowance in respect of annuity.*

(C) DOUBLE DUTY.

(A) LEGACY DUTY.

(a) *Money to be laid out in land.*

1.—Testator, who died in 1800, by his will directed a fund in Consols to be laid out in the purchase of land, and settled in succession on certain persons and their issue male, with remainder to his own right heirs. S. became entitled by inheritance to the fund, and on her death E. became entitled thereto as heir to S. The fund never was laid out in the purchase of land, nor in any way dealt with by S., or those from whom she inherited it:—Held, affirming the judgment below, 40 Law J. Rep. (N.S.) Exch. 198; Law Rep. 6 Exch. 286, that under the 36 Geo. 3. c. 52, s. 19, the rate of legacy duty payable by E. was the same as would have been payable on a legacy bequeathed to him by S. *De Lancey v. The Queen* (Exch. Ch.), 41 Law J. Rep. (N.S.) Exch. 64; Law Rep. 7 Exch. 140.

(b) *Legitimated child of foreigner.*

2.—A testator of English birth, but domiciled in France, gave, by his will, shares in the proceeds of converted real estate in England to his two daughters, who were not born in wedlock, but had been legitimated according to the law of France:—Held, that the status of the daughters in England must be their status according to the law of France, i.e., that of legitimate "children" and not of "strangers in blood," and that legacy duty at the rate of 1*l.* per cent. was payable upon the shares taken by them under their father's will—Observations on *Birtwhistle v. Vardill* (2 Cl. & F. 571; 7 Cl. & F. 895). *Skottowe v. Young*, 40 Law J. Rep. (N.S.) Chanc. 366; Law Rep. 11 Eq. 474.

(c) *Foreign domicil: estate pur autre vie.*

3.—Legacy duty is payable on an annuity for lives (including the testator's) charged on land in the United Kingdom, and bequeathed by a person having a foreign domicil.—Decision of Bacon, V.C., (41 Law J. Rep. (N.S.) Chanc. 115; Law Rep. 12 Eq. 464) reversed. *Chatfield v. Berchtoldt*, 41 Law J. Rep. (N.S.) Chanc. 255; Law Rep. 7 Chanc. 192.

(B) SUCCESSION DUTY.

(a) *When payable.*

(1) *Testator domiciled abroad.*

4.—When a testator domiciled abroad directs a part of his residuary personal estate which is to be invested in English securities in the names of English trustees to be set apart to answer a life annuity, and on its determination to fall into the

residue, the increase of benefit accruing on the death of the annuitant to the residuary legatees is not a succession within the operation of section 5 of the Succession Duty Act. *Callanane v. Campbell*, 40 Law J. Rep. (N.S.) Chanc. 195; Law Rep. 11 Eq. 378. [But see next case.]

5.—A testator domiciled abroad, directed his residuary personal estate to be invested in English Government securities, and a part thereof to be set apart to answer a life annuity on the determination of which it was to fall back into the residue for the benefit of the residuary legatees, and the fund was appropriated and invested in Consols accordingly:—Held, that the increase of benefit accruing to the residuary legatees upon the death of the annuitant was a succession within section 5 of the Succession Duty Act, 16 & 17 Vict. c. 51.—*Callanane v. Campbell* (40 Law J. Rep. (N.S.) Chanc. 195; Law Rep. 11 Eq. 378) reversed, and *In re Badart's Trusts* (39 Law J. Rep. (N.S.) Chanc. 645) supported. *The Attorney-General v. Campbell* (H.L.), 41 Law J. Rep. (N.S.) Chanc. 611; Law Rep. 5 E. & I. App. 524.

6.—L. having his domicile in Sydney, by marriage settlement made in England, assigned to trustees a sum in Consols and a policy on his life in an English assurance office and covenanted to pay to them a sum of 1,000*l.* within three years from the date of the settlement. The trust funds were settled upon the usual trusts, for the husband for life, wife for life, remainder for the children of the marriage, and L. by his will left all his property, principally situated in Sydney, to English trustees, upon trust for his wife for life and after her death for his children. L. died at Sydney before the moneys covenanted to be paid to the trustees were payable. His wife died three months afterwards, after the moneys covenanted to be paid by Mr. Lyall became due, but before the policy moneys were due. There was one child of the marriage. None of the property of the testator was transmitted to England until after the death of his wife:—Held, that succession duty was payable on all the funds comprised in the settlement, but not on any of the funds that passed by the will. *The Attorney-General v. Campbell* (last case) commented upon. *Lyall v. Lyall*, 42 Law J. Rep. (N.S.) Chanc. 195; Law Rep. 15 Eq. 1.

Duty on benefits taken under a will and a settlement distinguished. *Ibid.*

(2) *Assignees of insured person.*

7.—Trustees of an assurance company held to be assignees of an assured person within the meaning of section 17 of the 16 & 17 Vict. c. 96, and that no succession duty was payable as between the subscriber and them. *In re Maclean's Trusts*, 44 Law J. Rep. (N.S.) Chanc. 145; Law Rep. 19 Eq. 275.

(3) *Accumulations of income.*

8.—A testator by his will, dated in March, 1850, devised real estates to trustees to accumulate the rents for twenty-one years from his death, and then to convey and assign the same respec-

tively to the person who should then be the heir male of his body; in default of such, to the heir general of his body; and in default of such, to his heirs general. The testator died, a bachelor, in June, 1850. The testator's heir general died in 1865. In 1871, the then heirs general succeeded to the estates and the accumulations of income:—Held, that they must pay the duty. *The Attorney-General v. Gell* (3 Hurl. & C. 615; 34 Law J. Rep. (N.S.) Exch. 145) followed. *Ring v. Jarman*, 41 Law J. Rep. (N.S.) Chanc. 535; Law Rep. 14 Eq. 357.

(b) *Succession: alienation by remainderman to corporation.*

9.—Testatrix by will, made in 1839, devised real property to one for life, and after his death to a remainderman in fee, and died in 1841. The remainderman, a cousin of the testatrix, died in 1870, having previously sold his reversion in fee to a corporation. The tenant for life died in 1872:—Held, on an information against the corporation, first, that the corporation, upon the death of the tenant for life, were "successors" within sections 2 and 27 of the Succession Duty Act, 1853, and were liable to pay succession duty upon the full value. Secondly, that if necessary, the Court would have decided the death of the remainderman to be immaterial, and the rate of duty to be the same as would have been payable by him if he had survived the tenant for life without selling, but that at all events the Crown had made out a *prima facie* case to duty at that rate, since the Crown need not prove the death of the remainderman, nor who was his heir; and that if events had happened by which the duty would be less, the corporation must prove them. *The Solicitor-General v. The Law Reversionary Interest Society*, 42 Law J. Rep. (N.S.) Exch. 146; Law Rep. 8 Exch. 233.

(c) *Charge of, upon proceeds of sale.*

10.—Estates subject to a jointure rent-charge were settled subject to a power of sale, with trusts for reinvestment of the purchase-money in lands to be settled to the like uses, and were sold under the power of sale:—Held, affirming the decision of one of the Vice-Chancellors, that the charge of succession duty that would become payable on the extinction of the jointure was shifted by section 32 of the Succession Duty Act, 16 & 17 Vict. c. 51, from the lands sold to the purchase-money, and the lands on which it might be re-invested, and therefore the purchaser was not entitled to require it to be paid for. *Dugdale v. Meadows*, 40 Law J. Rep. (N.S.) Chanc. 140; Law Rep. 6 Chanc. 501.

(d) *Value of succession: allowance in respect of annuity.*

11.—Where a person in possession of property as tenant for his life joins with the person next entitled as tenant in tail and opens the entail, reserving a joint power of appointment over the estate, and by means of that power settles an annuity upon the tenant in tail for their joint lives, and the tenant for life afterwards dies, the

tenant in tail being alive, the value of that annuity must be taken and allowed as a deduction, under the 38th section of the Act of 1853, from the value of the succession of the tenant in tail upon which duty is to be paid.—So held, following the decisions of this House in *The Attorney-General v. Lord Braybrooke*, 9 H. L. Cas. 150; 31 Law J. Rep. (n.s.) Exch. 177, and *The Attorney-General v. Floyer*, 9 H. L. Cas. 477; 31 Law J. Rep. (n.s.) Exch. 404. *The Commissioners of Inland Revenue v. Harrison* (H. L.), 43 Law J. Rep. (n.s.) Exch. 138; Law Rep. 7 E. & I. App. 1.

Decisions of the House of Lords upon questions of law, as the construction of statutes, and especially of fiscal Acts, are binding upon the House in subsequent cases. *Ibid*.

12.—Entailed estates were by a disentailing deed conveyed to such uses as a father, the tenant for life, and his son the tenant in tail, should jointly appoint. By indenture of even date made between the father and son, a lady, whom the son was about to marry, and trustees, the father and son acting under the powers of the disentailing deed conveyed the estates to trustees by way of mortgage to secure 20,000*l.*, and the father covenanted with the trustees that he would, so long during his life as the said sum of 20,000*l.* should remain due to the trustees, pay them interest on the same, or so much thereof as for the time being should remain due, at three per cent. per annum. And it was declared that the trustees should stand possessed of the 20,000*l.* and the interest thereon on the trusts of the marriage settlement of the son, viz., on trusts for him for life with the usual trusts over for wife and children. The marriage took place, and the son received under the mortgage and settlement deeds the yearly sum of 600*l.* (being interest at three per cent. on the 20,000*l.*) until the death of his father. The son then succeeded to the estates and the annuity of 600*l.* ceased.—Held (Cleasby, B., *dissentiente*), following *Lord Braybrooke v. The Attorney-General* (9 H. L. Cas. 150; 31 Law J. Rep. (n.s.) Exch. 177), that in the assessment of the succession duty payable under 16 & 17 Vict. c. 51, the son was entitled by section 38 to an allowance in respect of the annuity which he had been “bound to relinquish” or had been “deprived of” within the meaning of that section. *Le Marchant v. The Commissioners of Inland Revenue*, 44 Law J. Rep. (n.s.) Exch. 216; Law Rep. 10 Exch. 292: affirmed, on appeal, 45 Law J. Rep. (n.s.) Exch. 257; Law Rep. 2 Exch. Div. 185.

### (C) DOUBLE DUTY.

13.—Where an interest in personal property has been transmitted before it has ripened into enjoyment, it matters not whether the person originally entitled died before or after the commencement of the Act, only one duty is payable on any succession to such property, whether such duty be legacy or succession duty. If the duty be succession duty and the interest has passed through more than one successor, then under section 14 the duty payable shall be the highest that

would have been paid by any of such successors. If the duty be legacy duty, then under section 18, no succession duty of any kind is payable. *Attorney-General v. Littleale* (H. L.), 40 Law J. Rep. (n.s.) Exch. 241; Law Rep. 5 E. & I. App. 290.

The successor from whom duty is payable is the person who, on the happening of the death, eventually becomes beneficially entitled in possession; that which was conferred upon any previous successor was only an expectant interest not a succession. The interest of an executor, not being beneficial, is not a succession within section 2, nor within section 15; for section 15 imposes no new duty, only a duty in substitution for that imposed by section 2. *Ibid*.

By a marriage settlement, made in 1829, funds were settled in such wise that in May, 1853, when the Succession Duty Act came into operation, there was an estate for life still in being, and a reversion expectant thereon, which was vested in the legal personal representatives of H. D., who had been originally entitled to the reversion, and had died in 1833. H. D. being so entitled, had by her will bequeathed the trust funds to the respondents, as her executors, in trust for her brother and nephew, and the legacy duty payable by her legatees was at a higher rate than the succession duty would have been if payable on the succession of the testatrix, H. D., from the settlor under the settlement of 1829:—Held, that the interest of H. D. was not a succession but only an expectant interest; the true successors from whom duty was payable were the beneficial owners, deriving their title through the will of H. D. That the succession being subject to legacy duty, no succession duty was payable; and the trustees of the settlement of 1829 having by mistake paid a succession duty of 1 per cent. on the succession, the estate being liable in the hands of the executors to a payment of legacy duty at the rate of 3 per cent., the executors were only chargeable with the difference between the 3 per cent. chargeable and the 1 per cent. paid, namely, 2 per cent. on such parts of the settled funds as were subject to the will of H. D. That if the successors had derived from H. D. otherwise than by will, and had been therefore subject to succession duty instead of legacy duty, then one duty would have been payable at the highest rate at which it could have been payable either by the successors or by H. D., if she had survived the particular life. *Ibid*.

### LEGITIMACY DECLARATION ACT.

- (A) PRESUMPTION OF MARRIAGE.
- (B) DOMICIL.
- (C) CLAIM TO BARONETCY.
- (D) EVIDENCE.

#### (A) PRESUMPTION OF MARRIAGE.

1.—Decision as to the amount of evidence required in order to presume a marriage where a

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man and woman have long lived together as man and wife, and have been so treated by their friends and neighbours. *Lyle v. Ellwood*, 44 Law J. Rep. (N.S.) Chanc. 164; Law Rep. 19 Eq. 98.

#### (B) DOMICIL.

2.—A petition was filed by the son, a minor, by his guardian, under 21 & 22 Vict. c. 93, for a declaration of his legitimacy. The marriage of his parents took place in 1864. In 1856 his mother went through a ceremony of marriage with one Hawkins, who was previously married, and whose wife was then living. The petition contained a prayer that this marriage of 1856 might be declared null and void, in which event the legitimacy of the petitioner would follow as a matter of course. Hawkins was cited to see proceedings. The mother was not cited, but was examined as a witness at the hearing, when it was admitted that the petition could not be sustained under the Legitimacy Declaration Act, the domicile of the petitioner being Australian and not English, and there being no property in England which could be affected by the decree. The Court declined to treat the proceedings as if instituted for a declaration of the nullity of the marriage of 1856, and dismissed the petition. *Johnstone v. The Attorney-General*, 43 Law J. Rep. (N.S.) P. & M. 3.

Quære—could the petitioner institute a suit for a declaration of the nullity of the marriage ceremony had between his mother and Hawkins previously to her marriage with his father. *Ibid.*

#### (C) CLAIM TO BARONETCY.

3.—A petition under the Legitimacy Declaration Act—the prayer of the petitioner being for a declaration that he was a natural born subject of the Queen, and that his paternal grandfather, C. F., was lawfully married to M. R. in 1773, and that he was the natural and lawful son of his father, who was one of the children of the marriage of his paternal grandfather with M. R.—contained an allegation to the effect that the petitioner, as the natural and lawful grandson of C. F., and the natural and lawful son and heir-at-law of E. F., his father, was a baronet of the United Kingdom of Great Britain and Ireland, by the death of his cousin, the sixth baronet, who died in September, 1873. The allegation was ordered to be struck out as irrelevant to the petition. *Frederick v. The Attorney-General*, 43 Law J. Rep. (N.S.) P. & M. 32; Law Rep. 3 P. & D. 196.

#### (D) EVIDENCE.

4.—Asserted marriage between A. and B. in 1773. In 1800, C., their eldest son, claimed certain property, to which, if legitimate, he was entitled, but which was then in the possession of D., his maternal uncle. D. answered, saying that he should be ready to defend any action which C. might bring, and communicated the fact that the claim had been made to E., the paternal uncle of C. C. replied that his object was to establish his legitimacy, and did not follow up the claim to the

property by any suit or action. In a proceeding under the Legitimacy Declaration Act to establish the fact of marriage between A. and B.,—Held, that a “controversy” had arisen in 1800 between C. and D. upon the very question involved in the litigation, and that declarations by members of his family subsequent to 1800 were inadmissible in evidence as made *post litem motam*. *Frederick v. The Attorney-General*, 44 Law J. Rep. (N.S.) P. & M. 1; Law Rep. 3 P. & D. 270.

A deed, dated 1803, to which members of the family were parties, was tendered in evidence for the purpose of proving by means of the recitals in the deed declarations by them, but was rejected on the ground that the declarations were made *post litem motam*. It was then tendered as evidence of conduct or a solemn act done by the parties:—Held, that it was inadmissible in evidence for the purpose for which it was tendered. *Ibid.*

Evidence of declaration by members of the family subsequent to 1800 as to statements made by other members of the family concerning the marriage prior to *lis mota* was also tendered and rejected as falling within the principle of declarations made *post litem motam*. *Ibid.*

A deed, of date 1826, made between D. and other parties, was tendered and received in evidence, for the purpose of shewing that the property claimed by C. had been dealt with adversely to his family from the death of B., his mother, down to the present time. *Ibid.*

Semble—that the Court has no power under the Legitimacy Declaration Act to condemn in costs a party who is cited, and who is unsuccessful in his opposition to the declaration prayed for in the petition. *Ibid.*

#### LEX LOCI.

[See COLONIAL LAW, 1; FOREIGN LAW; INTERNATIONAL LAW; CONFLICT OF LAWS; DOMICIL.]

#### LIBEL.

- (A) WHAT IS ACTIONABLE.
  - (a) *Disparagement of tradesman.*
  - (b) *Innuendo.*
- (B) PUBLICATION.
- (C) PRIVILEGED COMMUNICATIONS.
  - (a) *Public meeting.*
  - (b) *Public interest; Admiralty Minute.*
  - (c) *Military court of enquiry.*
  - (d) *Bishop's charge.*
  - (e) *Communication between agents at parliamentary election.*
- (D) PRACTICE AND PLEADING IN ACTION FOR LIBEL.
  - (a) *Married woman having protection order.*
  - (b) *Evidence in support of declaration.*
  - (c) *Plea of justification.*
  - (d) *Interrogatories.*
- (E) RELIEF IN EQUITY.
- (F) CRIMINAL INFORMATION.



## (A) WHAT IS ACTIONABLE.

(a) *Disparagement of tradesman.*

1.—To publish of a tradesman falsely and without lawful occasion, that the goods in which he trades are inferior in quality to similar goods in which his rivals trade, is actionable if special damage results. *Young v. Macrae* (32 Law J. Rep. (n.s.) Q. B. 6, 8; 3 B. & S. 264, 269) distinguished. *The Western Counties Manure Company v. Lawes' Chemical Manure Company*, 43 Law J. Rep. (n.s.) Exch. 171; Law Rep. 9 Exch. 218.

2.—Declaration, that the plaintiffs carried on the business of manufacturers of bags, and in such business invented, manufactured and sold great numbers of a bag called "The Bag of Bags," and the defendant maliciously printed and published of and concerning the plaintiffs in their business, in a periodical called the "Tomahawk," the words following:—"Novelty and enough. Let us [meaning the defendant] premise our remarks that they are not a planned advertisement, and then let us declare that Messrs. J. & K. [meaning the plaintiffs] have introduced and largely advertised an article of their manufacture as the Bag of Bags. As we have not seen the Bag of Bags, we cannot say that it is useful, or that it is portable, or that it is elegant. All this it may be, but the only point we can deal with is the title, which we think very silly, very slangy, and very vulgar, and which has been forced upon the notice of the public *ad nauseam*."—Held, on demurrer, by the majority of the Court (Mellor, J., and Hannen, J.), that the declaration was good, on the ground that it was a question for the jury whether the article did not merely criticise the title of the bag, but contained a personal imputation on the plaintiffs. By Lush, J., that there was no evidence of a libel for the jury, as there was nothing in the article which conveyed an imputation on the plaintiffs, or the manner in which they conducted their business. *Jenner v. A'Beckett*, 41 Law J. Rep. (n.s.) Q. B. 14; Law Rep. 7 Q. B. 11.

3.—There is no such *prima facie* presumption of the validity of a patent as to entitle a patentee by publishing threats of proceedings for infringement to injure a rival's trade, without by substantive proceedings establishing the validity. *Rollins v. Hinks*, 41 Law J. Rep. (n.s.) Chanc. 358; Law Rep. 13 Eq. 355.

(b) *Innuendo.*

4.—In an action for libel it is the duty of the Judge to determine, upon the evidence adduced at the trial, whether the words complained of are reasonably capable of the defamatory meaning ascribed to them by the innuendoes, and if they are not, he is bound to withdraw the case from the jury and to direct either a nonsuit or a verdict for the defendant. *Hunt v. Goodlake*, 43 Law J. Rep. (n.s.) C. P. 54.

5.—An action will not lie in respect of words published, if an ordinary reader would not understand them in a defamatory sense, and they cannot be made actionable by being alleged to bear a meaning which the evidence does not support.

*Mulligan v. Cole*, 44 Law J. Rep. (n.s.) Q. B. 153; Law Rep. 10 Q. B. 549.

6.—Where a local paper, by the mistake of the proprietor's servants, inserted a dissolution of partnership under the head of "first meeting under the Bankruptcy Act:"—Held, in an action for libel against the proprietor in which the innuendo in the declaration was that the plaintiff was bankrupt, that the innuendo was good, and a rule for arrest of judgment on the ground that the declaration disclosed no cause of action, and for a new trial on the ground of excessive damages, was refused. *Shephard v. Whittaker*, Law Rep. 10 C. P. 502.

## (B) PUBLICATION.

7.—Sending defamatory matter by a post-office telegram is an authorised publication which prevents a communication from being privileged though made *bona fide* and under circumstances which otherwise would have made it privileged. *Williamson v. Freere*, 43 Law J. Rep. (n.s.) C. P. 161; Law Rep. 9 C. P. 393.

## (C) PRIVILEGED COMMUNICATIONS.

(a) *Public meeting.*

8.—Comments made without express malice upon the behaviour of persons attending a public meeting fall within the rule of privilege and are not actionable, even although the persons go to the meeting in a private capacity. *Davies v. Duncan*, 43 Law J. Rep. (n.s.) C. P. 185; Law Rep. 9 C. P. 396.

The plaintiff went with two friends to a public meeting, held for the purpose of hearing a candidate at a parliamentary election, and of discussing political questions connected with it. The plaintiff and his friends, whose object in going to the meeting was merely to listen to the proceedings, dissented from the political views expressed thereat, and a disturbance occurred which resulted in their leaving the meeting under the protection of the police. A newspaper, represented by the defendants, commented in disparaging terms upon the conduct of the plaintiff and his friends, and used language capable of meaning that two of them were intoxicated, and that they were given into the custody of the police for misconduct. The plaintiff having sued for a libel, at the trial, the Judge directed the jury that the comments upon the behaviour of the plaintiff and his friends were privileged if made in a fair spirit, and that it was for the jury to say whether the alleged libel imputed intoxication, and also misconduct requiring the interference of the police:—Held, a proper direction. *Ibid.*

(b) *Public interest; Admiralty minute.*

9.—The Board of Admiralty having ordered the defendant, the Queen's Printer, to print a board minute relating to their proceedings in naval ship-building, which contained a letter of the Comptroller of the Navy in reference to plans of the plaintiff submitted to the board, the defendants sold copies to the public; the plaintiff brought his action of libel against the defendant, averring

that a statement in such letter that the plans derived no weight from his antecedents meant that his plans were worthless, and were calculated to injure him in his profession; no actual malice was imputed:—Held by the majority (Willes, J., Byles, J., and Brett, J.) of the Court (*dissentiente* Grove, J.), that the plaintiff was rightly nonsuited on the ground that every man has a right to discuss freely, if honestly and without malice, any subject in which the public are generally interested, and that what the defendant had done merely amounted to this. *Henwood v. Harrison*, 41 Law J. Rep. (N.S.) C. P. 206; Law Rep. 7 C. P. 606.

(c) *Military court of enquiry.*

10.—A military man giving evidence before a military Court of enquiry which has no power to administer an oath, is entitled to the same protection as that enjoyed by a witness on oath in an ordinary judicial proceeding. *Dawkins v. Lord Rokeby*, (H. L.) 45 Law J. Rep. (N.S.) C. L. 8; Law Rep. 7 E. & I. App. 744: affirming the decision of the Court of Exchequer Chamber, 42 Law J. Rep. (N.S.) Q. B. 63; Law Rep. 8 Q. B. 255.

No evidence, whether written or oral, given by him in the course of the enquiry and relative to the enquiry, can be made the foundation of an action at law however strong the presumption may be that such evidence was not only untrue but was also known to be untrue by him who gave it or even that it was dictated by malice. For the correctness of this presumption must always be a question until resolved by a jury, and public policy requires that witnesses should give their evidence freely and openly and without fear of being harassed by a civil action on an allegation, whether true or false, that they have spoken from malice. *Ibid.*

Where a witness before such a Court handed in a written statement voluntary and unasked after his examination was concluded,—Held, that evidence that the statements in such paper were untrue and were made maliciously, was wholly inadmissible. *Ibid.*

(d) *Bishop's charge.*

11.—The charge of a bishop to his clergy in convocation contained defamatory matter in respect of a layman in the diocese who had publicly attacked the conduct of the bishop, and the charge by authority of the bishop was afterwards published in a local newspaper:—Held, that both the charge and the publication were privileged communications, if made *bond fide*, and for the purpose of vindicating the conduct of the bishop. *Laughton v. The Bishop of Sodor and Man*, 42 Law J. Rep. (N.S.) P. C. 11; Law Rep. 4 P. C. 495.

(e) *Communication between agents at parliamentary election.*

12.—Shortly before a Parliamentary election the agents of F. and B., the rival candidates, mutually undertook that there should be no corrupt practices by either party during the contest. On the day of polling, the defendant, H., one of

the agents, wrote to the other complaining that bribery was going on, and, at an interview sought by the latter, gave the name of the plaintiff as a briber. The day after the election, which resulted in the return of B., the following letter was written by H. in conjunction with the other defendant, who was chairman of B.'s committee, and signed by both of them:—"We certify that we have discovered that Mr. D. (the plaintiff) and Mr. R., two of the prominent members of Mr. F.'s committee, have been personally guilty of offering 1*l.* 10*s.* to a voter for his vote, and 1*l.* 10*s.* for every vote he could procure for Mr. F. The elector referred to has been personally examined by one of us, and the evidence which he is prepared to give is clear and distinct." This letter was sent to F.'s agent, and by him handed to the chairman of F.'s committee, and the plaintiff having brought an action for libel in respect of its contents,—Held, that no such relations existed between the parties as to make the letter a privileged communication. *Dickeson v. Hilliard*, 43 Law J. Rep. (N.S.) Exch. 37; Law Rep. 9 Exch. 79.

*Privileged communication: communications to Chinese Government.* [See INTERNATIONAL LAW.]

(D) PRACTICE AND PLEADING IN ACTION FOR LIBEL.

[And see PRODUCTION, 6.]

(a) *Married woman having protection order.*

13.—A woman who has been deserted by her husband, and has obtained a protection order under 20 & 21 Vict. c. 85, s. 21, may maintain an action for libel without joining her husband. *Ramsden v. Brearley*, 44 Law J. Rep. (N.S.) Q. B. 46; Law Rep. 10 Q. B. 147.

(b) *Evidence in support of declaration.*

14.—In an action of libel it is a fatal variance if the defamatory words set out in the declaration are materially qualified in the proof by words not in the declaration, although the words so qualified be still libellous. Where secondary evidence is given of a libellous document the witnesses must prove the actual words used, and not merely their impression of them. *Rainy v. Bravo*, Law Rep. 4 P. C. 287.

(c) *Plea of justification.*

15.—The general practice of the Court now is, in actions of libel, to allow pleas of justification in a general form with a liberal allowance of particulars. *Gourley v. Plimsoll*, 42 Law J. Rep. (N.S.) C. P. 121; Law Rep. 8 C. P. 362.

(d) *Interrogatories.*

[See PRACTICE AT LAW, 14.]

(E) RELIEF IN EQUITY.

16.—Circumstances under which an injunction to restrain the publication or sale of a book as

libellous, will or will not be granted. *Mulkern v. Ward*, 41 Law J. Rep. (n.s.) Chanc. 464; Law Rep. 13 Eq. 619.

*Right to file bill of discovery with a view to action of libel.* [See DISCOVERY, 2.]

*Jurisdiction of Court of Chancery to restrain publication of a libel.* [See INJUNCTION, 1.]

#### (F) CRIMINAL INFORMATION.

17.—In order to obtain leave to file a criminal information, the affidavits must connect the person complained of with the offence by legal evidence. *The Queen v. Stanger*, 40 Law J. Rep. (n.s.) Q. B. 96; Law Rep. 6 Q. B. 352.

Therefore, where a rule *nisi* had been granted, calling upon S. to shew cause why an information should not be exhibited against him for publishing a libel in a newspaper, and the affidavits simply shewed that copies of the newspaper had been purchased at the publishing office of the paper, that by a foot-note printed at the end of the copies S. was stated to be the printer and publisher of them, and that the deponent believed that he, S., was the printer and publisher, the Court discharged the rule on the objection that the affidavits were insufficient. *Ibid.*

Quære,—whether, under such circumstances, recourse can be had to the affidavits used in shewing cause, to supply the defect in those for the prosecution. *Ibid.*

#### LIEN.

*Lien of attorney for costs.* [See ATTORNEY, 39-52; DIVORCE, 86, 87.]

*Lien of bankers on deposited securities.* [See BANKER, 5-8, 10.]

*Lien of depositary of policy for premiums.* [See DEBTOR AND CREDITOR, 3.]

*Lien in respect of bill of exchange drawn against cargo.* [See BILL OF EXCHANGE, 11.]

*Lien of innkeeper.* [See INNKEEPER, 1.]

*Vendor's lien.* [See SALE, 23; VENDOR AND PURCHASER, 18, 19.]

*Winding-up of company: business carried on by liquidator: general lien under agreement previous to winding up.* [See COMPANY, I 70.]

#### LIGHT AND AIR.

(A) EFFECT OF PRESCRIPTION ACT.

(B) CONSTRUCTION OF GRANT.

(C) SUIT FOR INJUNCTION TO RESTRAIN INTERFERENCE WITH LIGHT AND AIR.

(a) *When maintainable.*

(1) *Enlargement of windows by plaintiff.*

(2) *Angle of forty-five degrees.*

(3) *Amount of injury.*

(b) *Personal inspection by Judge.*

#### (A) EFFECT OF PRESCRIPTION ACT.

1.—The right of an owner of ancient lights is to prevent his neighbour from obstructing the access of sufficient light and air to such an extent as to render his house substantially less comfortable and enjoyable, and the Prescription Act (2 & 3 Will. 4. c. 71) has not altered the nature of the right or the principle on which it is to be determined, whether it has been infringed, but has merely substituted a statutory title for an assumed grant. *The City of London Brewery Company v. Tennant*, 43 Law J. Rep. (n.s.) Chanc. 457; Law Rep. 9 Chanc. 212.

2.—An injunction will be granted to restrain the erection of a building so as to obstruct light and air, if the party applying can shew that the deprivation of light and air will be such as to render his house uncomfortable, or as would enable him in an action at law to obtain substantial damages. The nature of the right to light and air has not been altered by the Prescription Act. *Kelk v. Pearson*, Law Rep. 6 Chanc. 809.

[And see No. 4 *infra*, and EASEMENT, 5, 6.]

#### (B) CONSTRUCTION OF GRANT.

3.—A grant of lights by the general words in a lease or other conveyance, followed by the ordinary covenant by the grantor for the quiet enjoyment of the premises, confers on the grantee, as against the grantor and those claiming under him, a right of no greater extent than the ordinary right to light which is acquired by twenty years' user. A plaintiff, therefore, who claims under such a grant, and who complains of an interference with the access of light to his premises, must, in order to sustain his case, shew that a substantial injury has been or will be done to him.—Decision of the Master of the Rolls reversed. *Leech v. Schweder*, 43 Law J. Rep. (n.s.) Chanc. 487; Law Rep. 9 Chanc. 462.

*Lease: construction: implied contract: access of light over adjoining premises demised to lessor after acquisition of fee by lessee.* [See LEASE, 7.]

(C) SUIT FOR INJUNCTION TO RESTRAIN INTERFERENCE WITH LIGHT AND AIR.

(a) *When maintainable.*

(1) *Enlargement of windows by plaintiff.*

4.—The Prescription Act (2 & 3 Will. 4. c. 71) has not taken away any of the modes of claiming easements which existed before the statute. *Aynsley v. Glover*, 44 Law J. Rep. (n.s.) Chanc. 523; Law Rep. 10 Chanc. 283: affirming the decision of the Master of the Rolls, 43 Law J. Rep. (n.s.) Chanc. 777; Law Rep. 18 Eq. 544.

The right to light and air is not lost by enlarging the windows of the dominant tenement. *Ibid.*

A plaintiff coming to the Court to restrain interference with his ancient lights by building is entitled to an injunction, and not merely to damages, if he files his bill before the building is commenced. *Ibid.*

In a light and air case it is immaterial that the plaintiffs are using the premises affected for a purpose for which light and air are unnecessary. It is sufficient that the premises are capable of being used for purposes requiring light and air. *Ibid.*

(2) *Angle of forty-five degrees.*

5.—An owner of a house in a narrow street will, as a general rule, be restrained from raising it to a height which will obstruct the access of light below the angle of forty-five degrees to ancient windows opposite. *Hackett v. Baiss*, Law Rep. 20 Eq. 494.

(3) *Amount of injury.*

[See *supra* Nos. 1, 2, 3.]

*Injunction to restrain infringement of right to light.* [See *LEASE*, 28.]

(b) *Personal inspection by Judge.*

6.—A Judge of the Court of Chancery ought not to make a personal inspection of buildings in order to ascertain whether a material diminution of light and air is caused in any case. *Leech v. Schweder*, 43 Law J. Rep. (N.S.) Chanc. 232; Law Rep. 9 Chanc. 463.

## LIGHTING AND WATCHING RATE.

1.—By 3 & 4 Will. 4. c. 90, s. 33, the Lighting and Watching Act, the "owners and occupiers of houses, buildings and property (other than land), rateable to the relief of the poor," shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated and pay for the purposes of the Act. The appellants were the occupiers of a canal and towing path, and of a dry dock used in connection with it:—Held, that they were occupiers of "land" within the meaning of the Act, and therefore that they were rateable at the lower amount only. *Peto v. West Ham* (28 Law J. Rep. (N.S.) M. C. 240) discussed. *The Queen v. The Company of Proprietors of the Neath Canal Navigation*, 40 Law J. Rep. (N.S.) M. C. 193; Law Rep. 6 Q. B. 707, *nom.* *The Queen v. The Overseers of Neath*.

2.—By 3 & 4 Will. 4. c. 90, s. 33, which regulates lighting and watching, the owners and occupiers of houses, buildings and property (other than land), rateable to the relief of the poor, are to be rated at and pay a rate in the pound three times greater than that which the owners and occupiers of land shall be rated at and pay for the purposes of the Act. The appellants were owners of a line of railway:—Held, that they were occupiers of "land" within the meaning of the Act, and rateable at the lower amount.—*Peto v. West Ham* (28 Law J. Rep. (N.S.) M. C. 240; 2 E. & E. 144) and *The Queen v. Neath* (last case) considered. *The Queen v. The Midland Railway Company*, 44 Law J. Rep. (N.S.) M. C. 137; Law Rep. 10 Q. B. 389.

## LIMITATIONS, STATUTE OF.

### (A) WHEN THE STATUTE OPERATES AS A BAR.

#### (a) *Adverse possession.*

- (1) *By tenant for life under will.*
- (2) *By trustee.*

#### (b) *Rent.*

- (1) *Heriot.*
- (2) *Person wrongfully claiming.*

#### (c) *Tenancy at will: trust.*

#### (d) *Express trust.*

#### (e) *Concealed fraud: bond fide purchaser for value.*

#### (f) *Mortgagor and mortgagee.*

#### (g) *Interest on legacy.*

#### (h) *Partners: fiduciary relation.*

#### (i) *Debtor and creditor.*

#### (k) *Private Act for restraining alienation.*

### (B) WHEN THE STATUTE BEGINS TO RUN.

#### (a) *Successive disabilities.*

#### (b) *As against remainderman.*

##### (1) *Waste.*

##### (2) *Tenant in tail creating base fee.*

#### (c) *Tenancy at will.*

#### (d) *Encroachment by tenant.*

#### (e) *Breach of duty by bailee.*

#### (f) *As against solicitor to promoters of company.*

### (C) HOW THE STATUTE MAY BE BARRED.

#### (a) *What acknowledgment sufficient.*

#### (b) *Acknowledgment by one joint mortgagee.*

#### (c) *What amounts to a promise to pay.*

#### (d) *Payment of interest and part payment.*

### (D) SET-OFF OF DEBT BARRED BY STATUTE.

[No claim of a cestui que trust against his trustee for property held on an express trust to be held barred by any Statute of Limitations after the 2nd of November, 1874. 36 & 37 Vict. c. 66, s. 25.]

[Parts of 3 & 4 Will. 4. c. 27, repealed. No land or rent to be recovered but within twelve years after the right of action accrued (section 1). In cases of future estates, time limited to six years from time when the person entitled to particular estate was out of possession (section 2). So in cases of disability, the time to be six years from the termination of the disability (section 3), thirty years being the maximum (section 5), and no time being allowed for absence beyond seas (sect. 4). The twelve years' limit also applied to the case of a mortgagor as against mortgagee in possession, and to remainderman after an estate tail as against the grantee of the tenant in tail (sections 7, 8). The time for recovering charges and arrears of interest not to be enlarged by express trusts for raising them (section 10). Act to commence on the 1st of January, 1879. 37 & 38 Vict. c. 57.]

### (A) WHERE THE STATUTE OPERATES AS A BAR.

#### (a) *Adverse possession.*

- (1) *By tenant for life under will.*

1.—A person named in a will as tenant for life of lands which the testator has no power to devise,

and who enters into possession under the will, is thereby estopped from disputing the validity of the will as against those in remainder under it, and setting up a title in fee by reason of possession for twenty years; and a purchaser from such person is in no better position. *Board v. Board*, 43 Law J. Rep. (n.s.) Q. B. 4; Law Rep. 9 Q. B. 49.

(2) *By trustee.*

2.—Testator by his will, dated in 1824, devised all his real estate, and also all other his estate and effects of which he might be possessed at the time of his decease, to trustees, one of whom was his wife, upon trust, to pay the rents to his wife for life, with remainders over. After the date of his will the testator purchased a freehold estate. On his death, his widow became sole trustee of the will, and entered into possession of the testator's after-acquired real estate as well as the devised estate, under the belief that the whole of the testator's real estate passed by his will. After having been in possession for upwards of twenty years, she was informed that she had acquired a good title to the after-acquired estate by adverse possession, whereupon she sold it to a purchaser for value:—Bill filed by a remainderman under the will to oust the purchaser, dismissed. *Paine v. Jones*, 43 Law J. Rep. (n.s.) Chanc. 787; Law Rep. 18 Eq. 220.

(b) *Rent.*

(1) *Heriot.*

3.—Notwithstanding the definition of rent in section 1, neither heriot service nor heriot custom are within sections 2, 3, 34, and 42 of 3 & 4 Will. 4, c. 27. The word "rent" in those sections must be construed agreeably to the context. A lord's right to a heriot is not lost because his predecessor failed to demand it when due, and it has consequently not been demanded for twenty years and upwards. The seizure of a heriot is not an entry or distress, or an action to recover rent within the statute. *Lord Zouche v. Dalbiac*, 44 Law J. Rep. (n.s.) Exch. 109; Law Rep. 10 Exch. 172.

(2) *Persons wrongfully claiming.*

4.—The operation of the Statute of Limitations is not affected by the fact that the person really entitled to the land has been in possession as agent for another. The possession of the agent is possession of the principal, and cannot preserve any adverse rights of the agent. In the 9th section of the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 9, the expression, "wrongfully claiming," merely means not rightfully claiming, and has no reference to the motive of the claimant. Claim by a person whose right to land was barred by the Statute of Limitations for arrears of rent received within six years of the time of the claim, and prior to the period at which the claimant's right to the land was barred, disallowed. *Williams v. Pott*, 40 Law J. Rep. (n.s.) Chanc. 775; Law Rep. 12 Eq. 149.

(d) *Tenancy at will: trust.*

5.—S., being seised in fee of land abutting on the convex side of an arc formed by the course of the Thames, entered into an agreement of the 23rd of June, 1769, whereby he covenanted with A. to grant leases to him, for ninety-nine years from 1768, of messuages, which A. covenanted to erect on the land. A., and persons having interest in neighbouring property, contemplated making an embankment along the chord of the aforesaid arc, so as to gain from the river the land inside the curve. They therefore obtained an Act (11 Geo. 3, c. 34), which, after reciting that the promoters had "very valuable freehold and leasehold interest in houses, wharfs, and grounds next adjoining the river," empowered them to make the embankment in front of their respective houses, &c., and enacted (section 2) that the soil of the river so to be enclosed in front of such respective houses, &c., should vest, and the same was thereby vested, in the owner or owners, proprietor or proprietors, of such adjoining house, &c., respectively, according to his or their respective estates, trusts, or interests. Having erected houses according to the agreement, A. duly received leases thereof. The embankment was contemporaneously made, and A. also built on the ground reclaimed. The leases, which expired in 1867, did not include that land; but A. and his representatives retained possession of it until the present day, without any demise to or acknowledgment by them. The plaintiffs, who derived their title from S., brought ejectment for the reclaimed land:—Held, that they were entitled to recover, for that the Embankment Act vested the fee-simple in S., subject to the interests created by the agreement, and A., having had a right in equity to demand leases for ninety-nine years from 1868, the occupation of the reclaimed land, although at law merely a tenancy at will, had been that of cestui que trusts in possession, and therefore the title of the plaintiffs was not barred by the Statute of Limitations (3 & 4 Will. 4, c. 27). The proviso in section 7 of that statute applies to actual direct trusts, and is not limited to express trusts. *Drummond v. Sant*, 41 Law J. Rep. (n.s.) Q. B. 21; Law Rep. 6 Q. B. 763.

(d) *Express trust.*

6.—A mortgage of real estate made by way of a conveyance to a trustee, upon trust to sell at discretion, and out of the proceeds of sale to pay the mortgage debt and to pay the surplus moneys to the mortgagor, does not constitute an express trust in favour of the mortgagor within the 25th section of the Statute of Limitations, 3 & 4 Will. 4, c. 27. *Locking v. Parker*, 42 Law J. Rep. (n.s.) Chanc. 257; Law Rep. 8 Chanc. 30.

7.—Between 1822 and 1828 A. executed several deeds of mortgage and further charge to B. by way of demise for terms of years to secure loans. By deed dated the 11th of February, 1829, in consideration of a sum of 560*l.* then advanced by B., and the other moneys owing on the previous mortgages, A., at the request of B., conveyed the estates comprised in the previous mortgages and

other estates to C. in fee upon trust, in case of repayment of the 560*l.* on the 11th of August then next, and of the other moneys then charged on the property, to reconvey the same to A., his heirs or assigns. But in default of payment, upon trust that C. should enter into possession of the property, and at his sole authority sell the same, and hold the sale moneys, upon trust, after paying off the sums owing to B., and a sum of 180*l.* to another incumbrancer, to pay the surplus unto A., his executors, administrators, or assigns. That deed did not assign the terms. B. entered into possession in 1832, and continued in possession till his death in 1860. He devised the property to the defendants in trust for sale, and they had remained in possession ever since. C. accepted and acted in the trusts:—Held, affirming the decision of the Court below (41 Law J. Rep. (n.s.) Chanc. 544), on a bill filed by the heir-at-law of A. against the devisee of B., that the deed of 1829 vested the property in C. upon an express trust within section 25 of the Statute of Limitations, that B. could not set up the terms, and that the possession of B. was the possession of C., his trustee, and that consequently the right of the heir-at-law of A. was not barred by section 28 of the statute. *Locking v. Parker*, 42 Law J. Rep. (n.s.) Chanc. 237; Law Rep. 8 Chanc. 30.

8.—Devise of land on trust for sale, the proceeds to be deemed personalty. The land having remained unsold for fifty years,—Held, an express trust, and that a bill by a residuary legatee for execution of the trust was maintainable. *Pawsey v. Barnes* (20 Law J. Rep. (n.s.) Chanc. 393) distinguished. *Mulrow v. Bigg*, Law Rep. 18 Eq. 246; reversed, on further evidence, 45 Law J. Rep. (n.s.) Chanc. 282; Law Rep. 1 Chanc. Div. 385.

9.—The Bombay Civil Fund was formed to provide retiring pensions for civil servants, and annuities and portions for their widows and children. The fund was constituted by the subscriptions of the members and by a grant from the Government. It was managed by a committee, the members of which resided in Bombay, and by the rules the property of the fund was vested in the committee of managers as trustees. In fact, however, the funds were always in the hands of the Government as a floating debt due to the association. A suit having been instituted by the representatives of the widow of a member of the association, against the trustees of the fund and the Secretary of State for India, claiming payment of an annuity which they alleged ought to have been paid to her in her lifetime,—Held, that there was no fiduciary relation between the trustees of the fund and a person making a claim against the fund, and that therefore the plaintiffs could only recover the arrears of the annuity which accrued due within six years before the filing of the bill. *Edwards v. Warden*, 43 Law J. Rep. (n.s.) Chanc. 644; Law Rep. 9 Chanc. 495.

10.—A debt from solicitors to a client in respect of moneys received is not an express trust within the Statutes of Limitation. *Watson v. Woodman*, Law Rep. 20 Eq. 721.

(e) *Concealed fraud: bonâ fide purchaser for value.*

11.—The plaintiff alleged in his bill that his father married A. in 1797. Three weeks before the marriage his mother A. had borne a son B., but the fact of his having been born before wedlock was carefully concealed, and he was brought up as a legitimate son and heir-apparent to his father's title and estates, to which he eventually succeeded. B. married C. in 1823, before his father's death, and he died in 1842, leaving D. his eldest son and heir. In 1866 the plaintiff, who was the eldest son born after the marriage of his father to A., discovered the fact of B.'s illegitimacy, and also that that fact was known to B., and also to the father of C. upon the negotiation for the marriage of B. and C. He prayed a declaration of his title, and an account of rents and profits against D. Upon demurrer under section 26 of the Statute of Limitations,—Held (affirming *Malins v. C.*), that the bill sufficiently alleged a concealed fraud, which the plaintiff could not with reasonable diligence have known sooner; that C. must be taken to have had notice of B.'s illegitimacy through the communication thereof to her father upon the negotiation for a settlement on her marriage with B.; and that her son D., claiming through the same marriage settlement, was equally affected with the same notice. *Vane v. Vane*, 42 Law J. Rep. (n.s.) Chanc. 299; Law Rep. 8 Chanc. 383.

By a "bonâ fide purchaser" in section 26 is meant a purchaser for actual value, not merely a donee taking a gift under the form of a purchaser. *Ibid.*

Whether the defence of a *bonâ fide* purchaser without notice is properly raised by demurrer or by plea—*quære*. *Ibid.*

(f) *Mortgagor and mortgagee.*

12.—Where a demise for a term of 1,000 years by way of mortgage is created in land, and no payment of principal or interest or acknowledgment is made for more than twenty years, and the mortgagor and those claiming under him remain in possession of the premises without interruption, the title of the mortgagee under the mortgage is thenceforth barred, therefore a payment of arrears of interest and the principal to the mortgagee under a decree in the foreclosure suit, after that time has elapsed, does not revive the title in the mortgagee, and an ejectment does not then lie to recover the possession. *Hemming v. Blanton*, 42 Law J. Rep. (n.s.) C. P. 158.

(g) *Interest on legacy.*

13.—Testator gave a fund to his executrix for life, subject to the immediate payment thereof of a legacy to be divided amongst the children of W. P., to whom he also gave the fund after the death of the executrix. He died in 1847. One of W. P.'s children, of whom there had been five, was last heard of in 1845. The executrix, M. W., retained one-fifth of the legacy. She became lunatic in 1851, whereupon the fund was carried to

an account entitled "the account of M. W. and the children of W. P.," and the income of the whole was applied for the benefit of the lunatic. To a petition presented in 1871 by the four surviving children, for payment of the fifth share, which remained unpaid out of the fund, and for the payment of the interest thereon out of another fund belonging absolutely to the lunatic, it was objected that the Statute of Limitations was a bar:—Held, that the statute was no bar to the claim for the principal, but was a bar to the claim for more than six years' interest. *In re Walker*, 41 Law J. Rep. (N.S.) Chanc. 219; Law Rep. 7 Chanc. 120.

(h) *Partners: fiduciary relation.*

14.—Where the remedy in equity is correspondent to a remedy at law, and the latter is subject to a limitation in point of time, by the Statute of Limitations, through being included within the words of the statute, a Court of Equity there acts in analogy to the statute, and adopts the enactment of the statute as its own rule of procedure. But if any proceeding in equity be included within the words of the statute, there a Court of Equity, like a Court of Law, acts in obedience to the statute. *Knorr v. Gye* (H.L.), 42 Law J. Rep. (N.S.) Chanc. 234; Law Rep. 5 E. & I. App. 656.

G. and T. were partners. T. died in 1854. In 1861 G. got in a considerable sum that was due to the partnership estate. In 1864 W., the representative of T., filed a bill against G. for an account:—Held, that W.'s right had accrued on the death of T.; that it was barred in equity by the Statute of Limitations, the enactment of which the Court of Equity would adopt as its rule, and that the fact that the surviving partner got in a partnership asset after the six years from the death of T., but within six years of the filing of the bill, did not prevent the application of the rule, or entitle the representative of T. to reopen the account, the asset being one which would have been comprehended in the original account, the right to which had been barred by statute. *Ibid.*

Held also, *dissentiente* the Lord Chancellor (Lord Hatherley), that although a surviving partner and the representatives of his deceased partner may sue one another in equity, it is a mistake to apply the word "trust" to the relation which exists between them. *Ibid.*

(i) *Debtor and creditor.*

15.—Testator died owing a debt of 100*l.* His widow, who was tenant for life under his will of both his real and personal estate, took possession accordingly, and paid interest on the debt for some years, and then ceased to pay any interest. After an interval of rather more than six years from the last payment of interest, the testator's will was proved in consequence of proceedings taken by the creditor; and shortly after the grant of probate the creditor filed a bill for administration of the real and personal estate of the testator:—Held, that his debt was barred by the Statute of

Limitations, and the bill must be dismissed with costs. *Boatwright v. Boatwright*, 43 Law J. Rep. (N.S.) Chanc. 12; Law Rep. 17 Eq. 71.

(k) *Private Act for restraining alienation.*

16.—By a private Act of 2 & 3 Philip & Mary, entitled "An Act concerning the restitution of the heirs male of Sir E. N. Knight," who had been attainted in 31 Hen. 8, and restored in 34 & 35 Hen. 8, certain lands were limited to certain members of the N. family in succession in tail male, with limitation over to Queen Mary, her heirs and successors, provided that "no feoffment, discontinuance, fine, or recovery, with voucher or otherwise, or any other act or acts thereupon to be made, done, suffered, or acknowledged of the premises or parcel thereof by the said N.'s or any of them, or by any of the heirs male of their several bodies, should bind or conclude in right, or put from entry Queen Mary, her heirs and successors, or any of the heirs in tail, or any to whom the premises or any parcel thereof should descend, revert, remain," &c. In 1781 the then tenant in tail in possession of the entailed lands, as heir male of the body of E. N., granted a lease for three lives of part of the entailed lands. The last of the three lives expired in 1832, since which time no rent had been paid to the tenants in tail, nor had their titles been acknowledged in any way:—Held, by Channell, B., and Cleasby, B., that the present heir in tail male of E. N. was not barred by 3 & 4 Will. 4, c. 27; *contra* by Bramwell, B. *The Earl of Abergavenny v. Brace*, 41 Law J. Rep. (N.S.) Exch. 120; Law Rep. 7 Exch. 146.

(B) WHEN THE STATUTE BEGINS TO RUN.

(a) *Successive disabilities.*

17.—The operation of the 16th section of 3 & 4 Will. 4, c. 27, which preserves to a person who, at the time his title to land accrues, is under any of the disabilities therein mentioned, the right to make an entry or bring an action to recover the land for ten years after he shall have ceased to be under any such disability, is not confined to cases where the same cause exists throughout the period of disability, but extends to all cases where the disability is continuous throughout, though it arise from different causes at different times of its existence. *Borrovs v. Ellison*, 40 Law J. Rep. (N.S.) Exch. 131; Law Rep. 6 Exch. 128.

(b) *As against remainderman.*

(1) *Waste.*

18.—Where after legal waste has been committed, time has run so as to bar the legal remedy in respect thereof, the remedy in equity is also barred. In a case of legal waste in cutting timber committed by a tenant for life, the Statute of Limitations begins to run as against the remainderman from the time of the waste being committed, or at all events from the time when the proceeds of the timber became money in the hands of the wrongdoer, and not from the

time when the estate in remainder falls into possession. *Higginbotham v. Hawkins*, 41 Law J. Rep. (N.S.) Chanc. 828; Law Rep. 7 Chanc. 676.

(2) *Tenant in tail creating base fee.*

19.—Where a tenant for life with remainder (in the events which happen) to himself in tail, executes an assurance which, for want of the protector's consent, creates only a base fee, time does not run under the 23rd section of the Statute of Limitations, to make such assurance effectual against the reversions, so long as any estates coming between his estate for life and estate in tail are in existence. *Mills v. Capel*, 44 Law J. Rep. (N.S.) Chanc. 674; Law Rep. 20 Eq. 692.

(c) *Tenancy at will.*

20.—By section 7 of 3 & 4 Will. 4. c. 27, "the right of the person entitled, subject to a tenancy at will, to make an entry or bring an action to recover the land, shall be deemed to have first accrued either at the determination of such tenancy, or the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined:"—Held, that the right accrues ultimately at the end of a year from the commencement of the tenancy at will, though it may accrue sooner by the actual determination of the tenancy. *Day v. Day*, 40 Law J. Rep. (N.S.) P. C. 35; Law Rep. 3 P. C. 751.

In May, 1842, a father let his son into possession of certain land. The son continued to occupy the land as tenant at will until 1864. In 1852 the son, with the knowledge of his father, let portions of the land on weekly and yearly tenancies, and received rent for the same:—Held, that the right of entry under the statute accrued at the end of the first year from the creation of the tenancy, and that the right of entry in the father was barred by the uninterrupted occupation by the son for twenty years. *Ibid.*

[And see *supra* No. 5.]

(d) *Encroachment by tenant.*

21.—Where a tenant takes in and encloses adjoining land during his tenancy, the presumption of law that he does it for his landlord, so that the land gained by such encroachment will have to be given up at the end of the tenancy as part of the originally demised premises, is not rebutted by the fact that the landlord expressly assented to the enclosure being made; and where such presumption exists the Statute of Limitations, 3 & 4 Will. 4. c. 27, s. 7, does not apply until the original tenancy has ended. *Whitmore v. Humphries*, 41 Law J. Rep. (N.S.) C. P. 43; Law Rep. 7 C. P. 1.

(e) *Breach of duty by bailee.*

22.—Where a person, entrusted with a chattel for safe custody to be restored to the owner when required, is sued in detinue for breach of duty in detaining it after demand, the Statute of Limitations is no bar to such action if the same be brought within six years after demand and refusal, although

more than six years have elapsed since the person so entrusted with the article has wrongfully parted with possession of it. *Wilkinson v. Verity*, 40 Law J. Rep. (N.S.) C. P. 141; Law Rep. 6 C. P. 206.

(f) *As against solicitor to promoters of company.*

23.—A solicitor and parliamentary agent not being promoters of a company expended moneys in procuring an Act in 1859; the railway was not constructed and the company had no assets:—Held, that the claims of the solicitor and agent were not barred, as the Statute of Limitations did not run until the company had assets. *In re Kensington Station Act*, Law Rep. 20 Eq. 197.

(C) HOW THE STATUTE MAY BE BARRED.

(a) *What acknowledgement sufficient.*

24.—In order to take a case out of the Statute of Limitations, there must be either (1) an acknowledgment of the debt from which a promise to pay is to be implied, or (2) an unconditional promise to pay, or (3) a conditional promise to pay, and evidence that the condition has been performed. Semble—a letter stated to be "without prejudice" cannot be relied upon as an acknowledgment. *In re the River Steamer Company; Mitchell's Claim*, Law Rep. 6 Chanc. 822.

25.—In 1846 L. gave B. and S. a promissory note for 500*l.* The note was made payable three months after date to "D. F. B. or S. M., his wife." In 1866, after the death of B., and on the application of S. M., L. wrote his name, and the date 1866, on the back of the note:—Held, a sufficient acknowledgment within the above statute; and that the debt, therefore, was not barred. *Bourdin v. Greenwood*, 41 Law J. Rep. (N.S.) Chanc. 73; Law Rep. 13 Eq. 281.

(b) *Acknowledgment by one joint mortgagee.*

26.—Two joint mortgagees of lands who appeared on the face of the mortgage deed to be trustees of a settlement, had been in possession of the mortgaged property for more than twenty years, but within twenty years before the institution of a redemption suit one of them had acknowledged in writing the mortgagor's title:—Held, that such recognition by one of the joint mortgagees did not operate as an acknowledgment within the statute, and that the equity of redemption was barred—affirming the decision of Malins, V.C. *Richardson v. Younge*, 40 Law J. Rep. (N.S.) Chanc. 338; Law Rep. 6 Chanc. 478.

(c) *What amounts to a promise to pay.*

27.—A promise by letter as follows: "Your account has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps in the meantime you will let your clerk send an account:"—Held, a promise sufficiently unconditional to take the case out of the Statute of Limitations. *Chasemore v. Turner*, Law Rep. 10 Q. B. 500: reversed, on appeal, 45 Law J. Rep. (N.S.) Q. B. 66.



**28.**—Upon a plaint brought in the County Court within six years before this action to recover two years' interest due upon a promissory note, made for the payment of a principal sum and interest, against the representatives of the deceased maker of the note, the defendants in the plaint, being also defendants in the present action, pleaded the Statute of Limitations, in answer to which plea an acknowledgment within six years was given in evidence and judgment was given for the plaintiff, and the defendants thereupon paid into Court the amount of the judgment:—Held, that to this action brought to recover the principal and further interest thereon two years after such payment into Court and more than six years after the acknowledgment proved in such plaint, such payment did not necessarily imply a promise to pay the principal, and therefore was no evidence of an acknowledgment to pay the debt within six years, so as to take the case out of the Statute of Limitations (21 Jac. 1. c. 16, sec. 3). *Morgan v. Rowlands*, 41 Law J. Rep. (n.s.) Q. B. 187; Law Rep. 7 Q. B. 493.

(d) *Payment of interest and part payment.*

**29.**—C. H. mortgaged freeholds and leaseholds in 1822. He devised and bequeathed his residuary estate upon trust to pay his debts, including mortgage debts, and afterwards on trust for T. H. A. H., who was beneficial tenant for life under the will of C. H., in a moiety of a freehold not comprised in the mortgage and was also interested in the residue under the will of T. H., paid interest on the mortgage down to her death in 1859:—Held, that such payment prevented the Statutes of Limitation being a bar to the mortgagee's proceeding, either against the property comprised in the mortgage or on the covenant for repayment against the estate of C. H. *Pears v. Laing*, 40 Law J. Rep. (n.s.) Chanc. 225; Law Rep. 12 Eq. 41.

**30.**—In 1827 an agreement was entered into between J. H. and M. H., by which the payment of a sum of 1,000*l.* was to be secured by the bond of H. M., the 1,000*l.* to be applied thus—750*l.* of it was to be paid to certain parties in certain events, and 250*l.* of it to other parties in other events. The bond, with two obligees, was in the same year duly executed by M. H., and trusts were by a separate deed declared of the 1,000*l.* accordingly. The 750*l.* was paid by instalments, and ultimately discharged in full in 1854. The 250*l.* was not paid. The obligor died. In 1872 the parties interested in the 250*l.* filed a creditor's bill to enforce its payment, and to administer the obligor's estate. They contended that the full discharge of the 750*l.*, in 1854, was a satisfaction *pro tanto* of the 1,000*l.*, and that their claim to the balance, namely, the 250*l.*, was not therefore barred by the statute:—Held, that the limits of the plaintiff's legal and equitable rights were commensurate; that the causes of action in respect of the two sums of 750*l.* and 250*l.* were distinct; that the payment of the 750*l.* was not on account of the 250*l.*; that the claim to that sum was therefore barred by the statute; and that the bill

must be dismissed with costs. *Ashlin v. Lee*, 44 Law J. Rep. (n.s.) Chanc. 174: affirmed, on appeal, 44 Law J. Rep. (n.s.) Chanc. 376.

(D) SET-OFF OF DEBT BARRED BY STATUTE.

**31.**—A debt due to an intestate's estate from one of the next-of-kin, barred by the Statute of Limitations, was set off against his share in the estate. *White v. Cordwell*, 44 Law J. Rep. (n.s.) Chanc. 746; Law Rep. 20 Eq. 644.

LIMITED OWNERS' RESIDENCES.

[The erection of mansion houses, &c., to be deemed "improvements" within the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114). 34 & 35 Vict. c. 84.]

LIS PENDENS.

On an application under 30 & 31 Vict. c. 47, s. 2, by the defendant in a suit which had been registered as a *lis pendens*, and subsequently by consent dismissed for want of prosecution, the Court ordered the registration to be vacated upon production of affidavit of service of the notice of motion upon the solicitor of one of two plaintiffs who could not be found, and upon the solicitor of the trustee in bankruptcy of the other plaintiff. *Jervis v. Berridge*, 44 Law J. Rep. (n.s.) Chanc. 164.

*Duty of attorney to register lis pendens.*

[See ATTORNEY, 23.]

*Effect of registration of administration suit as lis pendens.* [See ADMINISTRATION, 40.]

LOCKE KING'S ACT.

[See ADMINISTRATION.]

LOCOMOTIVE.

The enactment in 24 & 25 Vict. c. 70, s. 7— which provides that if a locomotive engine in being driven over a bridge carrying a highway over a stream, damages the bridge so as to render it unsafe for traffic, "none of the proprietors, undertakers, directors, conservators, trustees, commissioners or other person interested in or having the charge of such navigable river, canal or railway, or other the tolls thereof, or of such bridge or arch, shall be liable to repair or make good any damage so occasioned, &c.; but every such damage shall be forthwith repaired to the satisfaction of the proprietors, undertakers, directors, conservators, trustees, commissioners or other person, as aforesaid, respectively interested in or having the charge of such river, &c., by and at the expense of the owner, &c., of such locomotive."

tive at the time of the happening of such damage"—does not apply to public bridges repairable by the inhabitants of a county so as to relieve them from their liability at common law to repair, and render the owner of the locomotive liable to an indictment for the non-repair of such a bridge so damaged by such locomotive. And a conviction of the owner in such a case upon such an indictment was quashed. *The Queen v. Kitchener*, 43 Law J. Rep. (N.S.) M. C. 9; Law Rep. 2 C. C. R. 88.

*Locomotive steam plough: exemption from toll.* [See TURNPIKE, 2.]

## LONDON.

### (A) SMALL DEBTS COURT: REMOVAL OF REGISTRAR.

#### (B) CITY OF LONDON COURT.

#### (C) LORD MAYOR'S COURT: JURISDICTION.

(a) *New trial.*

(b) *Leave to appeal.*

(c) *Attachment.*

(d) *Dishonour of bill or cheque within the City.*

(e) *Sale of goods.*

(f) *Application for prohibition.*

### (A) SMALL DEBTS COURT: REMOVAL OF REGISTRAR.

1.—By the 15 Vict. c. lxxvii. s. 11, the chief clerk of the London (City) Small Debts Court is to be appointed by the Mayor, Aldermen, and Commons, and it shall be lawful for them, in case of the clerk's inability or misbehaviour, or for any other cause which may appear reasonable to them, the Mayor, Aldermen and Commons, to remove such clerk. By the 28 & 29 Vict. c. 99, s. 4, the jurisdiction exercised by the Judges of the Metropolitan County Courts is conferred upon the Judges of the City Court, except the power of appointing officers, and the title of the chief clerk of the City Court is changed to registrar, and by section 21 it is enacted that that Act and the 9 & 10 Vict. c. 95 and any Act amending or altering the same, shall be read and construed as one Act, as if the several provisions in the said Acts referred to were repealed and re-enacted in that Act. By the 9 & 10 Vict. c. 95, s. 24, the appointment of the clerks of the County Courts and also their removal for inability or misbehaviour is vested in the Judges of such Courts subject to the approval of the Lord Chancellor, and by the 13 & 14 Vict. c. 61, s. 4, the power to appoint is left as before, but the power to remove is vested in the Lord Chancellor solely. Charges had been informally made against the registrar of the above-mentioned City Court, and the same were investigated by a committee of the Common Council, who reported that the duties of the office had not been properly discharged by the registrar. The evidence taken on the enquiry was printed and supplied to the members of the Common Council and to the registrar, and at a council afterwards held, it was resolved that the

registrar should shew cause on a day named why he should not be removed from his office. The registrar shewed cause by counsel, who argued that the only charge specifically made against him was too vague, being that he had not properly discharged the duties of his office; and that the evidence adduced before the committee did not support either the more definite charges informally brought against him, or the vague charge made by the report of the committee. He declined to adduce further evidence. The Council then removed the registrar from his office, and appointed the defendant in his place:—Held, first, that the County Court Acts did not affect the jurisdiction to remove conferred by section 11 of 15 Vict. c. 77. Second, that although the charge of improperly discharging his duties might of itself have been too vague, still as, by the course of the enquiry, the registrar had been made acquainted with the particular heads of accusation on which the general charge was founded, and evidence had been adduced in support of such heads, and matters were thereby charged, which, if proved, might seem to the Mayor, Aldermen and Commons, reasonable cause for his removal, and he had had every opportunity of meeting such evidence, it was not competent for any Court of Common Law, or for this House sitting to review the decision of such Court, to interfere with the conclusion arrived at on the evidence, or the consequent judgment pronounced by the Court of Common Council in the exercise of the jurisdiction conferred upon them by the Act. *Osgood v. Nelson* (H. L.), 41 Law J. Rep. (N.S.) Q. B. 329; Law Rep. 5 E. & I. App. 636.

### (B) CITY OF LONDON COURT.

2.—A document purporting to be the order of a Judge at chambers for the removal of a cause for trial in a County Court, and stamped with the Judge's signature according to the usual practice, is binding upon the County Court Judge, and he cannot enquire into the circumstances under which it was made. *Blades v. Lawrence*, 43 Law J. Rep. (N.S.) Q. B. 133; Law Rep. 9 Q. B. 374.

Upon hearing a rule under 19 & 20 Vict. c. 108, s. 43, calling upon the Judge of the City of London Court to shew cause why he should not hear and determine the case which had been ordered to be tried in the Court under the County Courts Act, 1867, 30 & 31 Vict. c. 142, s. 7, it appeared that on the day fixed for the hearing of the case, the Judge of the City of London Court asked to see the order transferring the cause, and, finding that the order had been made by the Master and afterwards stamped by the Judge's clerk at chambers with the signature "G. Honyman," he declined to hear the case, stating that he had made a rule of practice by which, before such a case could be heard, proof must have been given that the order was made by the Judge of the Superior Court:—Held, first, that the Judge of the City of London Court was wholly unjustified in the course which he took, as he had no right to enquire into the validity of the order of the Judge of a Superior Court, such order being on the face of it properly

authenticated; secondly, that the proceeding by rule as provided by 19 & 20 Vict. c. 108, s. 43, applied to the Judge of the City of London Court. *Ibid.*

(C) LORD MAYOR'S COURT: JURISDICTION.

(a) *New trial.*

3.—The 10th section of the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), enables either party to a suit in that Court, if leave be given to him by the Judge on the trial, to move in any of the Superior Courts to enter a verdict or nonsuit, as the case may be, and gives the Superior Court power to make such order therein as it may think proper, and directs judgment to be entered accordingly:—Held, that the disposal by the Superior Court of a rule to enter a nonsuit moved for under that section, does not take away the jurisdiction of the Judge of the Mayor's Court to entertain an application for a new trial. *Lebeau v. The General Steam Navigation Company*, 42 Law J. Rep. (N.S.) C. P. 76; Law Rep. 8 C. P. 129.

(b) *Leave to appeal.*

4.—The Lord Mayor's Court Act, 20 & 21 Vict. c. clvii. ss. 8, 10, provides that in certain cases a party may appeal, if he give notice within two days of the decision, and give security; and that, "if upon the trial" the Judge gives him leave to move in a Superior Court, he may move within the time limited for like motions in such Court. At the conclusion, on a Thursday, of a trial in the Lord Mayor's Court, the Judge refused to give the plaintiff, who was nonsuited, leave to move, but on the ensuing Monday on application made to him granted such leave:—Held, by the majority of the Court (Bovill, C.J., Keating, J., and Grove, J.), that he had no power to do so, because, even if there had been no refusal (which per Bovill, C.J., determined the time), the leave must be given within a reasonable time, and that would be two days; but per Brett, J., four days is a reasonable time, and the refusal did not curtail it. *Folkard v. The Metropolitan Railway Company*, 42 Law J. Rep. (N.S.) C. P. 162; Law Rep. 8 C. P. 470.

(c) *Attachment.*

5.—The plaintiffs, merchants in London and Madras, issued an attachment out of the Lord Mayor's Court, to attach moneys in the hands of B. for a debt due from V., of Madras. B. pleaded a prior attachment by S., a foreign creditor, and so the action of the plaintiffs in the Lord Mayor's Court was defeated. The plaintiffs filed a bill alleging that the prior attachment was not for a *bonâ fide* debt, and praying for an account and payment of their debt:—Held, that this Court had jurisdiction to decide the matter, and the Court being of opinion that no debt was due to S., directed payment to the plaintiffs of the debt due to them. *Shand v. Du Buisson*, 43 Law J. Rep. (N.S.) Chanc. 508; Law Rep. 18 Eq. 283.

*Custom of foreign attachment.* [See ATTACHMENT, 9, 10.]

(d) *Dishonour of bill or cheque within the City.*

6.—The defendant, for valuable consideration, indorsed to the plaintiff a cheque for 10*l.*, payable at a bank in the City of London: the cheque was dishonoured upon presentation; the indorsement was at S., in Yorkshire. The plaintiff having sued in the Mayor's Court, London, to recover the amount of the cheque, the defendant's attorney applied to this Court for a prohibition:—Held, that the dishonour of the cheque within the City of London did not give the Mayor's Court jurisdiction, that a prohibition ought to issue, and that the applicant for the same was entitled to costs. *Robinson v. Emanuel*, 43 Law J. Rep. (N.S.) C. P. 244; Law Rep. 9 C. P. 414, and *Quarley v. Timmins*, Law Rep. 9 C. P. 416, *n.*

7.—In an action in the Mayor's Court, London, upon a bill of exchange for less than 50*l.* by indorsee against acceptor, the defendant pleaded to the jurisdiction of the Court; at the trial the bill was produced and was found to be payable at Smith, Payne & Smiths; a witness proved that Smith, Payne & Smiths carried on business in the City. There was no evidence where the bill was drawn, accepted, or indorsed:—Held, that the plea to the jurisdiction admitted merely the dishonour of the bill somewhere, that the above circumstances constituted no proof of dishonour within the City of London, and that there was no evidence that part of a cause of action accrued to the plaintiff within the jurisdiction of the Mayor's Court, pursuant to the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 12. *Sevell v. Cheetham*, 43 Law J. Rep. (N.S.) C. P. 239; Law Rep. 9 C. P. 420.

(e) *Sale of goods.*

8.—Where an order for goods is given outside the City of London, to be delivered to a carrier (named and paid by the buyer), within the City; and the goods having been delivered accordingly, an action in the Lord Mayor's Court is brought for their price, the cause of action must be deemed to have arisen in part out of the jurisdiction of the Lord Mayor's Court, and a prohibition will be issued to restrain the action. *Gold v. Turner*, Law Rep. 10 C. P. 149.

(f) *Application for prohibition.*

9.—In order to allow the Mayor's Court of London to entertain a suit, the cause of action must have arisen within its jurisdiction, even although the amount in dispute is less than 50*l.*, and the defendant carries on business in the City of London. An attorney is sufficiently a stranger to the suit in the Mayor's Court to entitle him to apply for a prohibition, although the defendant himself can only raise an objection to the jurisdiction by plea (20 & 21 Vict. c. clvii. s. 15). *Willis v. Harris*, 43 Law J. Rep. (N.S.) C. P. 208.

[And see *supra* Nos. 6, 8.]

## LORD'S DAY.

[See SUNDAY.]

1.—A company constructed a large building with tanks for the exhibition of marine fish and animals, and in the same building they had a museum, a reading-room, and a restaurant. The building was open on Sundays, when a band played at a stated time, and the public were admitted at sixpence each:—Held, by the Court of Queen's Bench, that this building was a place of public entertainment or amusement within the 21 Geo. 3. c. 49, s. 1. *Terry v. The Brighton Aquarium Company*, 44 Law J. Rep. (N.S.) M. C. 173; Law Rep. 10 Q. B. 306.

2.—The band and the newspapers in the reading-room were afterwards suppressed:—Held, by the Court of Exchequer, that the place was still within the Act. *Warner v. The Brighton Aquarium Company*, 44 Law J. Rep. (N.S.) M. C. 175; Law Rep. 10 Exch. 291.

## LUNACY.

[General Orders, 23rd December, 1872. See 42 Law J. Rep. (N.S.) Chanc. *ad init.*]

## LUNATIC.

## (A) JURISDICTION IN LUNACY.

- (a) Lunatic foreigner.
- (b) Appointment of new trustee.

## (B) PRACTICE IN LUNACY.

- (a) Sale or lease of lunatic's estate.
- (b) Costs and allowances out of estate.
- (c) Summary powers as to realty where estate small.
- (d) Attending proceedings.

## (C) PROPERTY OF LUNATIC.

- (a) Conversion.
- (b) Rights of presumptive next-of-kin.
- (c) Lien on lunatic's legacy for past maintenance.

## (D) SUITS AND PROCEEDINGS BY AND AGAINST LUNATICS.

- (a) Suit by lunatic partner for dissolution.
- (b) Lunatic not so found by inquisition.

## (E) MAINTENANCE OF CRIMINAL LUNATIC.

## (F) MAINTENANCE OF PAUPER LUNATIC.

## (A) JURISDICTION IN LUNACY.

- (a) Lunatic foreigner.

1.—Where a Portuguese, whose family and property (with a trifling exception) were in Portugal, became lunatic in England:—Held, that 25 & 26 Vict. c. 86, s. 3, did not take away the power of the Court here to direct an enquiry when the lunacy commenced, but that in this case the enquiry ought not to be directed, as it was not required for the purpose of the proceedings in

England, and would probably be treated in Portugal as affecting unheard parties. *In re Sotto-major*, Law Rep. 9 Chanc. 677.

## (b) Appointment of new trustee.

2.—The Lords Justices sitting in Lunacy have jurisdiction, under the Trustee Acts, to appoint a new trustee of a creditors' deed registered under the Bankruptcy Act, 1861, in the place of a trustee who has become of unsound mind. *In re Donisthorpe*; *In re Thompson's Trusts*, 44 Law J. Rep. (N.S.) Chanc. 536; Law Rep. 10 Chanc. 55.

## (B) PRACTICE IN LUNACY.

## (a) Sale or lease of lunatic's estate.

3.—Order made on petition to carry out an agreement by committee of a lunatic's estate (without the sanction of the Master) to let a lunatic's property for a term of years, the petition being presented by the intended lessee. *In re Wynne*, Law Rep. 7 Chanc. 229.

*Sale of ecclesiastical lease: lunatic interested: application to be in Chancery.*  
[See TRUST, E 2.]

## (b) Costs and allowances out of estate.

4.—Cost of report of Commissioners in Lunacy directing an enquiry as to the state of mind of a person confined in an asylum, and costs of the enquiry, which resulted in his being declared of sound mind, ordered to be paid out of the supposed lunatic's estate. *In re C—(an alleged lunatic)*, Law Rep. 10 Chanc. 75.

5.—Where a wealthy lunatic had made two wills before he was found lunatic, the Court, without giving any opinion whether a bill to perpetuate testimony as to their validity would lie, ordered that such costs as the Master should think proper, of a bill to be filed with his approbation for that purpose, should be paid out of the lunatic's estate. *In re Tayleur*, Law Rep. 6 Chanc. 417.

6.—Leave given to the committee of a lunatic's estate, who was also heiress-at-law and sole next-of-kin, to contribute 250*l.* out of the lunatic's surplus income to a charitable object approved by the Master in Lunacy. *In re Strickland*, Law Rep. 6 Chanc. 226.

## (c) Summary powers as to realty where estate small.

7.—Where in the case of a small estate it is desired to deal with a lunatic's realty, without incurring the expense of an inquisition, the proper course is to proceed under the summary powers of section 120 of the Lunacy Regulation Act, 1853. *Halfhide v. Robinson*, 43 Law J. Rep. (N.S.) Chanc. 398; Law Rep. 9 Chanc. 373.

## (d) Attending proceedings.

8.—Although there were special circumstances, the Court declined to make a precedent for allowing persons named in the wills of lunatics to attend proceedings in Lunacy. *In re Scarlett*, Law Rep. 8 Chanc. 739.

## (C) PROPERTY OF LUNATIC.

(a) *Conversion.*

9.—A., B., C. and D. were tenants in common in fee of certain real estate. A., B. and C. sold and demised portions thereof and the mines thereunder, and covenanted that D., who was of unsound mind, should confirm the transactions as to her shares therein. Subsequently C. became of unsound mind, and A. and B. together, and after the death of B. A. alone, by indentures (which contained covenants with respect to C. and D.'s share, similar to the above-mentioned covenant concerning D.'s share), sold or in consideration of sums payable by instalments granted mining leases of other portions of the property. In 1861 A. died, and in 1862 C. and D. were found lunatics by inquisition, and their committee filed a bill against A.'s personal representative for an account of the shares of C. and D. in the purchase-money received in respect of these transactions. This suit was compromised by an agreement, whereby the defendant undertook to pay the plaintiff a certain sum in satisfaction of C.'s claim, and the same sum in satisfaction of D.'s claim. This compromise was confirmed by the Court, and an order was made authorising the committee to concur in the sales and leases, directing that the sums named in the agreement should be paid into Court to the credit of C. and D. respectively, and a part of each carried to "the real estate account," and a part to "the mineral account." In 1867 D. died leaving C. her heiress-at-law and sole next-of-kin, and both sums were carried to the credit of her estates. After the death of C. in 1874, her heir-at-law and personal representative each filed a petition, claiming the sums standing to her credit to the real estate account and to the mineral account:—Held, that the order of the Court was made under section 124 of the Lunacy Regulation Act, 1853, that the mining leases were in fact sales, and that consequently all the funds in question must be treated as real estate, except as to so much of them as was received in respect of the sales in which C. had concurred before she became of unsound mind. *In re Mary Smith*, Law Rep. 10 Chanc. 79.

(b) *Rights of presumptive next-of-kin.*

10.—The presumptive next-of-kin of a living lunatic have no interest in his personal estate, and the Court will not during his life, upon the application of an assignee of the expectant share of such presumptive next-of-kin, make any order restraining prospectively the payment out of Court of such expectant share. *In re Piggott* (3 Mac. & G. 268) overruled. *In re Wilkinson*, 44 Law J. Rep. (N.S.) Chanc. 328; Law Rep. 10 Chanc. 73.

(c) *Lien on lunatic's legacy for past maintenance.*

11.—Where a legacy given by a will for the benefit of a person of unsound mind (not so found by inquisition) was paid to her brothers:—Held, that they were entitled to retain it in payment of expenses incurred by them for her maintenance

in past years, as against the county, at the expense of which she had been maintained for the last twelve years. The brothers undertook to maintain her in future, but, semble, they would have been entitled without doing this. *In re Gibson*, Law Rep. 7 Chanc. 52.

## (D) SUITS AND PROCEEDINGS BY AND AGAINST LUNATICS.

(a) *Suit by lunatic partner for dissolution.*

12.—A partner who has become incurably insane may obtain a decree for dissolution of the partnership on this ground, and although he has not been found lunatic by inquisition, may institute a suit for dissolution by his next friend, alleging that the lunatic is incurably insane, and that the dissolution is for the benefit of the lunatic, and the Court will entertain the suit, in order to protect the property of the lunatic. *Jones v. Lloyd*, 43 Law J. Rep. (N.S.) Chanc. 826; Law Rep. 18 Eq. 265; and *Fisher v. Melles*, Law Rep. 18 Eq. 268 n.

A bill was filed by the plaintiff (described as a person of unsound mind, not so found) by his next friend, stating that the plaintiff and the defendant had entered into partnership for fourteen years, determinable by notice at the end of seven; that the plaintiff had since become incurably insane; that since he had become insane the defendant had given notice to determine the partnership, and also had attempted to withdraw the notice; and that dissolution would be for the benefit of the lunatic:—Held, on demurrer, first, that the notice to dissolve having been given to the insane partner could not be withdrawn. Secondly, that, independently of this, on the allegations that the plaintiff was incurably insane, and that it was for his benefit that the partnership should be dissolved, the Court would entertain the suit, as it was necessary that the property of the lunatic should be protected; but quære, whether a final decree could be made without an application in lunacy. *Ibid.*

(b) *Lunatic not so found by inquisition.*

13.—A suit instituted by a next friend on behalf of a person of unsound mind, not so found by inquisition, becomes absolutely paralysed by a change in the status of the plaintiff. If he becomes of sound mind there is no pretext for the continued intervention of the next friend; if he is found a lunatic by inquisition, and is thus placed under the protection of the Crown, the suit should be continued only with the sanction of the Court in Lunacy. *Beall v. Smith*, 43 Law J. Rep. (N.S.) Chanc. 245; Law Rep. 9 Chanc. 85.

Every proceeding taken in the suit after the inquisition, whether or not a committee has been appointed, is irregular and void and a contempt of the Court in Lunacy. *Ibid.*

Liability of solicitors to refund costs. *Ibid.*

14.—Where the medical officer of an asylum refused to allow service of a bill on a lunatic who was not so found by inquisition the Court allowed

substituted service on the medical officer. *Raine v. Wilson*, 43 Law J. Rep. (N.S.) Chanc. 469; Law Rep. 16 Eq. 576.

#### (E) MAINTENANCE OF CRIMINAL LUNATIC.

15.—Where the keeper of a private asylum received an insane prisoner by virtue of a warrant of a Secretary of State under 3 & 4 Vict. c. 54, and the guardians of a union during thirteen years paid him for maintenance a certain weekly sum, which was a reasonable sum in that behalf:—Held, that the inference was, that either there had been an order of justices for payment of such sum or an arrangement to pay the said, or a reasonable sum during the time the lunatic was kept, and that as the lunatic was not removed, and the keeper could not turn him out, the guardians were bound to pay the keeper at the same rate. *Pegge v. The Guardians of the Lampeter Union*, 41 Law J. Rep. (N.S.) C. P. 204; Law Rep. 7 C. P. 366.

But this was reversed on appeal by the Court of Exchequer Chamber, holding that no inference could be drawn, either that there had been an order of justices under 3 & 4 Vict. c. 54, ss. 2, 3, for payment of that sum, or that an arrangement had been made to pay that sum, or a reasonable sum, so long as the lunatic should be kept. *Pegge v. The Guardians of the Lampeter Union* (Exch. Ch.), 43 Law J. Rep. (N.S.) C. P. 181; Law Rep. 9 C. P. 373.

16.—E. was tried and convicted of a murder committed within a borough having a separate Court of quarter sessions, and having a contract with the justices of the county in which the borough was situate, in pursuance of section 31 of the Prison Act, 1865, to receive and maintain in the county prison all prisoners maintainable at the expense of the borough. After conviction E. was confined in such county prison. While so confined she was found to be insane; and was removed under a warrant of the Secretary for the Home Department to the Criminal Lunatic Asylum at Broadmoor:—Held (in the Exchequer Chamber, affirming the decision of the Queen's Bench, 41 Law J. Rep. (N.S.) M. C. 57; Law Rep. 10 Q. B. 166), that the visiting justices of the county were the proper justices to enquire into and ascertain the place of the last legal settlement of E. in pursuance of 3 & 4 Vict. c. 54, s. 2. *The Queen v. The Justices of Lewes*, 41 Law J. Rep. (N.S.) M. C. 176; Law Rep. 10 Q. B. 579.

17.—The Act 39 & 40 Geo. 3. c. 94, s. 1, provides for the detention of persons charged with treason, murder, or felony, and acquitted on the ground of insanity at the time of the commission of the offence. By 9 Geo. 4. c. 40, s. 54, where any person is in custody as an insane person by order of any Court, or by his Majesty's order subsequent thereto, "it shall be lawful for two justices of the county where such person is in custody to enquire into and ascertain the place of the last legal settlement, and the circumstances of such person; and, if it shall not appear that he is possessed of sufficient property which can be applied to his maintenance, it shall be lawful for such two justices to make an order upon such parish

of settlement to pay such weekly sum for his maintenance in such place of custody as the Secretary of State shall from time to time direct;" with a proviso that the overseers of the parish of adjudged settlement may appeal against such order to the Quarter Sessions, "in like manner and under like restrictions and regulations as against any order of removal, giving reasonable notice thereof to the clerk of the peace, who shall be respondent in such appeal." By 3 & 4 Vict. c. 54, s. 1, a criminal becoming insane during imprisonment may be detained. By section 2, justices of the peace may enquire into the settlement of such prisoner and make orders on the parish where he is settled for his maintenance; and by section 3, persons charged with misdemeanours and acquitted on the ground of insanity may be kept in custody. By section 5, an appeal to quarter sessions is given to the overseers of the parish or guardians against the decision of the justices as to the settlement with the like restrictions, &c., as in 9 Geo. 4. c. 40, s. 54. By section 7, so much of 9 Geo. 4. c. 40, s. 54, as relates to the direction to the Secretary of State, is repealed, and power is given to two justices to "direct the overseers of the parish in which they shall adjudge such insane person to be settled, or the guardians, &c., to pay such weekly sum for the maintenance of such person as they or any such two justices shall direct." By 8 & 9 Vict. c. 126, s. 1, the Act 9 Geo. 4. c. 40, is entirely repealed. A woman indicted for murder was acquitted on the ground of insanity, and ordered to be detained in custody during her Majesty's pleasure. While she was in Newgate an order of justices was made, adjudging her settlement, and ordering the guardians of the union to pay 14s. a week while she remained in the Criminal Lunatic Asylum. The order was served on the guardians, but it was not accompanied by the grounds of the order or particulars of the settlement. On mandamus to the guardians of the union to pay the arrears of the 14s. weekly, the facts above mentioned were stated on the record, and with respect to 25*l.*, part of the amount claimed, the defendants relied on the limitation clause in 22 & 23 Vict. c. 49, s. 1, which enacts that, "with respect to any debt, claim or demand which may be lawfully incurred, or become due, from the guardians of any union or parish, such debt, claim or demand shall be paid within the half year in which the same shall have been incurred or become due, or within three months after the expiration of such half year, but not afterwards:"—Held, first, that, notwithstanding the repeal of 9 Geo. 4. c. 40, there was, under 3 & 4 Vict. c. 54, s. 7, power to make the order. Secondly, that it was not necessary to serve the grounds of appeal with the order. Thirdly, with regard to the 25*l.*, that the limitation clause applied, and the claim was barred. *The Queen v. The Guardians of Stepney Union*, 43 Law J. Rep. (N.S.) M. C. 145; Law Rep. 9 Q. B. 383.

#### (F) MAINTENANCE OF PAUPER LUNATIC.

18.—Accrued and future dividends of a fund settled on a married woman for her life for her

separate use, without power of anticipation, were ordered to be paid to the officer charged with the care of lunatics in the Colony of Victoria, to provide for her past and future maintenance as a pauper lunatic in the colony. *In re Baker's Trusts*, 41 Law J. Rep. (N.S.) Chanc. 162; Law Rep. 13 Eq. 168.

### MAINTENANCE.

[See INFANT; LUNATIC; POOR.]

*Enforcement of trust for maintenance in voluntary settlement.* [See VOLUNTARY SETTLEMENT, 10.]

### MALICIOUS INJURY TO PROPERTY.

(A) WHAT CONSTITUTES MALICE.

(B) REASONABLE SUPPOSITION OF RIGHT.

(C) INFORMATION: OWNERSHIP OF PROSECUTOR.

#### (A) WHAT CONSTITUTES MALICE.

1.—The word “maliciously” in the 24 & 25 Vict. c. 97, s. 51, requires that an act to be criminal within that section should be done wilfully. *The Queen v. Pembilton*, 43 Law J. Rep. (N.S.) M. C. 91; Law Rep. 2 C. C. R. 119.

A conviction under that section, for unlawfully and maliciously committing damage above the value of 5*l.* to a house, where the defendant, after fighting in a crowd in the street near the window of the house, separated himself from the crowd, picked up a stone, threw it at one of the persons with whom he had been fighting, missed his aim, and hit a plate-glass window above the value of 5*l.* in the house, but did not intend to break the window, was quashed. *Ibid.*

#### (B) REASONABLE SUPPOSITION OF RIGHT.

2.—By 24 & 25 Vict. c. 97, s. 52, “whoever shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, shall, on conviction before a justice,” be subject to fine or imprisonment, &c. . . . ; “provided that nothing herein contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of.” The appellant was summoned before the justices under this section. It appeared that he was in the employment of D., and that by his order he forcibly entered a garden belonging to and in the occupation of the respondent, accompanied by thirteen other men, and cut a small ditch, from forty to fifty yards in length, through the soil. The respondent and his predecessor in title had occupied the garden for thirty-six years, and during the whole time there had been no ditch upon the site

of part of that cut by the appellant. For the defence D. was called, who stated that fifteen years before, there had been an open ditch in the land in question, which received the drainage from the highway, and that he gave directions for the ditch to be cut by the appellant, in the exercise of what he considered to be a public right. The justices found that the appellant had no fair and reasonable supposition that he had a right to do the act complained of, and accordingly convicted him:—Held, that by the express words of the section and proviso, the jurisdiction of the justices was not ousted by the mere *bona fide* belief of the appellant that his act was legal, and that there was evidence on which they might properly find that he did not act under the fair and reasonable supposition required by the statute. *White v. Feast*, 41 Law J. Rep. (N.S.) M. C. 81; Law Rep. 7 Q. B. 353.

#### (C) INFORMATION: OWNERSHIP OF PROSECUTOR.

3.—An information was laid against the appellant, under section 52 of 24 & 25 Vict. c. 97, charging him with committing damage to a lamp, which was affixed to a club-house. The lamp was alleged in the information to be the property of B., C. and A., the trustees of the club-house. The evidence shewed that B. was the lessee of the house, and that by a declaration of trust between himself, of the first part, and B., C. and A., of the second part, he declared himself to stand possessed for the trustees. The informant, the manager of the club, did not see the damage committed by the appellant:—Held, that this was not necessary, that he was not precluded from laying the information, and that the justices were not justified in dismissing the information by reason of the alleged variance between the information and the evidence. If they thought that the appellant had been deceived or misled, they might have adjourned the hearing, as provided by 11 & 12 Vict. c. 43; but if they did not think so, they should have gone on to decide the case. *Ralph v. Hurrell*, 44 Law J. Rep. (N.S.) M. C. 145.

### MALICIOUS PROSECUTION.

1.—Where in an action for maliciously giving the plaintiff into custody and for slander, the defendant pleaded to the latter cause of action a plea in justification, which would have been no answer to the former, and at the trial the plaintiff failed to prove the slander:—Held, that the jury ought to disregard this plea in considering the former cause of action. *Brooke v. Ayrillon*, 42 Law J. Rep. (N.S.) C. P. 126.

2.—S., an attorney, having been instructed by H. to make J. bankrupt, obtained a debtor's summons under s. 7 of the Bankruptcy Act, 1869, and served it on J., who thereupon applied to the registrar of the County Court to dismiss the summons. Having heard both parties, the registrar made an order on the 12th of April that J. should within seven days enter into a bond, with two

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such sufficient sureties as the Court should approve, to pay such sum as should be recovered by H. in any proceeding taken for the recovery of the debt due to him from J., together with costs; and that all proceedings on the summons should be stayed until the Court in which such proceedings for the recovery of the debt should be taken had come to a decision thereon. S. drew up the order, which was the first of the kind made by the County Court in pursuance of the statute. During the seven days a correspondence took place as to the proposed sureties, who were objected to by S. on behalf of H., and no bond having been executed in consequence, a petition in bankruptcy was, by the express order of H., presented by S. on the 21st of April under the 8th section, and on the same day a receiver was appointed under the 13th section, the act of bankruptcy alleged being (in the terms of section 6, sub-sec. 6 of the Act) that the petitioning creditor had served on J. a debtor's summons, and that he being a trader had for seven days neglected to pay the debt alleged to be due, or to secure or compound for the same. J. objected to the petition; and after several hearings under the 8th section, the County Court Judge on the 8th of May adjudged J. to be bankrupt. This decision was affirmed by the Chief Judge in Bankruptcy, but was afterwards reversed by the Lord Justice of Appeal, who annulled the proceedings on the ground that the order of the 12th of April was a stay of proceedings at the time of the petition and adjudication:—Held, by Kelly, C.B., and Cleasby, B., that upon these facts an action was maintainable by J. against S. for maliciously and without reasonable and probable cause presenting the petition and causing him to be adjudicated a bankrupt. Held, contra, by Martin, B., and Bramwell, B., that such an action was not maintainable by J. against S. *Johnson v. Emerson*, 40 Law J. Rep. (N.S.) Exch. 201; Law Rep. 6 Exch. 329.

*Case stated by County Court Judge: evidence itself ought to be set out.* [See COUNTY COURT, 23.]

## MANDAMUS.

### (A) WHEN IT LIES.

(a) *Right of applicant.*

(b) *To Lords of Treasury.*

### (B) COSTS.

### (A) WHEN IT LIES.

(a) *Right of applicant.*

1.—The Court in the exercise of its discretion as to the issuing of a writ of mandamus requires that the application should be made by one who has a real interest in requiring the duties to be performed. *The Queen v. Mayor of Peterborough*, 44 Law J. Rep. (N.S.) Q. B. 85.

The Court will not grant a mandamus to the mayor of a borough to hold a fresh meeting of the

ratepayers of the borough for the purpose of granting or withholding their consent to the incurring by the governing body of a borough the expense of opposing a bill in Parliament under the 35 & 36 Vict. c. 91, s. 4, after a prior meeting had been held where a poll had been refused, in order that at the fresh meeting a poll of the ratepayers of the borough might be taken, upon the application of a ratepayer of the borough who is also one of the promoters of the bill in question. *Ibid.*

### (b) *To Lords of Treasury.*

2.—By 29 & 30 Vict. c. 39, s. 14, when any sum shall have been granted to Her Majesty by a resolution of the House of Commons or by an Act of Parliament to defray expenses for any specific public services, it shall be lawful for Her Majesty from time to time, by order, under the royal sign manual, countersigned by the Treasury, to authorise and require the Treasury to issue, out of the credits to be granted to them on the Exchequer accounts, the sums which may be required from time to time to defray such expenses, not exceeding the amount of the sums so voted or granted. By the Annual Appropriation Acts since 1835 there has been a grant of a gross sum each year to defray "the charges for prosecutions at assizes and quarter sessions in England formerly paid out of county rates." The accounts of costs of prosecution in the county of L. were duly taxed by the proper officers, and paid out of the county rates, but a number of items in these bills were taxed off and disallowed by officers appointed by the Treasury. The justices of the county obtained a rule *nisi* for a mandamus to compel the Lords of the Treasury to pay the amount disallowed to the county treasurer:—Held, that a mandamus could not issue to compel the Lords of the Treasury to pay the amount as they had only received it in the character of servants of the Crown. *The Queen v. The Lords Commissioners of the Treasury*, 41 Law J. Rep. (N.S.) Q. B. 178; Law Rep. 7 Q. B. 387.

*Mandamus to election commissioners to grant certificate of witness.* [See PARLIAMENT, 8.]

*To directors of company to allow inspection of books.* [See PRODUCTION, 9.]

### (B) COSTS.

3.—A party who induces Quarter Sessions to act upon an objection which turns out to be ill-founded, and to refuse to hear an appeal and who substantially litigates the point up to the time of cause being shewn against a rule which had been obtained for a mandamus to the sessions to hear the appeal, will have to pay the costs of the rule, though he does not actually shew cause against the rule. *The Queen v. The Guardians of the Birmingham Union*, 44 Law J. Rep. (N.S.) M. C. 48.



## MANOR.

[See COPYHOLD; COMMON; INCLOSURE.]

*Custody of Court rolls.*

1.—Summons by guardian *ad litem*, of infant lord to compel a steward to deliver up Court Rolls dismissed. *Windham v. Giubilei*, 40 Law J. Rep. (N.S.) Chanc. 505.

*Grant of waste.*

2.—The 51 Geo. 3. c. 115, s. 2, does not empower the lord of a manor to grant a portion of the waste land of the manor, which is a village green, freed from the parishioners' customary right to the use of it, as such, and a demurrer by the vicar of St. M. E., in the manor of B., the grantee of the ecclesiastical commissioners (lords of the manor), to a bill by one of the parishioners of B., to establish their right to the village green, and set aside the grant of it, was overruled. *Forbes v. The Ecclesiastical Commissioners for England and the Rev. T. L. O. Davies*, 42 Law J. Rep. (N.S.) Chanc. 97; Law Rep. 15 Eq. 51.

## MANSLAUGHTER.

Where two men fought with fists and the one was killed, and before fighting they by agreement each deposited a pound with the defendant, upon the terms that after the fight he was to hand over the two pounds to the winner, the defendant, who was not present at the fight, and took no further part in the circumstances attending it than to hold the money, and to hand it over afterwards to the survivor, was held not liable to be convicted of being accessory before the fact to the manslaughter. *The Queen v. Taylor*, 44 Law J. Rep. (N.S.) M. C. 67; Law Rep. 2 C. C. R. 147.

## MARINE INSURANCE.

## (A) VALIDITY OF CONTRACT OF INSURANCE UNDER PROVISIONS OF 30 VICT. c. 23.

- (a) *Specification of names of underwriters.*
- (b) *Policy exceeding twelve months.*
- (c) *Stamp.*
  - (1) *Action on unstamped slip.*
  - (2) *Admissibility of unstamped document.*

## (B) AVOIDANCE OF POLICY.

- (a) *Concealment.*
  - (1) *Material fact: what is.*
  - (2) *Facts subsequent to initialing of slip.*
  - (3) *Mistake in name of ship.*
  - (4) *Election to avoid contract.*
- (b) *Misrepresentation.*
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## (C) CONSTRUCTION OF PARTICULAR POLICIES.

- (a) *Policy of insurance against losses as carriers.*
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## (G) PARTIAL AND TOTAL LOSS.

- (a) *Of vessel: mode of assessing under separate outward and homeward policies.*
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- (a) *When necessary.*
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- (a) *Warranty of.*
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## (K) GENERAL AVERAGE.

## (L) INSURABLE INTEREST.

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## (N) ASSIGNMENT OF POLICY.

- (a) *Termination of interest.*
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## (O) ACTIONS AND SUITS.

- (a) *Undisclosed principal.*
- (b) *Suit in equity for return of premiums.*

## (P) MUTUAL MARINE INSURANCE ASSOCIATION.

- (a) *Rules and constitution.*
- (b) *Contract between society and members.*

## (A) VALIDITY OF CONTRACT OF INSURANCE UNDER PROVISIONS OF 30 VICT. c. 23.

(a) *Specification of names of underwriters.*

1.—A mutual marine insurance association issued policies signed by managers "per procuration of" the several members of the association:—Held (affirming the decision of the Master of the Rolls), that this was not a specification of the names of the subscribers or underwriters within the meaning of the 30 Vict. c. 23, s. 7, and that on this ground the policies were void. *In re the Arthur Average Association; Ex parte Cory*, 44 Law J. Rep. (N.S.) Chanc. 569; Law Rep. 10 Chanc. 542, nom. *Ex parte Hargrove & Company*.

The policies in question were non-mutual policies, but *Semble*, the same objection would apply to all. *Ibid*.

(b) *Policy exceeding twelve months.*

2.—A policy of insurance was made on a vessel for a year, by an insurance association, by the rules of which the insurance was to be from year to year unless notice to the contrary be given, and the managers, unless they receive ten days'

notice to the contrary, were to renew the policy on its expiration:—Held, that according to the terms of such rules, and 30 & 31 Vict. c. 23, s. 8 (which makes null a policy exceeding twelve months), the policy was not a continuing one, but expired at the end of the year. *Lishman v. The Northern Maritime Insurance Company (Lim.)*, 42 Law J. Rep. (n.s.) C. P. 108; Law Rep. 8 C. P. 216.

(c) Stamp.

(1) Action on unstamped slip.

3.—No action lies on an unstamped slip, inasmuch as by sections 7 and 9 of 30 Vict. c. 23, no contract for sea insurance is valid unless the same is expressed in a policy, and no policy is available unless duly stamped. So held by the Exchequer Chamber affirming the judgment below, 42 Law J. Rep. (n.s.) Q. B. 224; Law Rep. 8 Q. B. 469. *Fisher v. The Liverpool Marine Insurance Company (Exch. Ch.)*, 43 Law J. Rep. (n.s.) Q. B. 114; Law Rep. 9 Q. B. 418.

The defendants, an Insurance Company at Liverpool, employed E. & Co. as their agents in London to accept risks and receive premiums in London for policies of marine insurance. The plaintiffs instructed P. & Co., insurance brokers in London, to effect an insurance upon a cargo of rails. P. & Co. on the 16th of November, 1871, prepared a slip which was initiated by E. & Co., and a copy was made out by P. & Co., who sent it to E. & Co. On the same night E. & Co. sent the copy to the defendants at Liverpool. A policy ought to have been executed and sent soon after, but this was not done. An account, including 2s. 6d. policy duty, was sent by E. & Co. to P. & Co., who paid it on the 13th of March, 1872. No stamped policy was ever prepared or executed, and the ship on which the cargo of rails was having been lost, the defendants refused to execute the policy or to pay the insurance money. The jury found that the defendants authorised E. & Co. to issue slips, accept risks and receive premiums; that they had given plaintiffs reasonable ground to believe, and that the plaintiffs did believe, that if the plaintiffs paid the premium and stamp, on a slip initiated by E. & Co., they, the defendants, would issue a policy in accordance with the slip. They also found that the plaintiffs were prevented by the conduct of the defendants from insuring elsewhere:—Held, that there was no duty on the defendants separable from the contract to insure in the usual and customary manner, and therefore that no action on such contract being maintainable by the plaintiffs against the defendants without contravening the provisions of sections 7 and 9 of 30 Vict. c. 23, the plaintiffs could not recover in any form of action brought against the defendants. *Ibid.*

(2) Admissibility of unstamped document.

4.—Letter authorising the manager of a mutual marine insurance to insure a ship, and undertaking to abide by the rules of the association, followed by a duly stamped policy issued to the

insurers, but which contained no reference to the rules:—Held, that, the letter, though not stamped, was admissible in evidence, and that the insurers were liable as contributories under the rules which bound each insurer to contribute to the losses of any other insurer. *Smith's case*, Law Rep. 4 Chanc. 611, distinguished. *In re the Albert Average Association*, Law Rep. 13 Eq. 529.

5.—A ship was insured in 1863 by M. in a Mutual Marine Insurance Association. The policy, which was unstamped, was renewed up to 1868, when the ship, with M. on board, was lost at sea. The money due in respect of the insurance was collected by order of the association, according to their usual practice, from the members liable to contribute the same, but was retained by the secretary until a personal representative to M. should have been appointed. Before any such appointment was made the association was ordered to be wound up. Subsequently M.'s widow took out administration to him, and brought in a claim in the winding up under the policy. A portion of the amount due under the policy had already been paid to persons having a lien thereon:—Held, that the relation of debtor and creditor had been sufficiently established between the parties, and the widow was entitled to recover the amount, notwithstanding the want of a stamp on the policy. *In re the Teignmouth and General Mutual Shipping Association*, 41 Law J. Rep. (n.s.) Chanc. 679; Law Rep. 14 Eq. 148.

A slip, though not stamped, and therefore not available as a policy, nevertheless referred to for the purpose of shewing the intention of the parties at the time of the execution of the policy. *Ionides v. The Pacific Fire and Marine Insurance Company*, No. 13 infra.

[And see No. 7 infra.]

(B) AVOIDANCE OF POLICY.

(a) Concealment.

(1) Material fact: what is.

6.—By the rules of Lloyd's register book, a vessel classed for a period of seven years is bound to undergo a "half-time survey" in her fourth year, and upon the report of such survey, the committee of Lloyd's determine whether she is to retain her classification or shall be degraded. If she has satisfactorily undergone the survey, and retains her classification, the letters "H. T." are placed opposite to her name in the book, with the date of the survey. If the report is not satisfactory, she is degraded, and if a survey is not had, or is declined, she is struck out of the register. Each subscriber to Lloyd's is furnished with a copy of this book, which is corrected from time to time, and he can get further information from the secretary of Lloyd's. The plaintiff was the owner of the ship A. classed A. 1, and built in 1865. On the 22nd of October, 1869, notice was given to him, by the surveyor, that she was due for half-time survey, and he was asked when she would be ready for survey. He replied on the 23rd of October, that he had decided not to con-

tinue her in Lloyd's book. On the 28th of October, his agent enquired of the defendant at what rate an insurance could be effected upon the A., and the book being looked at in which she stood A. 1, seven years from 1865, a quotation was given to him. On the 15th of November, she was initiated for insurance, and the policy was issued, dated the 1st of December, 1869. On the 16th of November she had been struck out of the book, and the plaintiff was informed on the 17th of her being so struck out. The A. was wrecked and became a total loss on the 31st of December. An action having been brought upon the policy, it was pleaded that there had been concealment of material facts by the plaintiff and his agents. The judge, at the trial, asked the jury, first, Was the ship, on the 16th of November, in the ordinary business sense, degraded from her class? To this question the jury answered "No." Second, Was the fact that the plaintiff had resolved not to continue the ship on the list, and had so stated to the surveyor, a material fact? To this question the jury answered "No." Third, Ought the underwriter to have known on the 16th of November that the continuance of the class must depend on whether the ship had been then lately surveyed and passed, or would within a few days be surveyed and passed or repaired, and if "Yes," ought the knowledge to have put the underwriter to ask whether the ship had been surveyed or was about to be surveyed? To this question, the jury answered "Yes," and a verdict was entered for the defendants:—Held, by Mellor, J., Lush, J., and Hannen, J., first, That the judge was not bound to direct the jury, as matter of law, that the verdict must be found for the defendants. Secondly, That there was no misdirection. Held, by Cockburn, C.J., that there was no misdirection, but that there was proof of the concealment of a material fact, which ought to have been communicated to the defendants, there being positive knowledge on the part of the plaintiff that he had refused to have the A. surveyed, while there was only a possible inference on the part of the defendants that there had been such refusal. *Gandy v. The Adelaide Marine Insurance Company*, 40 Law J. Rep. (N.S.) Q. B. 239; Law Rep. 6 Q. B. 746.

7.—Underwriters having agreed upon the terms for a marine insurance with the broker of the assured, initialed the slip and debited the broker with the premium, in ignorance of facts material to be communicated to them, and known to the broker. Shortly afterwards the underwriters discovered the concealment, and mentioned it to the broker, but raised no objection, and afterwards, at the usual time, executed and delivered to the broker in silence a stamped policy in accordance with the slip. News of a total loss having arrived, they repudiated their liability on the ground of the concealment and the assured sued them on the policy. By 30 & 31 Vict. c. 23, s. 9, no policy shall be pleaded or given in evidence in any Court, or admitted in any Court to be good or available in law or in Equity unless duly stamped. It was conceded that in effecting marine insurances,

when the slip is initialed the contract is considered concluded; and it was proved to be the usage to issue a stamped policy in accordance with the slip, no matter what might happen after the slip was initialed:—Held (reversing the judgment of the Exchequer, 42 Law J. Rep. (N.S.) Exch. 17; Law Rep. 8 Exch. 40), that since the assured had not been induced to alter his position by a belief that the underwriters had elected to treat the contract as binding, the delivery of the stamped policy was not an act of estoppel; nor even *prima facie* evidence of an election, so as to make it incumbent on the underwriters to shew that the assured did not understand, or had no right to understand, the conduct of the underwriters as an election. *Morrison v. The Universal Marine Insurance Company (Lim.)* (Exch. Ch.), 42 Law J. Rep. (N.S.) Exch. 115; Law Rep. 8 Exch. 197.

8.—An underwriter having subscribed a marine policy of insurance on certain goods, afterwards insured his risk by effecting with other underwriters a policy on the goods without stating that the latter transaction was a re-insurance. In an action by him upon the second policy, a common practice to state the fact of a re-insurance in the slip or policy was admitted, but the jury found the fact immaterial, and negatived concealment:—Held, that the plaintiff was not bound by law to disclose the fact of re-insurance unless enquiry were made of him with respect to it, and was, therefore, upon the findings of the jury, entitled to the verdict. *MacKenzie v. Whitworth*, 44 Law J. Rep. (N.S.) Exch. 81; Law Rep. 10 Exch. 142.

9.—Where the insurer, in effecting a marine policy, does not disclose to the underwriter the fact that the goods insured are largely overvalued, it is a question for the jury whether the concealment is material having regard to the reasonable practice of underwriters. *Ionides v. Pender*, 43 Law J. Rep. (N.S.) Q. B. 227; Law Rep. 9 Q. B. 531.

It is the duty of an insurer to disclose everything which would affect the judgment of a rational underwriter governing himself by the principles and considerations on which underwriters do in practice act, and therefore the jury are justified in finding that an overvaluation of the goods insured is a material fact which ought to have been and was not disclosed; and upon such finding the underwriters are entitled to the verdict. *Ibid.*

#### (2) Facts subsequent to initialing of slip.

10.—Although, for want of statutory requisites, an underwriter's slip does not constitute a valid contract, yet, inasmuch as according to the usage of marine insurance it amounts to a contract, binding upon the underwriters in good faith and honour, the assured need not communicate to the underwriters material facts which have come to his knowledge after they have initialed the slip, and the policy of insurance afterwards executed will be valid notwithstanding such facts are not communicated. *Xenos v. Wickham* (36 Law J. Rep. (N.S.) C. P. 313; Law Rep. 2 E. & I. App.

296) considered. *Cory v. Patton*, 41 Law J. Rep. (N.S.) Q. B. 195 n.; Law Rep. 7 Q. B. 302.

11.—The plaintiffs at Cardiff instructed their agents in London to effect an insurance upon a cargo at 30s. a ton. The defendant refused to insure at that rate, but initialed a slip at 35s., subject to approval by the plaintiffs, who subsequently ratified the agreement of their agent to the higher premium. Subsequently to the slip being initialed, but before the policy was signed, the plaintiffs became aware that the cargo was lost. They did not communicate the fact to the defendant:—Held, on the authority of *Hagedorn v. Oliverson* (2 M. & S. 485), that the defendant was not entitled to have the fact communicated to him. *Cory v. Patton*, 43 Law J. Rep. (N.S.) Q. B. 181; Law Rep. 9 Q. B. 577.

12.—The defendants on the 11th of March agreed to insure freight by the plaintiffs' vessel on a certain voyage, and a slip containing the terms of insurance was then drawn up by the defendants, who on that day accepted the risk. No question was then asked by the defendants as to the insurance upon the hull. The plaintiffs' vessel had been insured with the T. Insurance Association for 500*l.*, but this insurance was to expire after the 20th of March; but, by the rules of the T. Insurance Association, policies were to be renewed, unless the assured gave ten days' notice not to renew them; the plaintiffs' vessel was otherwise insured for 2,700*l.* She was lost by perils of the sea on the 16th of March. On the 17th of March the plaintiffs, being aware of the loss, requested that a stamped policy should be delivered to them. The defendants, being ignorant of the loss, asked for what amount the hull was insured, and being informed they inserted a warranty that the hull was not insured for more than 2,700*l.* after the 20th of March, and they issued the stamped policy to the plaintiffs. The T. Insurance Association did not renew the assurance upon the plaintiffs' vessel after her loss:—Held (affirming the judgment of the Court of Common Pleas, 42 Law J. Rep. (N.S.) C. P. 108; Law Rep. 8 C. P. 216), that the vessel having been lost before the 20th of March, the warranty as to the amount of insurance upon the hull had been complied with; and that the warranty being immaterial as to the risk at the time of the loss, the plaintiffs were not bound to disclose to the defendants, at the time of inserting it on the 17th of March, that the vessel was then lost, and that they were entitled to recover from the defendants the amount secured by the policy. *Lishman v. The Northern Maritime Insurance Company (Lim.)* (Exch. Ch.), 44 Law J. Rep. (N.S.) C. P. 185; Law Rep. 10 C. P. 179.

(3) *Mistake in name of ship.*

13.—I. and C., the plaintiffs, who were ship and insurance brokers in London, were in the habit of effecting insurances by the instructions of S. on behalf of G. and R., merchants of Hamburg. On the 23rd of September, 1869, they received instructions from S. to open a policy on hides to the amount of 5,000*l.* On the same day C. filled

up a slip on one of the printed forms kept at the office of the defendants, who were underwriters, for 5,000*l.* on hides per "ships," and left it at the office. On the 22nd of January, 1870, S. wrote referring to hides on board *The Socrates*, and on the 24th of January L., the clerk of I. and C., called on the defendants and, referring to the French Veritas, in which were named two ships, *The Socrate* and *The Socrates*, said that he believed the ship was *The Socrates*. On the 3rd of February, 1870, C. called on the defendants, and taking up the slip for 5,000*l.*, which he had filled up on the 23rd of September, 1869, filled up two slips, one for 2,455*l.* on hides per *The Socrates*, and the other for 2,500*l.* on hides per *The Sophie*, saying that it would be more convenient to have two separate policies. In due course policies were executed in accordance with the slips. The hides were loaded on board *The Socrate*, and not on board *The Socrates*, and whilst on board that vessel they were lost by the perils insured against. The risk on *The Socrate* was greater than on *The Socrates*. At the trial, the jury was asked whether both the parties in making the policies meant to insure the hides by the vessel on which they were shipped, whatever her name might be, though they supposed her to be *The Socrates*, or whether the defendants meant to insure hides on board *The Socrates*. The jury answered this question in favour of the plaintiffs:—Held (affirming the judgment below, 41 Law J. Rep. (N.S.) Q. B. 32), in an action upon the policy for 2,455*l.*, that although by 30 Vict. c. 23, ss. 4 and 9, the slip of the 23rd of September, 1869, not having been stamped, would not be available as a policy, it might be referred to for the purpose of shewing what was the intention of the parties at the time of the execution of the policy, which was founded upon that slip. *Ionides v. The Pacific Fire and Marine Insurance Company (Exch. Ch.)*, 41 Law J. Rep. (N.S.) Q. B. 190; Law Rep. 7 Q. B. 517.

Held also, that it appearing by the slip that the insurance was on hides per "ships," and the jury having found, in favour of the plaintiffs, on the question left to them as above, that it became immaterial that *The Socrates* was mentioned in the policy and in the declaration in the action upon it, and that the plaintiffs were entitled to recover, although the hides were on board *The Socrate* when they were lost. *Ibid.*

(4) *Election to avoid contract.*

14.—There is no presumption of law that underwriters are acquainted with the contents of Lloyd's Lists, so as to discharge an assurer from the duty of communicating material facts known to himself and published in those lists. *Morrison v. The Universal Marine Insurance Company (Lim.)*, 42 Law J. Rep. (N.S.) Exch. 115; Law Rep. 8 Exch. 197.

Underwriters having agreed upon the terms for a marine insurance with the broker of the assured, initialed the slip and debited the broker with the premium, in ignorance of a fact material to be communicated to them, and known to the broker.

Shortly afterwards the underwriters discovered the concealment, and mentioned it to the broker, but raised no objection, and afterwards, at the usual time, executed and delivered to the broker in silence a stamped policy in accordance with the slip. News of a total loss having arrived, they repudiated their liability on the ground of the concealment, and the assured sued them on the policy. By 30 & 31 Vict. c. 23, s. 9, no policy shall be pleaded or given in evidence in any Court, or admitted in any Court to be good or available in law or in Equity unless duly stamped. It was conceded that in effecting marine insurances, when the slip is initialed the contract is considered concluded; and it was proved to be the usage to issue a stamped policy in accordance with the slip, no matter what might happen after the slip was initialed.

Blackburn, J., directed the jury that the underwriters could not, after discovering the concealment, say, "we elect to go on," and afterwards, on hearing of the loss, repudiate the contract, but were bound within a reasonable time after the discovery to elect whether they would avoid the contract on that ground; and he asked the jury whether the underwriters had, after the discovery, elected to treat the policy as subsisting, telling them that he himself attached no weight to the delivery of the stamped policy:—Held (reversing the judgment of the Exchequer, 42 Law J. Rep. (N.S.) Exch. 17; Law Rep. 8 Exch. 40), that there was no misdirection of which the assured could complain; that since the assured had not been induced to alter his position by a belief that the underwriters had elected to treat the contract as binding, the delivery of the stamped policy was not an act of estoppel nor even *prima facie* evidence of an election, so as to make it incumbent on the underwriters to shew that the assured did not understand, or had no right to understand, the conduct of the underwriters as an election. *Ibid.*

Upon an appeal to the Exchequer Chamber, from a decision of the Court below, making absolute a rule for a new trial, the respondent cannot support that decision on the ground that the verdict was against the weight of evidence; for under the Common Law Procedure Act, 1854, the Court of Appeal has no jurisdiction to entertain that question in any form. *Ibid.*

#### (b) *Misrepresentation.*

15.—A shipowner stated in a proposal for insurance that his ship had been last metalled in 1867. The bottom was then overhauled, and new metal put where required:—Held, that he had not made a material misstatement so as to vitiate the policy. *Alexander v. Campbell*, 41 Law J. Rep. (N.S.) Chanc. 478.

16.—Where a party effecting an insurance on chartered freight from B. to R. point and thence to London, read to the insurers a letter from the master of the ship, stating "R. point is considered by the pilot here a good and safe anchorage and well sheltered. I have been out and seen the place and consider it safe:—Held, that the read-

ing of the letter was only a statement of opinion, and not an averment of the truth of its contents in fact, and that if R. point was not a safe anchorage, there was no such misrepresentation as to vitiate the policy. *Anderson v. The Pacific Fire and Marine Insurance Company*, Law Rep. 7 C. P. 65.

#### (c) *Illegal voyage.*

17.—The circumstance that a vessel without the owner's knowledge, carries passengers without having obtained a certificate does not under 17 & 18 Vict. c. 104, s. 118, make the voyage illegal so as to avoid a policy of insurance effected by the owner. *Dudgeon v. Pembroke*, 43 Law J. Rep. (N.S.) Q. B. 220; Law Rep. 9 Q. B. 581: reported, on appeal, Law Rep. 1 Q. B. Div. 96.

#### (C) CONSTRUCTION OF PARTICULAR POLICIES.

##### (a) *Policy of insurance against losses as carriers.*

18.—The plaintiffs, who were lightermen, were insured by a Lloyd's policy, upon craft of every description "at and from all or any of the wharves, banks, quays, and places of arrival or departure in the river Thames, comprising the whole extent of the river from Wandsworth downwards to the Victoria Docks, including all or any intermediate docks and wharves, and *vice versâ*, until on board any merchant or steam-vessel, barge or boat, or otherwise landed at any wharf," &c. The policy was "on all goods and produce as interest may appear," and at the foot of it was written, "to cover and include all losses, damages and accidents, amounting to 20%. or upwards, on each craft, to goods carried by the plaintiffs as lightermen, or delivered to them to be water-borne either in their own or other craft, and for which losses, damages and accidents the plaintiffs may be liable or responsible to the owners thereof or others interested. It is agreed that the amount of each underwriter's liability shall not exceed the amount of his subscription." This policy was subscribed by underwriters for sums, amounting to 2,000*l.* The defendant underwrote it for 100*l.* During the risk a loss occurred to goods carried by the plaintiffs as lightermen, for which the plaintiffs became responsible to the owners interested to the amount of 1,100*l.*, and paid that amount. The total interest of the plaintiffs in goods carried in this and other barges, amounted at the time of the loss to 20,000*l.*:—Held, that the policy was not a marine policy, but was intended to indemnify the plaintiffs against losses sustained by them as carriers, and that the defendant was liable to the extent of his subscription, and not merely to such a proportion of the loss as his subscription bore to the whole value of the plaintiffs' interest at the time of the loss. *Joyce v. Kennard*, 41 Law J. Rep. (N.S.) Q. B. 17; Law Rep. 7 Q. B. 78.

##### (b) *"During ship's stay and trade."*

19.—By the terms of a marine policy the insurance was expressed to be an insurance on a vessel and cargo "at and from Liverpool to the west and (or) south-west coast of Africa during her stay and trade therein and back to a port of call or

(and) discharge in the United Kingdom." The premium was eight guineas per cent. on the value insured. 20 per cent. of the premium was to be returned for the risk ending in ten months and 40 per cent. for the risk ending in eight months; and there was written in the margin "held covered at 13s. 4d. per cent. per month if longer than twelve months out." The vessel having stayed a month on the African coast for the purpose of earning salvage, and having been damaged there, and afterwards stranded on her voyage home, the owners sued for a total loss:—Held, that the words "stay and trade" meant "stay for the purpose of trade;" and that, no evidence being given that staying for salvage purposes was staying for an ordinary purpose of the South-West African Coast trade—the risk had been substantially varied, that there was in the absence of such evidence no question for the jury, and that they were properly directed to find for the underwriters. *The Company of African Merchants (Lim.) v. The British and Foreign Marine Insurance Company (Lim.)* (Exch. Ch.), 42 Law J. Rep. (N.S.) Exch. 60; Law Rep. 8 Exch. 154.

(c) "Freight."

20.—The term "freight" in a policy of insurance may be limited by the assured to such freight only as he has an insurable interest in at the time of effecting the assurance. *Allison v. The Bristol Marine Insurance Company*, 42 Law J. Rep. (N.S.) C. P. 334.

By a charter-party under which the plaintiff's vessel was chartered to carry a cargo of coal from Greenock to Bombay, freight was to be paid on the right delivery of the cargo at a certain rate per ton on the quantity delivered, and such freight was to be paid half in cash on signing bills of lading and the remainder on the right delivery of the cargo. The vessel left Greenock with her chartered cargo and was wrecked on the voyage, and half its cargo was totally lost, but half was saved and delivered at Bombay the port of destination, but as the freight in respect of such cargo was less than the freight which had been paid in advance on signing the bills of lading, the plaintiff received no freight on the delivery of such half, but totally lost the same:—Held, that the freight which the plaintiff so lost was recoverable as a total loss under an insurance of "freight" by the said vessel, on the said voyage, which the plaintiff effected after the charter-party, although at the time the underwriters were not informed of such charter-party, and that part of the freight was payable in advance, since the plaintiff at the time of effecting such insurance had only an insurable interest in so much of the freight as was payable on the delivery of the cargo at the port of destination. *Ibid.*

21.—The plaintiff's vessel had been chartered on a voyage from Sydney to Calcutta and London, but upon her arrival at Calcutta, the voyage to England was abandoned because of the charterers having stopped payment, and the ship took 360 coolies, and the necessary provisions for their use, and 12,000 bags of rice for Mauritius. The pas-

sage money of the coolies amounted to 1,944l., and was payable on their arrival at Mauritius, and the bill of lading freight of the rice amounted to 1,412l. On hearing this the plaintiff, who wished to insure the freight on the rice only, caused a policy of insurance which had originally been effected with the defendants for 1,000l. upon chartered freight valued at 7,000l. on the voyage from Sydney to Calcutta and London, to be altered by the defendants inserting a declaration "that the within voyage is from Sydney to Calcutta, and thence to Mauritius, instead of as before stated," and that "the within interest is to be on freight valued at 2,000l." The sum insured by the defendants remained unaltered, 1,000l. Though there did not appear to exist a customary use of the word "freight" in insurance business, yet the most frequent course was to insure passage money by some distinguishing term when it was intended to insure it, and the premium for insuring such upon a voyage from Calcutta to Mauritius was generally less than for insuring freight of goods upon the same voyage. The plaintiff's vessel was wrecked near Mauritius, and the rice and freight thereof were wholly lost, but 348 of the coolies were saved, and their passage money was paid:—Held, upon the above facts, and upon the construction of this policy, that the freight of the rice only was insured, but that as the rice was not a full cargo, and there was nothing to shew what the total freight would have been had the vessel been filled up with cargo, the policy was an open policy for half the loss of freight of the rice, not exceeding 1,000l., and the defendants were liable therefore for the amount of such half, namely, 760l. *Dinooon v. The Home and Colonial Assurance Company*, 41 Law J. Rep. (N.S.) C. P. 162; Law Rep. 7 C. P. 341, *nom. Denoon*, &c.

(D) RESTRAINT OF PRINCES.

22.—Policy on goods from S. to London via Marseilles, and whilst remaining there for transit. It appearing that goods sent from S. to London were always sent overland through France, and that the underwriters knew this:—Held, that the policy covered the risk during the overland transit through France. The risks insured included restraint of princes:—Held, that the detention of the goods in Paris, which was being besieged by the German armies, was a loss by "restraint of princes," and justified notice of abandonment by the insured. *Rodocanachi v. Elliott*, 43 Law J. Rep. (N.S.) C. P. 255; Law Rep. 9 C. P. 518.

(E) CONTRABAND OF WAR.

23.—Whilst war was existing between the United States of America and the so-called Confederate States goods were insured on a voyage from London to Matamoras by a policy which contained a warranty against contraband of war. Matamoras was a neutral port belonging to Mexico, but the intention of the assured from the beginning was to send the goods on to the Confederate States by transshipping them at Matamoras, and conveying them across the river which divided Mexico from the territory then in the

possession of the Confederate States. Some of the goods which were so insured consisted of artillery harness:—Held, that such goods were contraband of war, and that there was therefore a breach of the said warranty, which avoided the whole insurance. *Seymour v. The London and Provincial Marine Insurance Company*, 41 Law J. Rep. (n.s.) C. P. 193.

(F) RISKS INSURED AGAINST.

(a) Inception of risk: "from loading."

(1) Re-assurance.

24.—A policy of insurance was underwritten by the defendants for 1,000*l.*, which was declared to be a re-assurance subject to all clauses and conditions of the original policy, on the ship D., at and from any port or ports in any order on the West Coast of Africa to the vessel's port or ports of call and discharge in the United Kingdom, the insurance to commence "from the loading of the goods at as above." By the original policy the insurance was for 1,000*l.* upon the cargo of the D., at and from Liverpool to any ports in any order backwards and forwards and forwards and backwards on the coast of Africa, and thence back to a port of discharge in the United Kingdom, with leave to increase the valuation of the cargo on the homeward voyage; "outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port of discharge." Goods were shipped at Liverpool, and the vessel, with the same goods on board, departed from a port on the West Coast of Africa, and more than twenty-four hours after she had arrived at her first port of discharge, the goods were lost by perils insured against in the original policy:—Held, that the words "the insurance to commence from the loading of the goods at as above" were qualified by the words in the original policy, by which outward cargo was to be considered homeward interest twenty-four hours after the vessel's arrival at her first port of discharge, and that the risk had consequently attached and the underwriters were liable. *Joyce v. The Realm Marine Insurance Company*, 41 Law J. Rep. (n.s.) Q. B. 356; Law Rep. 7 Q. B. 580.

(2) Chartered freight.

25.—The plaintiffs had signed a policy on chartered freight of the vessel *Napier* on a voyage to Baker's Island, and from Baker's Island to a port of destination in the United Kingdom. They then caused themselves to be re-insured by the defendants, "lost or not lost, upon freight payable in respect to this present voyage to be performed by the vessel *Napier* from Baker's Island to a port of discharge in the United Kingdom; the insurance on the freight beginning from the loading of the vessel." The *Napier* arrived at Baker's Island, and was wrecked after taking in about two-thirds of her homeward cargo:—Held, that the plaintiffs were not entitled to recover as for a total or partial loss of the freight—by Blackburn, J., on the ground that it was not intended that the risk should commence until the vessel sailed

on her voyage from Baker's Island, and that the words, "beginning from the loading of the vessel," did not extend the liability of the defendants, but only added the further statement that they would not be liable for freight until the goods were actually loaded—by Mellor, J., and Lush, J., on the ground that these words did create a liability before the voyage commenced, but that the word "loading" must be taken to mean "complete loading," so that as the cargo was never fully loaded, the policy did not attach, and nothing could be recovered. *Jones v. The Neptune Marine Insurance Company*, 41 Law J. Rep. (n.s.) Q. B. 370; Law Rep. 7 Q. B. 702.

(b) Duration of risk.

26.—The plaintiffs insured by a policy in the ordinary form of a Lloyd's policy, which was underwritten by the defendant, silks from Shanghai to London, via Marseilles or Southampton, "and whilst remaining there for transit, with leave to call at any ports or places in or out of the way, for all purposes, including all risks of craft to and from the steamers." The risk insured included "arrests, restraints and detentions of all kings, princes and people," and there was a memorandum in the margin of the policy that the silks should be shipped by, *inter alia*, the Messageries Impériales steamers. It was found as a fact that the company of the Messageries Impériales always send goods from Shanghai to London overland through France, and that it was well known among underwriters that goods sent from China to London via Marseilles were always sent overland through France. The silks insured were shipped on one of the steamers of the Messageries Impériales, and reached Paris via Marseilles, on the 13th of September, 1870, but at that time there was war between France and Germany, and the German armies were surrounding Paris, which they completely invested on the 19th of September, so from that day to the commencement of the plaintiff's action it was impossible to remove the silks from Paris. On the 7th of October the plaintiffs who had previously sold the silks, gave notice of abandonment to the defendant:—Held, affirming the decision of the Court of Common Pleas (42 Law J. Rep. (n.s.) C. P. 247; Law Rep. 8 C. P. 649), that the policy was not limited to marine risks, but included those during the land transit through France. Held, also, that by reason of the siege of Paris there was such a constructive total loss of the silks by restraint of princes within the terms of the policy as to entitle the plaintiffs to abandon and sue the defendant for a total loss. Held further, that the plaintiffs did not lose their right of abandonment by a previous sale of the silks. *Rodocanachi v. Elliott* (Exch. Ch.), 43 Law J. Rep. (n.s.) C. P. 255; Law Rep. 9 C. P. 518.

(c) Description of risk.

27.—The plaintiffs, who carried on business in New South Wales, effected a policy of fire insurance with the defendant's company on wool, "in all or any shed or store on station or in transit

to Sydney by land only, or in any shed or store, or any wharf in Sydney, until placed on board ship." The foregoing policy was subject to a stipulation that if the wool should be "insured elsewhere," notice was to be given to the defendant's company. The plaintiffs afterwards effected a policy of marine insurance with the I. Company, upon wool, "at and from the river Hunter to Sydney, per ships and steamers, and thence per ship or ships to London, including the risk of craft from the time that the wools are first waterborne, and of transshipment or landing and reshipment at Newcastle and Sydney." Notice of this policy effected with the I. Company was not given to the defendant's company. Certain wool of the plaintiffs was brought from the river Hudson to Sydney. It was there stored, in order to be sent to London, whenever the ship appointed to carry it should be ready to receive it. Whilst the wool was thus stored it was burnt.—Held, that the defendant's company was liable to reimburse the plaintiffs for the loss sustained; for at the time of the fire the marine policy effected with the I. Company did not affect the plaintiffs, as the wool was not then being landed and reshipped within the meaning thereof; and further, that the stipulation as to notice did not refer to an insurance accidentally overlapping the policy effected with the defendant's company, but to an insurance for substantially the same risk, and therefore that the absence of notice as to the policy with the I. Company afforded no defence to the present action. *The Australasian Agricultural Company v. Saunders* (Exch. Ch.), 44 Law J. Rep. (N.S.) C. P. 391; Law Rep. 10 C. P. 668.

(d) Declaration of risk.

28.—A shipowner, who was in the habit of receiving shipments of cotton to be carried on deck, sometimes at the request and risk of the shippers, sometimes for his own convenience, and under a clean bill of lading at his own risk—to protect himself as to jettison in the latter case, entered into open policies of insurance as to which the usage was that he was bound to declare all his risks in order of shipment, and rectify any mistake even after loss known. His agent, by negligence or mistake, gave a clean bill of lading for a certain shipment and gave no notice to him, but such shipowner on discovering the omission altered his declarations by inserting this shipment though after loss known.—Held, that the shipowner had an insurable interest, as at law a written contract cannot be varied on the ground of negligence or mistake, and was entitled to alter the declarations both according to the usage, which could not be said to be unreasonable, and according to the doctrine to be deduced from decided cases, that by the usages of merchants and underwriters, recognised by the Courts without formal proof, such declarations may be altered even after loss known, if the alterations be made innocently and without fraud. *Stephens v. The Australasian Insurance Company*, 42 Law J. Rep. (N.S.) C. P. 12; Law Rep. 8 C. P. 18.

(e) Variation of risk.

29.—On the 13th of July a voyage policy was effected upon a ship "at and from Montreal to Monte Video," at a premium of two per cent. The ship was at sea on a voyage intended to end at Montreal, and did not arrive at Montreal until the 30th of August, so that the voyage was changed from a summer to a winter voyage, whereby the risk and the rate of premium were materially affected. The delay between the making of the policy and the commencement of the risk intended to be insured against was unreasonable, but it was occasioned by matters beyond the control of the assured. At the time of effecting the policy, no question was asked by the underwriter as to where the ship was, nor was any information offered by the assured:—Held, that the risk being materially varied, the underwriters were not liable to an action upon the policy. *De Wolf v. The Archangel Maritime Bank*, 43 Law J. Rep. (N.S.) Q. B. 147; Law Rep. 9 Q. B. 451.

[And see supra No. 19.]

(G) PARTIAL AND TOTAL LOSS.

(a) Of vessel: mode of assessing under separate outward and homeward policies.

30.—The plaintiffs, who were owners of a vessel, effected two policies of insurance upon her, one for the outward voyage, in which the risk was "at and from London to Calcutta, and for thirty days after arrival," and the other for the homeward voyage, in which the risk was "at and from Calcutta to London." In each policy the vessel was valued at a specific sum. The vessel arrived at Calcutta damaged from an injury received during the outward voyage by striking on a reef; and after the expiration of the outward policy, and when the risk under the homeward policy had attached, she was totally destroyed by fire. At that time her repairs rendered necessary by the damage sustained on her outward voyage had been begun, but were not finished. The defendant, who had underwritten both policies, admitted a liability to a partial loss under the outward policy, and a total loss under the homeward policy:—Held, that such losses were to be assessed under each policy as if the other policy had never been made, and that the loss under the outward policy was to be assessed on the principle of the plaintiffs being entitled to be paid the diminution in value of the vessel at the end of her voyage from the damage she had received by striking on the reef, although all the expense of repairing such damage had not been actually incurred; and that in assessing the total loss under the homeward policy the defendant was not entitled to any deduction from the valuation of the vessel in the policy in respect of the expense of such repairs which had not been incurred, as the valuation of a vessel in a valued policy is, in the absence of fraud or wagering, the conventional sum to be paid if the vessel be lost, whatever may



then be her actual value. *Lidgett v. Secretan*, 40 Law J. Rep. (n.s.) C. P. 257; Law Rep. 6 C. P. 616.

(b) *Of cargo.*

**31.**—Policy of insurance on a cargo of flour with a stipulation that no action should be brought, unless within a year after the loss occurred. The ship having encountered a storm was found six months afterwards, and part of the flour was saved, and sold by the insurance company. An action was brought ten months afterwards:—Held, that it was not too late, as the loss was not in its inception total, and only became so when it was found impossible to carry the flour to its destination, and necessary to sell it. *Browning v. The Provincial Insurance Company*, Law Rep. 5 P. C. 263.

**32.**—Insurance on cargo by policy warranted "free from average unless general, or the ship should be stranded." Whilst on the voyage the ship met with disasters, and finally, in a crippled condition, was towed on to a bank, where she lay on her port side, and was further damaged. The ship and cargo having been seized by salvors, the damaged cargo was sold in the suit:—Held (1), that there was not a total loss, the sale under the decree of the Court not being a consequence of the peril insured against; (2) that there was a "stranding" within the policy. *De Mattos v. Saunders*, Law Rep. 7 C. P. 571.

**33.**—By a marine policy of insurance the insurance was described to be "on 1,711 packages teas," valued at one sum, on a voyage from New York to London, by a certain ship "warranted by the assured free from damage, from dampness, change of flavour, or being spotted, or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils." In case of partial loss by sea damage to certain goods, not including tea, "the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as for all other merchandise, as far as practicable." The ship met with very bad weather during the voyage, and 449 of the 1,711 packages of the tea were seriously damaged by actual contact of sea water. The rest of the packages arrived sound and in good condition, except by the injury to their reputation from having formed part of a shipment of which 449 packages had been damaged by sea water, and which was the cause, as was usual in such cases, of these packages, though sound and uninjured, not realising so high prices as they would have done if the 449 packages had not been damaged by sea water:—Held, that the packages insured by the above policy were divisible, and that the assured was entitled to recover only in respect of the 449 packages which were actually damaged. Also, that the loss in value of the goods depended on their value at the time of their arrival at the port of destination, and not at the time of sale, and the underwriters were therefore not liable for a fall in the market price between such arrival and the time of sale. *Cater*

*v. The Great Western Insurance Company of New York*, 42 Law J. Rep. (n.s.) C. P. 266; Law Rep. 8 C. P. 552.

(c) *Of chartered freight.*

**34.**—By a charter-party, which contained the usual exceptions of dangers and accidents of navigation, the plaintiff's vessel was to proceed with all convenient speed from Liverpool to Newport, and there load a cargo of iron rails for San Francisco, and the freight was to be paid by the charterers on right delivery of the cargo. The plaintiff effected a policy of insurance with the defendants on the chartered freight on that voyage. The vessel proceeded from Liverpool to Newport, but before arriving there she took the rocks at Carnarvon Bay, where she remained for a considerable time. She was ultimately got off, and brought back to Liverpool, but though the damage she had sustained was not such as to constitute a total loss of the ship, the time necessary for getting her off and repairing her, so as to be a cargo carrying ship, was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the plaintiff (the shipowner) and the charterers, and the latter accordingly abandoned the contract, and hired another vessel by which they forwarded the rails to San Francisco:—Held, by the Exchequer Chamber (Cleasby, B., *dissentiente*), affirming the judgment of the Court of Common Pleas, 42 Law J. Rep. (n.s.) C. P. 284; Law Rep. 8 C. P. 572, that under the above circumstances the charterers were released from their contract to load under the charter-party, and that there had been a total loss of chartered freight by perils of the seas within the meaning of the policy. *Jackson v. The Union Marine Insurance Company (Lim.)* (Exch. Ch.), 44 Law J. Rep. (n.s.) C. P. 27; Law Rep. 10 C. P. 125.

**35.**—Notice of abandonment need not be given where there is nothing which on abandonment can pass or be of value to the abandonee. *Rankin v. Potter* (H.L.), 42 Law J. Rep. (n.s.) C. P. 169; Law Rep. 6 E. & I. App. 83.

A ship being chartered for a voyage from Calcutta to London, she being at the time at sea on a voyage out to New Zealand, and thence to Calcutta, the owners effected an insurance on the chartered freight from Calcutta to London, but such insurance was only for the preliminary voyage to New Zealand. The ship, during such preliminary voyage, got aground and sustained such damage as would have justified the owners had they been then aware of the actual extent of it in abandoning the vessel and treating the loss as a constructive total loss, but though several surveys were held on her after she arrived at New Zealand, there were no means there of ascertaining her real condition as it was necessary for that purpose that she should be taken into a dry dock or put on a patent slip, neither of which existed at New Zealand. The surveyors recommended certain repairs being done, and that the ship should be put in a dry dock or on a slip, at the nearest available port, for further examination; but they did not state that they apprehended she had sustained

any extensive damage beyond what had been ascertained, and they advised the captain to proceed in ballast on his voyage as soon as the necessary repairs pointed out had been completed. The vessel was partially repaired and proceeded in ballast to Calcutta, where, on putting her into dry dock, her real condition was ascertained. On the owners being informed of this, they at once gave notice of abandonment to the underwriters both on the ship and on freight, there having been also an insurance on the ship. The accident to the ship had occurred in May and June, 1863, and she might have left New Zealand in the following September, but for the captain not having sufficient funds to effect the necessary repairs. This deficiency of funds arose from great expenses which had been incurred in getting the vessel off from where she had grounded, and in meeting claims of passengers for breaches of the Passenger Act, and of consignees of the outward cargo for damage thereto, and also from the unwillingness of the owners' agent at New Zealand to advance what was required without specific directions from the owners to do so. When at length these directions arrived the money was advanced and the ship repaired without further delay; but the result of it altogether was the detention of the ship at New Zealand to the 14th of April, 1864, on which day she left for Calcutta:—Held, first, that as there was a constructive total loss of the ship, it was impossible for its owners to earn the chartered freight, and there was therefore an actual and not a constructive total loss of such freight; therefore no notice of abandonment was necessary. Secondly, that no such notice was necessary, inasmuch as the ship never having been ready to receive the chartered cargo there was nothing to abandon to the underwriter on freight. And thirdly, that sufficient notice of abandonment of freight was given, if such notice was necessary, in order to recover as for a total loss on the insurance on freight. *Ibid.*

(d) *Constructive total loss.*

*Of ship.* [See supra No. 35.]

*Of cargo.* [See supra 26.]

(H) NOTICE OF ABANDONMENT.

(a) *When necessary.*

[See supra No. 35.]

(b) *What amounts to acceptance.*

**36.**—The Civil Code of Canada by Art. 2,547 provides that "Abandonment made and accepted is equivalent to transfer, and the thing abandoned with the rights pertaining to it becomes from the time of abandonment the property of the insurers. The acceptance may be either express or implied." A ship was lost by a peril not insured against. The insurers received notice of abandonment and were silent, but they took possession of the ship, and repaired her:—Held, that the insurers by their conduct had accepted the abandonment, and were therefore liable as for a total loss though the

ship was not lost by a peril insured against. *The Provincial Insurance Company of Canada v. Ledue*, 43 Law J. Rep. (N.S.) P. C. 49; Law Rep. 6 P. C. 224.

(I) SEAWORTHINESS.

(a) *Warranty of seaworthiness.*

(1) *Implied warranty: policy on cargo.*

**37.**—The plaintiff sued upon a policy of insurance to recover an alleged total loss by jettison of wine loaded on board a steamship. The risk insured was "at and from L., on wine in casks, on or under deck." The wine insured was all on deck, so loaded at L., after the ship's hold had been filled with other cargo. The insured wine was jettisoned in bad weather by staving in the casks. The ship and under-deck cargo arrived safe. The defendants pleaded that the ship at the commencement of the insured voyage was not seaworthy. At the trial the Judge directed the jury that although they should find, as matter of fact, that if the deck cargo were not got rid of, the ship, with the cargo on and under her decks, would be in danger of destruction in the ordinary rough weather of the voyage insured, yet if the deck cargo could, in such weather, be got rid of so easily, that by reason of the facility of its destruction the ship and the rest of the cargo were in no danger in an ordinary voyage, they might find that the implied warranty that the ship was seaworthy was satisfied in point of law:—Held, a wrong direction; for the extent and effect of the warranty, that the ship is seaworthy in a policy on cargo, can never be implied to contemplate the destruction, in order to save the ship on an ordinary voyage, of that very cargo which is the subject-matter of insurance; and that the jury ought not to have been led to understand, that if the ship could only be made safe for an ordinary voyage by the destruction of the insured cargo, they might, nevertheless, say that the ship was seaworthy. *Daniels v. Harris*, 44 Law J. Rep. (N.S.) C. P. 1; Law Rep. 10 C. P. 1.

(2) *Representation as to seaworthiness: time policy.*

**38.**—In an action upon a time policy upon a steamer, the *Frances*, it appeared that at the time of the insurance the vessel, which had not been classed in this country, was lying at Millwall, and that at the time of effecting the insurance the broker stated that she had been thoroughly repaired, and was going into the Gottenburgh trade. The *Frances* took out a cargo to Gottenburgh, and on her return encountered a heavy rolling sea, and after beating about for some days became waterlogged, went ashore, and was lost. There was strong evidence that the *Frances* did not behave at sea in the manner that a good vessel would, and that owing to a screw tunnel having been unrepaired and left in a decayed state, the pumps became choked with oats which were on board:—Held, first, that inasmuch as it was a question for the jury whether the broker's representation involved a statement that the *Frances* had been

actually made seaworthy, or only that her owners had *bonâ fide* done all that competent advisers thought necessary to put her in thorough repair, and reasonably believed that their outlay had been sufficient to make her fit for the service, the jury were justified in finding that the representation was substantially correct. Secondly, that there being in a time policy no warranty of seaworthiness, and the jury having negatived any knowledge on the part of the assured that the ship was unseaworthy, there was nothing to shew that the loss was occasioned by a wrongful act on their part. Thirdly, that there was no sufficient evidence that the loss was occasioned by wear and tear aggravated by the original bad state of the vessel, instead of by perils of the sea. *Dudgeon v. Pembroke*, 43 Law J. Rep. (n.s.) Q. B. 220; Law Rep. 9 Q. B. 581: reversed, on appeal, Law Rep. 1 Q. B. Div. 96.

In an action on a marine policy a plea that the ship was sent by the owners with passengers on board on the voyage on which she was lost, without the plaintiffs, the owners, having done what was necessary to enable them to receive and without having received a passengers' certificate from the Board of Trade, all which the plaintiffs well knew, is good. *Ibid.*

(b) *Evidence of.*

39.—On the 2nd of February the plaintiff contracted to buy of B. "the cargo of new crop Rangoon rice, per *Sunbeam*, at 9s. 1½d. per cwt. cost and freight. . . . Payment by seller's draft on purchasers at six months' sight with documents attached." The *Sunbeam* did not belong to either the seller or the plaintiff. She was chartered by the seller's agent to load a cargo of rice at Rangoon for a port in the United Kingdom or Continent. On the 3rd of February the plaintiff effected a policy of insurance with the defendant, "at and from Rangoon to any port or place of discharge in the United Kingdom or Continent by the *Sunbeam* . . . on rice." The *Sunbeam* arrived in the Rangoon river on the 3rd of March, and began to load a cargo of rice. On the 30th of March, whilst lying at anchor in the river, she sprang a leak from an unknown cause, and sank in the course of a few hours. At the time of foundering the *Sunbeam* had not finished loading; both the ship and the portion of the cargo on board were totally lost. Two years before she went down the *Sunbeam* was re-caulked and re-metalled in dry dock; she afterwards performed some long voyages; and before the 30th of March no suspicion was felt that anything was wrong about her:—Held (affirming the judgment of the Court of Common Pleas, 44 Law J. Rep. (n.s.) C. P. 10; Law Rep. 10 C. P. 58), that upon the foregoing facts there was evidence to be laid before a jury that the *Sunbeam* was seaworthy when the risk under the policy attached, and that she had been lost by perils of the seas; but held (per Bramwell, B., Blackburn, J., Lush, J., Pollock, B., and Amphlett, B., reversing the judgment of the Court of Common Pleas, *dissentiente* Quain, J.), that under the contract to buy the rice the prop-

erty therein was not to vest in the plaintiff until the loading should have been completed, and that there having been no default in the seller, the plaintiff, after the ship had sunk, had not an option to accept a short delivery so as to charge the defendant with the loss, and therefore that the plaintiff had no insurable interest in the rice when the *Sunbeam* foundered; and although he might have an insurable interest in the profit to be derived from the sale of the cargo, he could not recover for the loss thereof upon the foregoing policy, where the subject-matter of insurance was declared to be "rice." *Anderson v. Morrice* (Exch. Ch.), 44 Law J. Rep. (n.s.) C. P. 341; Law Rep. 10 C. P. 609.

(K) GENERAL AVERAGE.

40.—The plaintiffs were owners of a cargo of wheat upon a vessel called the C., to be carried from Varna to Marseilles; they insured the wheat with the defendants, and by the policy general average was to be paid "as per foreign statement," and a warranty against average, unless general, was also inserted. Upon the voyage the C., owing to bad weather, was compelled to hoist a press of canvass; in consequence she was strained, shipped heavy seas, and sprang a leak, whereby part of the cargo was damaged. Upon arriving at Constantinople it was necessary to repair the C., and thereupon the sound portion of the cargo was transhipped and forwarded to Marseilles, and the residue was sold. An adjustment was made up at Constantinople, according to the law of France, which there prevailed; in this adjustment the damage to the wheat was treated as a general average loss. Nearly three months elapsed before the repairs of the C. were finished:—Held (affirming the judgment of the Court of Common Pleas, 43 Law J. Rep. (n.s.) C. P. 339; Law Rep. 9 C. P. 595), that the voyage was properly broken up at Constantinople, and that the defendants were bound by the adjustment, treating the damage to the wheat as a general average loss. *Mavro v. The Ocean Marine Insurance Company*, (Exch. Ch.) 44 Law J. Rep. (n.s.) C. P. 229; Law Rep. 10 C. P. 414.

41.—The plaintiffs, owners of goods on a voyage from Taganrog to Bremen, insured them with the defendants, by a policy in the ordinary form used at Lloyd's, except that it contained a marginal note "to pay general average as per foreign statement, if so made," and certain warranties as to being free from particular average and capture and seizure. From stresses of weather the ship had to put into ports of distress, and the master had to charge the ship, freight and cargo by bottomry bonds. On arrival at Bremen, B. & Co., purchasers of the cargo, had to pay the bonds to get the cargo. A foreign adjustment was made, apportioning this charge between ship and freight and cargo. The shipowner and master being unable to pay the part apportioned to the ship and freight, and the ship on sale only realising part thereof, and a supplemental adjustment having been made, including the residue as against cargo, the plaintiffs, as trustees for

B. & Co., sought to recover payment thereof from the defendants:—Held (on Special Case stated), that the plaintiffs were entitled to recover, per Bovill, C.J., and Keating, J., because the defendants had bound themselves to repay whatever had to be paid by the owners of the cargo and was general average according to the foreign statement, whether or not it were really general average by English or Bremen law, or arose from perils (not being those specially excepted) insured against, and in their view of the particular findings of the case, such a statement had been made as to the sum in question; and, per Brett, J., because in his view of the findings in this case, not only had there been such a statement, but also the sum was general average by the Bremen law; and as the defendants under an ordinary policy would have been liable to pay if the loss had arisen from perils insured against, the only way to give effect to the marginal note was to hold it to extend the liability to losses not occasioned by perils insured against, and not within the special exceptions. *Harris v. Searamanga*, 41 Law J. Rep. (N.S.) C. P. 170; Law Rep. 7 C. P. 481.

**42.**—The plaintiff insured a cargo (consisting of bags of sugar in series) with the defendants by an English policy, which contained these words: "To cover only the risks excepted by the clause warranted free from particular average unless the vessel be stranded, sunk or burnt, to pay all claims and losses on Dutch terms, and according to statement made up by official dispatcheur in Holland, being warranted free from particular average unless amounting to ten per cent. on each series." The plaintiff had previously insured the same cargo with Dutch underwriters, and the defendants knew that the cargo was insured, but not where, nor the terms of the Dutch policy. The vessel in the course of the insured voyage took the ground under circumstances which made it a stranding according to English law, but not according to Dutch law. An average statement was made by a Dutch dispatcheur according to the principles of the Dutch law, shewing a particular average loss, and for this the plaintiff sued:—Held, that the policy was to be construed according to English law, and without reference to the Dutch or any other policy, but that as the defendants were to pay all claims according to a Dutch average stater, the stranding of the vessel must be determined according to Dutch law, and the defendants were liable to pay the average loss as stated by such Dutch average adjuster according to the Dutch law. *Hendricks v. The Australasian Insurance Company*, 43 Law J. Rep. (N.S.) C. P. 188; Law Rep. 9 C. P. 460.

**43.**—A ship was lying at anchor in port with a general cargo on board, when a fire broke out in the forehold. Every effort was made, but without success, to extinguish the fire by throwing water down the hatchways and upon the cargo. Finally, a hole was cut in the side of the vessel, and her fore compartment filled with water. This extinguished the fire, and if it had not been done the cargo would have been destroyed, and

the ship seriously damaged if not rendered a total wreck. Part of a quantity of bark, shipped on board by the plaintiffs, was damaged or destroyed by the water which was poured or let into the vessel to extinguish the fire. The bark was shipped under a bill of lading, which contained the words, "average, if any, to be adjusted according to British custom." It is the practice of British average adjusters in adjusting losses to treat a loss occasioned by water in the manner above described as not a general average loss:—Held, affirming the judgment of the Queen's Bench (42 Law J. Rep. (N.S.) Q. B. 84; Law Rep. 8 Q. B. 88), but without determining whether the loss was (as held in the Court below), according to the general law of England, the subject of a general average contribution, that the words "British custom" in the bill of lading must be taken to mean the practice of British average adjusters, so that the claim for general average was expressly excluded. *Stewart v. The West Indian and Pacific Steamship Company*, 42 Law J. Rep. (N.S.) Q. B. 191; Law Rep. 8 Q. B. 362.

#### (L) INSURABLE INTEREST.

[See also *supra* No. 39.]

**44.**—The usage of the marine insurance business that when a policy is effected on goods by ship to be declared, the policy attaches to the goods as soon as and in the order in which they are shipped, and that the assured is bound to declare them in such order, and, if a mistake is made, must rectify the declarations, and that this may be done even after loss, is reasonable, and, as to the last particular, consistent with the authorities. Where the agent of a shipowner, by mistake, gave a bill of lading for a shipment of goods, at the shipowner's instead of the shipper's risk, it was held that the shipowner had an insurable interest. *Stephens v. The Australasian Insurance Company*, 42 Law J. Rep. (N.S.) C. P. 12; Law Rep. 8 C. P. 18.

**45.**—The plaintiffs were cotton brokers and agents in London, who were accustomed to receive consignments of cotton from Bombay for sale on behalf of the shippers, who drew bills of exchange on them against the consignments; the bills of exchange were usually negotiated in India, sent to this country with the bills of lading attached as security, presented to, and accepted by, the plaintiffs against delivery of the shipping documents; and the plaintiffs were in the habit of effecting open floating policies of insurance with the defendants, "as well in their own names as for and in the name or names of all and every person or persons to whom the same doth, may or shall appertain, in part or in all." Cotton having been shipped, bills of exchange drawn on the plaintiffs against it, negotiated and sent with the bills of lading, and accepted against delivery of the documents, the plaintiffs declared the cotton against two open floating policies previously made and not yet exhausted; and the cotton being lost, the bills of exchange paid by them, and the bills of lading obtained, brought an action on the poli-

cies, averring that they, or some or one of them, were interested to the full amount named, and that the insurances were made for the use and benefit, and on account of the persons so interested:—Held, per Bovill, C.J., and Denman, J., on the facts of the case, that the plaintiffs had an equitable interest in every part of the cotton, and that it was intended that not only their interests but those of the other parties interested should be covered, and that the plaintiffs having such an interest and a duty of selling and managing, were in law entitled so to insure, and were the only persons to bring an action, and might aver, as they did in their declaration, and recover to the full extent, applying the proceeds to their own benefit to the extent of their own claims, and holding the residue for the other persons interested; but, per Brett, J., and Keating, J., the plaintiffs were consignees for sale of goods not arrived, who had made advances on goods, but had only a contract right as to them, and though interested in every part were not the legal owners, and therefore they were by law limited to the recovery of their own beneficial interest, which alone they could properly insure and recover. *Ebsworth v. The Alliance Marine Insurance Company*, 42 Law J. Rep. (N.S.) C. P. 305; Law Rep. 8 C. P. 596.

[N.B.—This case was argued on appeal in the Exchequer Chamber, when, by arrangement between the parties, the decision of the Court below was reversed, and the damages entered for the plaintiffs reduced to a sum representing the personal pecuniary interest of the plaintiffs, and not including the interest of any other person.]

#### (M) VALUED POLICY.

**46.**—The valuation of a vessel in a valued policy is, in the absence of fraud or wagering, the conventional sum to be paid if the vessel be lost, whatever may then be her actual value. *Lidgett v. Secretan*, No. 30 supra.

#### (N) ASSIGNMENT OF POLICY.

##### (a) Termination of interest.

**47.**—The plaintiffs purchased linseed, to be delivered at a destined port in the United Kingdom, and paid for in fourteen days from being ready for delivery, by cash, less discount, or, at sellers' option (which was not exercised), on handing shipping documents less interest. The sellers, before the sale to the plaintiffs, by policy made with the defendants, insured the linseed, including all risk of craft and boats to and from the ship or vessel, and also any special lighterage, each lighter or craft being considered as if separately insured. The vessel containing the linseed arrived at a port in the United Kingdom, and the cargo was landed by means of public lighters employed by the plaintiffs, one of which was sunk when loaded, and the linseed on it partly lost and partly damaged. This loss, which was within the terms of the policy, occurred before delivery of the cargo had been completed, and before the plaintiffs had paid the price. After the cargo

had been completely delivered the sellers assigned the policy to the plaintiffs, who sued the defendants in respect of the loss above mentioned:—Held, that as there was no express contract that the policy of insurance should pass to the purchaser on the sale of the linseed, and as none could be implied from the terms of the sold-note, the interest under the policy remained in the sellers until delivery; and as on delivery on board the lighter the plaintiffs' interest ceased and the policy lapsed, no interest under it could pass to a subsequent assignee. *The North of England Pure Oil Cake Company (Lim.) v. The Archangel Maritime Bank and Insurance Company (Lim.)*, 44 Law J. Rep. (N.S.) Q. B. 121; Law Rep. 10 Q. B. 249.

##### (b) Right of assignee to sue.

**48.**—By the first section of 31 & 32 Vict. c. 86, it is provided that "whenever a policy of insurance on any ship, or on any goods in any ship, or on any freight, has been assigned, so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name:—Held, that this provision is not confined to cases where the policy is assigned before the loss along with the goods, but also applied to a policy upon goods assigned after loss, and therefore that the assignee of such a policy so assigned may sue upon it in his own name. *Lloyd v. Spence. Same v. Fleming*, 41 Law J. Rep. (N.S.) Q. B. 93; Law Rep. 7 Q. B. 299.

*As to effect of rules of insurance association.*  
[See infra No. 51.]

#### (O) ACTIONS AND SUITS.

##### (a) Undisclosed principal.

**49.**—The rule that an undisclosed principal may sue and be sued upon mercantile contracts made by an agent in the agent's own name, subject to any defences or equities which, without notice, may exist against the agent, is applicable to policies of marine insurances, as well under Canadian as English law. Where in a certificate of insurance the words usually inserted, stating that the agent "as well in his own name as in the name of every person to whom the same shall appertain," had insured the goods, were omitted:—Held, that the omission did not take away the principal's right to sue. *Browning v. The Provincial Insurance Company*, Law Rep. 5 P. C. 263.

##### (b) Suit in equity for return of premiums.

**50.**—On the 16th of September A. (since dead) insured a cargo of wheat at Lloyd's in the sum of 5,400*l.*, at the rate of 60*s.* per cent., which policy was duly subscribed by the agent of the defendant for 100*l.* A. forged bills of lading for the cargo, and on the 5th of October obtained an advance of 5,000*l.* from the plaintiff's agents on the security of the bills. On the 28th of October the plaintiff discovered the forgery, and subsequently applied to the defendant and the other underwriters for repayment of the premiums on the policy, on the

ground of no interest having attached, but repayment was refused. After the death of A. (whose representatives could not be found) the plaintiff filed his bill, praying that it might be declared that he was entitled to be repaid the sum of 60s.:—Held, first, that a Court of law was the proper tribunal to decide the question as to whether the defendant was liable to repay the premium, as the fact of a person being only the equitable assignee of a legal demand was not a ground for changing the forum; secondly, that a suit could not be maintained in equity for the sum of 60s., as no "general right" would be established, and there were no "special circumstances" to bring the case within the exceptions mentioned in Cons. Ord. IX. r. 1. *Hoskins v. Holland*, 44 Law J. Rep. (n.s.) Chanc. 273.

(P) MUTUAL MARINE INSURANCE ASSOCIATION.

(a) Rules and constitution.

51.—A rule of a mutual marine insurance association provided that in case of a mortgage or assignment of any vessel insured in the association, the mortgagee must make himself personally liable to pay premiums:—Held, that the rule did not affect an assignment of a policy. *Alexander v. Campbell*, 41 Law J. Rep. (n.s.) Chanc. 478.

The above rule was not set up as a defence by answer:—Held, that at the hearing a certificate of the ship's register could not be produced to shew that there was a mortgage of the ship itself. *Ibid.*

The rules of a marine insurance association provided that disputes should be referred to arbitration:—Held, that the assured was not bound to submit a legal point to the decision of arbitration before suing in equity. *Ibid.*

52.—In the winding-up of a mutual marine insurance association,—Held, by the Master of the Rolls, James, L.J., expressly not dissenting, that a power to issue "to members" non-mutual policies at special rates did not sanction a practice of issuing such policies to persons not mutual members, as quasi-members, for this purpose. *In re the Arthur Average Association; Ex parte Cory*, 44 Law J. Rep. (n.s.) Chanc. 569; Law Rep. 10 Chanc. 542.

Also, that a mutual insurance association is an association for the acquisition of gain, so as to require registration under the Companies Act, 1862, if it consists of more than twenty members. *Ibid.*

Semble—that a company which ought to be, but is not, registered under the Companies Act, 1862, is not an "unregistered company," that can be wound up under s. 199. *Ibid.*

A call having been made to answer debts found by the chief clerk's certificate, the contributories applied to vary the certificate. The application was allowed, though six months had elapsed since the certificate was filed. *Ibid.*

53.—A policy of marine insurance for a year effected in an insurance association, by the rules of which the insurance was to be from year to year unless ten days' notice to the contrary were given, and the managers in the absence of notice were to renew the policy:—Held, regard being had to 30 &

31 Vict. c. 23, s. 81 (making void a policy exceeding twelve months), not a continuing policy after the expiration of the current year. *Lishman v. The Northern Maritime Insurance Company*, 42 Law J. Rep. (n.s.) C. P. 108; Law Rep. 8 C. P. 216.

(b) Contract between society and members.

54.—The defendants, a mutual insurance society (limited), registered pursuant to 25 & 26 Vict. c. 89, issued to the plaintiff, one of its members, a policy of insurance on his ship H., which was afterwards lost. The policy referred to the articles of the association, the 39th of which provided that the directors should have full power to decide and determine all disputes, &c., arising between the society and its members concerning insurances, &c., and the decision of the directors should be final and conclusive, &c., and no member of the society should be allowed to bring any action, &c., except as was provided, &c., and the directors might, if they thought fit, cause any claim or demand to be submitted to an average adjuster, "and in every such case the decision or award of such average adjuster shall be final and conclusive on the society and claimant, and every person interested in such claim, and no appeal shall be allowed therefrom." By the 84th article, a means was provided by which any member who was dissatisfied with the decision of the directors might obtain a reconsideration of his claim. The H. having been lost, the plaintiff made a claim, but the directors decided that he had no claim upon the society. He then brought his action:—Held, that the decision of the claim by the directors, subject to the right of obtaining a reconsideration, under the 84th article, was binding, and that no action was maintainable, although it was admitted that the H. was lost by perils of the seas. *Edwards v. The Aberayron Mutual Ship Insurance Company (Lim.)*, 44 Law J. Rep. (n.s.) Q. B. 67.

MARKET.

- (A) RIGHT OF SALE.
- (B) TOLLS.
- (C) ENLARGEMENT.

(A) RIGHT OF SALE.

1.—The local board for C., acting under the powers of the Acts in that behalf, made bye-laws, directing that cattle markets and an annual show of horses should be held in prescribed places. The respondent, at the time when these markets were established, was possessed of a building called the "Agricultural Hall," which was erected some years before the passing of the bye-laws regulating the market. It was a large building, containing a ring or area in which was accommodation for about 100 head of cattle. Adjoining to, and communicating with it, was a yard capable of holding 1,400 sheep. The respondent's dwelling-house was separated from the Agricultural Hall by his harness-room and stable. He adver-

tised and held sales in the Agricultural Hall on market-days, the average sale on these day amounting to 100 cattle and 1,000 sheep, and exceeding the sales in the regular market. The cattle and sheep so sold were the property of farmers and others, the respondent charging them with a commission. The justices had refused to convict the respondent:—Held, without expressing any opinion as to whether an auctioneer would have been at liberty to sell a horse on his premises, notwithstanding the market, it was evident, having regard to the nature and extent of the respondent's premises, that they were not part of his dwelling-place or shop within the meaning of 10 Vict. c. 14, s. 13, and that the business carried on by the appellant was not a right, power or privilege which he enjoyed when the market was established, within the meaning of the Local Government Act, s. 50. *Fearon v. Mitchell*, 41 Law J. Rep. (N.S.) M.C. 170; Law Rep. 7 Q. B. 690.

2.—By section 13 of the Markets and Fairs Clauses Act, 1847, after a market-place is opened for public use every person other than a licensed hawk, selling in a place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are by the special Act authorised to be taken in the market, is liable to a penalty. By the Pedlars Act, 1871, section 6, a certificate under that Act is to have the same effect as a hawk's license for the purpose of the Markets and Fairs Clauses Act, 1847, and the term "licensed hawk" in such Act shall be construed to include a pedlar holding such a certificate. A person holding a pedlar's certificate both sold on foot and with a horse and four wheeled waggon within the limits of a district formed by the adoption of the Local Government Act, 1858, under which Act the local board had provided a market-place, potatoes and other vegetables liable to toll in the market:—Held (Lush, J., dissenting), that he was exempted by the pedlar's certificate from the penalty imposed by the 13th section of the Markets and Fairs Clauses Act, 1847, though not acting strictly as a pedlar, but rather as a hawk. *Howard v. Lupton*, 44 Law J. Rep. (N.S.) M.C. 150; Law Rep. 10 Q. B. 598.

#### (B) TOLLS.

3.—By 32 & 33 Vict. c. cxxxi. s. 204, the tolls in respect of cattle brought to the market of Wolverhampton for sale, become due as soon as the cattle in respect whereof they are demandable, are brought into the market place:—Held, that the lessee of the market was not rateable in respect of tolls received for animals brought into the market place for sale, but not placed under covered places or in pens so as to occupy any part of the soil. *Caswell v. The Overseers of the Borough of Wolverhampton*, 41 Law J. Rep. (N.S.) M.C. 108; Law Rep. 7 Q. B. 328, *nom. The Queen v. Casswell*.

#### (C) ENLARGEMENT.

4.—Power in a local Act to "enlarge" a market:—Held, to give power to extend the market to streets in the immediate neighbourhood, not Digest, 1870—1875.

therefore forming part of its sides and not mentioned in the Act. *The Attorney-General v. The Mayor, Aldermen and Burgesses of Cambridge*, (H. L.), Law Rep. 6 E. & I. App. 303.

"Market place" held to extend to streets where the actual market had been held. *Ibid*.

The erection of a new corn exchange adjoining the market also held to be authorised. *Ibid*.

### MARRIAGE.

#### (A) FORMALITIES.

(a) *Celebration without license.*

(b) *Publication of banns.*

#### (B) FORFEITURE UNDER MARRIAGE ACT.

#### (A) FORMALITIES.

(a) *Celebration without license.*

1.—A. and B. intermarried at the parish church of Bradford, Yorkshire, on the 18th of June, 1857. The license for their marriage did not issue until the 19th of June, and A. (the husband) knew at the time of the marriage that the license was not in existence, but B. (the wife) was ignorant of the fact and believed that all necessary formalities had been observed:—Held, that the parties had not knowingly and wilfully intermarried without license within the meaning of 4 Geo. 4. c. 76, s. 22, and the validity of the marriage was pronounced for. *Greaves v. Greaves*, 41 Law J. Rep. (N.S.) P. & M. 66; Law Rep. 2 P. & D. 423.

(b) *Publication of banns.*

2.—The husband caused the banns to be published without the knowledge of the wife, a minor, to whom he proposed marriage only the day before it took place. For the purpose of concealment, the Christian name of the wife was wrongly stated, and the age and residence of the husband and wife were also falsely described:—Held, that the marriage was valid, the wife having been unconscious of the irregularity in the publication of the banns. *Templeton v. Tyree*, 41 Law J. Rep. (N.S.) P. & M. 86; Law Rep. 2 P. & D. 420.

The Court has no power to pronounce a decree of nullity of marriage, or to dissolve a marriage, because of fraud in its inducement. *Ibid*.

3.—In the register of a marriage which was solemnized in 1842, only secondary Christian names of both husband and wife appeared. The wife was dead. The husband deposed that he had given incomplete names for the sake of brevity:—Held, that there was no evidence to shew that the marriage had been celebrated "without due publication of banns." *Gompertz v. Kensit*, 41 Law J. Rep. (N.S.) Chanc. 382; Law Rep. 13 Eq. 369.

#### (B) FORFEITURE UNDER MARRIAGE ACT.

4.—A man by falsely swearing to certain circumstances, obtained a license for his marriage with a woman under age, who had eloped with him, and married her. The wife was entitled to a sum

of stock absolutely, and to a reversionary interest in other sums of stock, expectant on her mother's death. Upon an information filed at the relation of the mother, the Court declared the wife's fortune to have been forfeited under the Marriage Act, 4 Geo. 4. c. 76, and having regard to the small amount of the fund instead of ordering a settlement, directed the fund to be transferred into Court, and made a declaration as to the trusts of it. *The Attorney-General v. Clements*, 40 Law J. Rep. (n.s.) Chanc. 678; Law Rep. 12 Eq. 32.

5.—On forfeiture under the Marriage Act, 1823, the Court in settling the property of a female minor, gave her, in default of children, a general power of appointment by will without the insertion of words to exclude the husband. In future, on applications for orders as to settlements under the Act, the Attorney-General must appear separately from the relator. *The Attorney General v. Read*, Law Rep. 12 Eq. 38.

### MARRIAGE SETTLEMENT.

#### (A) COVENANT OR AGREEMENT FOR SETTLEMENT.

##### (a) *Agreement by wife's father.*

##### (b) *Covenant by husband to settle lands on "issue."*

##### (c) *Marriage articles.*

##### (1) *Construction and effect of.*

##### (2) *Right to specific performance.*

#### (B) CONSTRUCTION OF SETTLEMENT.

##### (a) *Eldest son.*

##### (b) *As to separate use, &c., extending to second marriage.*

##### (c) *Gift over to class: when class to be ascertained.*

##### (d) *Vesting: gift over.*

##### (1) *Provision for issue of children dying before becoming entitled.*

##### (2) *Trusts for children: child attaining twenty-one and predeceasing tenant for life.*

##### (3) *Divesting clause: eldest son.*

##### (e) *Personal representatives.*

##### (f) *Trust for next-of-kin of wife not binding on her.*

##### (g) *Shifting clause.*

##### (h) *Covenant to settle after-acquired property.*

##### (1) *To what property it extends.*

##### (2) *Validity of, as against creditors of husband.*

#### (C) INVESTMENT IN NAMES OF TRUSTEES OF SETTLEMENT.

#### (D) ELECTION.

#### (E) EFFECT OF DIVORCE ON SETTLED PROPERTY OF WIFE.

#### (F) JURISDICTION, &c., OF COURT OF CHANCERY.

##### (a) *Mortgage authorised for rebuilding mansion house.*

##### (b) *Mistake: rectification.*

##### (c) *Bill to set aside settlement by lunatic.*

##### (d) *Equity to a settlement.*

#### (A) COVENANT OR AGREEMENT FOR SETTLEMENT.

##### (a) *Agreement by wife's father.*

1.—Letters written by a widower previously to the marriage of his only daughter stated that he would settle all his property after his death on her and her children. The father married again, and by his will left certain benefits to his widow:—Held, that the daughter was entitled to have the whole of her father's property settled. *Coverdale v. Eastwood*, 42 Law J. Rep. (n.s.) Chanc. 118; Law Rep. 15 Eq. 121.

##### (b) *Covenant by husband to settle lands on "issue."*

2.—A covenant by an intended husband to settle lands upon his issue by the intended wife is a covenant for a strict settlement, so that he has no power to charge the lands with portions for younger children. *Grier v. Grier*, Law Rep. 5 E. & I. App. 689.

##### (c) *Marriage articles.*

##### (1) *Construction and effect of.*

3.—Where by marriage articles it was stipulated that funds of the wife should belong to the husband if there were no children and he should survive her, and by the subsequent settlement after limitations in trust for wife and husband successively for life and trusts for children there was a provision that if there were no children of the husband and wife and the husband should survive the fund should belong to him, without any alternative provision in case the wife should survive, and the husband joined in transferring the fund to the trustees and died in the wife's lifetime without leaving children:—Held, (1) that there had been no reduction into possession, (2) that the settlement ought to be rectified, and that the wife was entitled to the fund, including arrears of income due at her husband's death. *Cogan v. Duffield*, 45 Law J. Rep. (n.s.) Chanc. 74; Law Rep. 20 Eq. 789; affirmed, on appeal, 45 Law J. Rep. (n.s.) Chanc. 307; Law Rep. 2 Chanc. Div. 44.

##### (2) *Right to specific performance.*

4.—Marriage articles entered into between an intended husband and the father of the wife, whereby each party covenanted to settle funds on the usual trusts, were enforced by the husband against the father's estate after the death of the wife without issue, although the husband had always neglected and refused to fulfil his part of the agreement. *Jeston v. Key*, 40 Law J. Rep. (n.s.) Chanc. 503; Law Rep. 6 Chanc. 610.

#### (B) CONSTRUCTION OF SETTLEMENT.

##### (a) *Eldest son.*

5.—A second born son, who attained twenty-one years of age, and on his father's death succeeded to his title, but died before the period of distribution, was held to be excluded as an "eldest son" from sharing in certain unappointed trust funds. His younger brother, who succeeded him in the title, and was living at the period of the distribution of the funds, was held entitled to share in



them. *In re Rivers's Settlement Trusts*, 40 Law J. Rep. (N.S.) Chanc. 87.

(b) *As to separate use, &c., extending to second marriage.*

6.—The trustees of a marriage settlement held money on trust during the life of the intended wife, to pay the income to her for her separate use, independently of her intended husband, and so that her receipts alone should be sufficient discharges, and so that she should not have power to deprive herself thereof by anticipation:—Held, that the trust for her separate use extended to the second marriage of the lady. *Hawkes v. Hubback*, 40 Law J. Rep. (N.S.) Chanc. 49; Law Rep. 11 Eq. 5.

7.—A husband, being entitled in remainder to an estate for his life in certain real property, settled the same during the joint lives of himself and his wife, for her separate use independently of his control, and without power of anticipation. The wife subsequently obtained a divorce, and married again without a settlement:—Held, that notwithstanding the special circumstances of the case, the trust for separate use and the restraint on anticipation revived on the second marriage. *Shafto v. Butler*, 40 Law J. Rep. (N.S.) Chanc. 308.

*Restraint on anticipation.* [See *BARON & FEME*, 20, 21.]

*Gift over to class: when class to be ascertained.*

8.—Limitation in a marriage settlement to wife for life, remainder to children other than an eldest or only son, with a gift over in case any younger son should become an eldest son before attaining twenty-one:—Held, that the class of younger children was to be ascertained at the death of the wife, and with reference to the family estate; and did not include a younger son who, after attaining twenty-one, became an eldest son, and then died in the lifetime of the wife. *In re Bayley's Settlement*, Law Rep. 6 Chanc. 590.

(d) *Vesting: gift over.*

(1) *Provision for issue of children dying before becoming entitled.*

9.—By a marriage settlement, after reciting an intention to make a provision for the issue of the marriage, the trust funds were settled, after the decease of the husband and wife, in case they should leave any issue of their two bodies begotten, which being a daughter or daughters should live to be married, or attain the age of twenty-one years, or, being a son or sons, should live to attain the age of twenty-one years, upon trusts to transfer the same unto, between and amongst all such issue (if more than one, share and share alike), as and when they should respectively attain the said age of twenty-one years or be married, if a daughter or daughters, with consent. The settlement contained trusts for the maintenance of the said issue in the meantime, and it was provided that, if any "such issue as aforesaid" should happen to die before he, she or they should respectively become entitled to and actually receive his, her or their portion or respective portions under the settlement,

leaving lawful issue surviving, such last-mentioned issue should have and be entitled to his, her or their father's or mother's share or shares. One of the children attained twenty-one, and died a bachelor in the lifetime of his father:—Held, reversing the decision of one of the Vice-Chancellors, that the deceased child had not acquired a vested interest in the trust fund. Observations on the rule in *Woodcock v. The Duke of Dorset*, 3 Bro. C. C. 569. *Jeyes v. Savage*, 44 Law J. Rep. (N.S.) Chanc. 706; Law Rep. 10 Chanc. 555.

(2) *Trusts for children: child attaining twenty-one and predeceasing tenant for life.*

10.—By a marriage settlement it was declared that the trustees should pay the income of the trust fund to E. H. for life, and after her decease leaving children, should pay the capital "to all and every the child or children" of the said E. H. and the issue of such of her said children as might be then dead (such issue to take their parent's share) equally, the shares of sons to be paid at twenty-one, and of daughters at twenty-one or marriage. E. H. died, leaving five children surviving her, who all attained twenty-one or married. One other child, a son, F. H., attained twenty-one, but died in her lifetime without issue:—Held, that F. H. took a vested interest in one-sixth of the trust fund on his attaining twenty-one, notwithstanding that he did not survive his mother. *In re Orlebar's Settlement Trusts*, 44 Law J. Rep. (N.S.) Chanc. 661; Law Rep. 20 Eq. 711.

(3) *Divesting clause: eldest son.*

11.—By a marriage settlement a sum of stock was settled, subject to the husband's and wife's life interests therein, upon trusts for the children and issue of the marriage (except an eldest son entitled to certain settled estates) as the husband and wife, or the survivor of them, should appoint, and in default of appointment, for the children (except as aforesaid) in equal shares, the shares of sons to be vested at twenty-one, of daughters at twenty-one or marriage, and it was provided that if the husband should die in his wife's lifetime, leaving an only child, a son, such son should be entitled to the whole trust fund, but if the wife should survive the husband, and there should be only two children or only one child (except as aforesaid) who should attain twenty-one or marry, such two only children or one only child (except as aforesaid) should not be entitled to any part of the trust fund, but it should go to the husband absolutely, as in that event such two children or one child (except as aforesaid) were otherwise provided for by a deed of even date creating a charge upon the settled real estates. There were two children of the marriage, a son who died an infant and a daughter who married, and became, on her brother's death, entitled to the settled estates. The wife survived the husband. The deed purporting to create a charge upon the settled estates, turned out to be invalid:—Held, upon the construction of the settlement, and without resting the decision upon the invalidity of the charge, that the daughter took an absolutely vested interest in

the trust fund, and that it did not go to the husband's representative. *Carter v. Ducie*, 41 Law J. Rep. (N.S.) Chanc. 153.

Semble—that if it had been otherwise, the invalidity of the charge would have been sufficient to displace the claim of the husband's representative. *Ibid.*

(e) *Personal representatives.*

12.—A fund was settled on A. for life, then on any husband she might leave for life, then on her children, and in default of children on the person or persons who should happen to be her legal personal representative or representatives at the time of her death:—Held, that legal personal representatives meant next-of-kin according to the Statutes of Distribution. *Robinson v. Evans*, 43 Law J. Rep. (N.S.) Chanc. 82.

Semble—on points of construction precedents may not be cited as authorities, unless they explain the meaning of technical terms or lay down general principles. *Ibid.*

13.—Under a limitation in a marriage settlement of the wife's property, in default of her appointment "to such person or persons as should be her personal representative or representatives," the wife's "administrators" are entitled. *In re Best's Settlement Trusts*, 43 Law J. Rep. (N.S.) Chanc. 545; Law Rep. 18 Eq. 686.

14.—By an ante-nuptial settlement real and personal estate was vested in trustees, upon trust for sale and investment of the proceeds; and after the marriage, for payment of the income to the husband and wife during their joint lives, and the life of the survivor, and then for the benefit of the children and issue of the wife, as she should by deed appoint, and in default for her children and issue. If there were no children of the marriage, the whole of the trust moneys and premises were to be held by the trustees upon trust for such person or persons as the wife should, notwithstanding any coverture, by deed or will appoint; and in default of appointment, then "upon trust to pay or transfer the said trust moneys and premises unto the legal representatives of the wife in a due course of administration":—Held, on demurrer, that the words "legal representatives in a due course of administration," denoted the next-of-kin of the wife according to the statutes, and not the husband. *Briggs v. Upton*, 41 Law J. Rep. (N.S.) Chanc. 519; Law Rep. 7 Chanc. 376: affirming the decision of Wickens, V. C., 41 Law J. Rep. (N.S.) Chanc. 33; Law Rep. 7 Chanc. 378 *n.*

(f) *Trust for next-of-kin of wife not binding on her.*

15.—In a marriage settlement (the intended wife being an infant) the husband covenanted that one half of the wife's personal property and of the proceeds of her real property when sold, should be settled upon trust for himself for life, then for her for her life, and then, in default of issue, upon trust for her next-of-kin. The property was duly vested in the trustees. The husband died, and there was no issue of the marriage:—Held, that the trust for the next-of-kin was not binding

against the wife, and that she had absolute power to deal with the trust funds. *Gibbs v. Grady*, 41 Law J. Rep. (N.S.) Chanc. 163.

(g) *Shifting clause.*

*Shifting clause following shifting clause in patent conferring a title.* [See Trust, A 7.]

(h) *Covenant to settle after-acquired property.*

(1) *To what property it extends.*

16.—A marriage settlement contained a covenant to settle property which the husband and wife, or either of them, should, during the coverture, become "seised or possessed of, or entitled to." The wife was then entitled to a vested remainder in realty, but she died before it came into possession:—Held, that such property was not subject to the settlement. *In re Pedder's Settlement*, 40 Law J. Rep. (N.S.) Chanc. 77.

17.—A marriage settlement contained a covenant to settle after-acquired property of the value of 500*l.* or upwards:—Held, that money acquired under several appointments of 499*l.* 19*s.* 11*d.* each, bearing different dates, but executed in immediate succession one to another, was not subject to the covenant. *Bouver v. Smith*, 40 Law J. Rep. (N.S.) Chanc. 194; Law Rep. 11 Eq. 279.

18.—A covenant, by husband and wife, to settle property to which the wife or the husband in her right "shall become entitled" during the coverture, held to include property vested in reversion before the coverture, and falling into possession during the coverture, but not to include property to which they are entitled only in reversion during the coverture, and which falls into possession after the coverture. *In re Clinton's Trusts; Ex parte Holloway; Ex parte Weare*, 41 Law J. Rep. (N.S.) Chanc. 191; Law Rep. 13 Eq. 295.

19.—A covenant to settle after-acquired property of a specified amount acquired "at any one time" must be held to mean "from one and the same source." Where the covenantor, becoming entitled to property exceeding the specified amount, receives by anticipation under a power of advancement a sum which reduces it below such amount, such sum must be taken into account in determining whether the property is within the covenant. *Hood v. Franklin*, Law Rep. 16 Eq. 496.

20.—A covenant in a marriage settlement to settle all property to which the wife shall become entitled after the marriage, will, in the absence of any expressions in the settlement shewing a contrary intention, be restricted to property acquired during the coverture. The rule laid down in *Dickenson v. Dillwyn*, 39 Law J. Rep. (N.S.) Chanc. 266; Law Rep. 8 Eq. 546, and *Carter v. Carter*, 39 Law J. Rep. (N.S.) Chanc. 268; Law Rep. 8 Eq. 551, adopted in preference to that laid down in *Stevens v. Vanvoorst*, 17 Beav. 305. *In re Edwards*; and *In re the London, Brighton and South Coast Railways Act*, 43 Law J. Rep. (N.S.) Chanc. 265; Law Rep. 9 Chanc. 97.

21.—A lady was entitled under a marriage settlement to the whole of a fund for her life, The

fund in default of children was limited to the husband. There being no children the lady, on her husband's death, became entitled to one moiety of his residue beneficially. She was also his administratrix, and on her second marriage a settlement was made by which she and her intended husband covenanted to settle all property to which she or he in her right should become entitled during the coverture under the former settlement. The life interest was expressly settled. At the date of the second marriage the fund in question was the only fund outstanding under the first settlement:—Held, that the covenant operated on her moiety. *In re Viant's Settlement*, 43 Law J. Rep. (n.s.) Chanc. 832; Law Rep. 18 Eq. 436.

**22.**—A half-pay officer covenanted on the occasion of his marriage to assign to the trustees of the marriage settlement all property to which he then was or should, during the coverture, become entitled at any one time, and from any one source, exceeding a given amount:—Held, that the covenant did not extend to a capital sum exceeding the given amount received by him during the coverture from the Treasury in commutation of his half-pay. *Churchill v. Denny*, 44 Law J. Rep. (n.s.) Chanc. 578; Law Rep. 20 Eq. 534.

(2) *Validity of, as against creditors of husband.*

**23.**—C, by a settlement made before his marriage, assigned a policy and some furniture to trustees for the benefit of his wife and the children of the marriage, and also covenanted that all other real or personal estate of which he should become seised, possessed or entitled during the coverture, should be transferred to the trustees upon trusts thereby declared. No trusts of the after-acquired property were declared in the settlement. After the marriage and when C. was still solvent he purchased some shares; the shares were registered in his name and he held the certificates. Subsequently he filed a petition for liquidation, and the trustee in the liquidation claimed these shares, as against the trustees of the settlement:—Held (reversing the decision of the County Court Judge), that C. could not be allowed in this way to withdraw the whole of his property from his creditors, and that the shares must be handed to the trustee in the liquidation. *Ex parte Bolland*; *In re Clint*, 43 Law J. Rep. (n.s.) Bankr. 16; Law Rep. 17 Eq. 115.

(C) INVESTMENT IN NAMES OF TRUSTEES OF SETTLEMENT.

**24.**—In 1858 C. wrote to his bankers requesting them to purchase a sum of 2,000*l.* consols to be added to the sum "now standing in my name" and the dividends to be received by them with this addition as before. C. was tenant for life under his marriage settlement of a sum of consols on which the dividends were received by the bankers under a general power of attorney from the trustees. The bankers wrote stating the names in which the consols stood, and asking if the investment was to be made in his name or the trustees'. He thereupon

called and endorsed the letter "Make the investment in the trustees' names." The trustees were never informed of this, but the investment was made and the dividends received by C. till his death in 1870. In 1862, C. and his wife executed a joint appointment to children under the settlement, of the original sum of consols, not mentioning the addition:—Held, that the 2,000*l.* consols was included in the settlement, and passed as in default of appointment. *In re Curteis's Trust Fund*, 41 Law J. Rep. (n.s.) Chanc. 631; Law Rep. 14 Eq. 217.

(D) ELECTION.

**25.**—By a post-nuptial settlement made before the passing of 20 & 21 Vict. c. 57, personal estate belonging to the husband and other personal estate brought into settlement by the wife's father, were settled upon certain trusts for the benefit of the husband and wife and the children of the marriage; and by the same deed, in consideration of the premises, the husband and wife assigned the wife's reversionary interest in other personality upon trusts for the husband and wife, and the issue of the marriage by reference to the trusts previously declared. The marriage was afterwards dissolved by a decree of the Divorce Court, and subsequently the wife's reversionary interest fell into possession. The divorced wife having instituted a suit to set aside the settlement so far as it affected the reversionary interest,—Held, reversing the decision of the Master of the Rolls, that she was bound to elect between the relief sought by the bill, and the benefits given to her by the settlement. Per James, L.J.—In marriage contracts each person bringing anything into settlement is contributing part of the consideration for everything else brought into settlement, and purchasing it on behalf of the objects of the settlement; and any object of the settlement taking any portion of the settled fund by paramount title, must take it in full satisfaction of his or her share or interest under the settlement. *Campbell v. Ingilby* (21 Beav. 567; s.c. 25 Law J. Rep. (n.s.) Chanc. 761; 1 De Gex & J. 393; s.c. 26 Law J. Rep. (n.s.) Chanc. 654) doubted. *Codrington v. Lindsay*, 42 Law J. Rep. (n.s.) Chanc. 526; Law Rep. 8 Chanc. 578: affirmed, on appeal, by the House of Lords, *Codrington v. Codrington*, Law Rep. 7 E. & I. App. 854.

(E) EFFECT OF DIVORCE ON SETTLED PROPERTY OF WIFE.

**26.**—By a marriage settlement property of the wife was settled upon her for life for her separate use, and after her decease, in case there should be no issue of the marriage and her husband should survive, upon trust for her next-of-kin, with power for her to appoint by will part of the property, and in case she should survive, then for her absolutely. The marriage having been dissolved on the petition of the wife, and there being no issue of the marriage, a bill was filed by her in her maiden name against her former husband and the trustees of the settlement:—Held, that she was absolutely entitled to the property. *Fussell v.*

*Dowding*, 41 Law J. Rep. (N.S.) Chanc. 716; Law Rep. 14 Eq. 421.

*Alteration of settlement in Court of Divorce.*  
[See DIVORCE, 47-52.]

(F) JURISDICTION, &C., OF COURT OF CHANCERY.

(a) *Mortgage authorised for rebuilding mansion-house.*

27.—The mansion-house on a settled estate was falling down. There were no powers in the settlement to raise money for rebuilding. It was shewn that to raise money by mortgage and rebuild would be beneficial to all parties interested. The Court on bill filed by tenant for life authorised a mortgage for the purpose. *Frith v. Cameron*, 40 Law J. Rep. (N.S.) Chanc. 778; Law Rep. 12 Eq. 169.

The settlor had intended to add three small plots of land to the settled estate; two of these had been purchased before the settlement, and omitted from it by mistake, the other had been purchased since. The Court ordered that they should be conveyed to the uses of the settlement. *Ibid.*

(b) *Mistake: rectification.*

[And see last case.]

28.—Words were inserted in a settlement by mistake. The Court, being convinced of the mistake, ordered funds, which had been paid into Court under the Trustee Relief Act, to be paid to the persons who would be entitled under the settlement as intended to be drawn, without rectifying the settlement. *In re De La Touche's Settlements*, 40 Law J. Rep. (N.S.) Chanc. 85.

29.—A settlement of personal property belonging to a ward of Court was made on her marriage and approved by the Court. It provided that, in case of failure of children, which event happened, after a life interest to the husband and wife, the property should go to the wife's next-of-kin. The wife survived her husband. On an affidavit by the wife that she had misunderstood the settlement, the Court declared that, in the events which happened, she was entitled absolutely to the fund. *Smith v. Liffe*, 44 Law J. Rep. (N.S.) Chanc. 755; Law Rep. 20 Eq. 666.

(c) *Bill to set aside settlement by lunatic.*

30.—Liberty was given to a person interested in impeaching a settlement by a lunatic of doubtful validity to file a bill to set it aside at his own risk as the lunatic's next friend. *In re Gordon*, 44 Law J. Rep. (N.S.) Chanc. 208; Law Rep. 10 Chanc. 192.

*Jurisdiction under leases and sales of Settled Estates Act.* [See SETTLED ESTATES ACT.]

(d) *Equity to a settlement.*

[See BARON AND FEME, 11-15.]

MARSHAL LING ASSETS.

[See ADMINISTRATION, 14-28; MORTGAGE, 31  
PRINCIPAL AND SURETY, 9.]

MASTER AND SERVANT.

[See APPRENTICE.]

(A) CONTRACT OF SERVICE.

(a) *Non-disclosure of material fact.*

(b) *Construction of contract.*

(1) *Service for "twelve months certain."*

(2) *Forfeiture of "all wages due."*

(B) LIABILITY OF MASTER FOR INJURY TO SERVANT.

(a) *Breach of statutory duty.*

(b) *Ignorance of servant of defective state of machinery.*

(C) RIGHT OF ACTION BY MASTER FOR LOSS OF SERVICE.

(D) LIABILITY OF MASTER FOR ACTS OF SERVANT.

(a) *Evidence of employment of servant by master.*

(b) *Whether servant acting within the scope of his employment.*

(c) *Liability as against licensee to use premises.*

(d) *Dangerous animal: evidence of knowledge of servant.*

(e) *Negligence of fellow-servant: common employment.*

(E) SUMMARY JURISDICTION UNDER MASTER AND SERVANT ACT, 1867.

(a) *Complaint against servant for not entering into service.*

(b) *Breach of contract to employ.*

(c) *Claim for wages.*

(d) *Absence without lawful excuse.*

[The use of violence, threats, or molestation, for coercing masters or workmen in their relations with each other, made subject to certain penalties. 34 & 35 Vict. c. 32.]

[Enlargement of the powers of County Courts in respect of disputes between employers and workmen. Limited civil jurisdiction in respect of such disputes given to other Courts. 38 & 39 Vict. c. 90.]

(A) CONTRACT OF SERVICE.

(a) *Non-disclosure of material fact.*

1.—In an action by a governess for breach of an agreement in writing, in which she was described as M. K., spinster, and by which the defendant undertook to employ her for a term of three years, it was pleaded that the plaintiff intending to induce the defendant to enter into the contract, concealed from him a fact material to her qualifications as such governess, and material to be known by the defendant in engaging her as such governess, namely, that she had previously been married, and that the marriage had been dissolved by decree of the Divorce Court:—Held, on de-

murrer, that the plea was bad, as there was no allegation of fraud, and the mere non-disclosure of a material fact was, except in the case of policies of insurance, no answer to an action upon a contract. *Fletcher v. Krell*, 42 Law J. Rep. (n.s.) Q. B. 55.

(b) Construction of contract.

(1) Service for "twelve months certain."

2.—By an agreement between brewers and their traveller, the latter was engaged at a salary of 200*l.* a year, payable fortnightly, and it was, *inter alia*, stipulated "that the agreement between the aforesaid parties shall be for twelve months certain, after which time either party shall be at liberty to terminate this agreement by giving to the other a three months' notice in writing." But if the said employers "shall be desirous of terminating this agreement without notice, after twelve months, or before any notice shall have expired, they may do so on payment of 50*l.*":—Held, per Bramwell, B., and Pigott, B. (Kelly, C.B., *dissentiente*), that the agreement ceased at the end of the first twelve months unless the parties allowed the engagement to continue beyond that time, in which event only did notice, or payment in lieu thereof, become necessary to determine it. *Langton v. Carleton*, 43 Law J. Rep. (n.s.) Exch. 54; Law Rep. 9 Exch. 57.

(2) Forfeiture of "all wages due."

3.—In an action to recover 2*s.* for wages it appeared that the plaintiff was a weaver in the employment of the defendants, who were cotton manufacturers, that he was a weekly servant, and that his wages were regulated by the number of pieces which from time to time he wove and delivered to his masters. The practice at the defendants' mill was that the wages earned by the workmen at the mill were ascertained and fixed at noon on Thursday, but were not paid to the workmen till the following Saturday. The workmen worked under rules embodied in the contract of hiring, as follows:—"All persons in our employ are required to give fourteen days' notice before leaving, such notice to be given at the time of booking up. Persons leaving without notice will forfeit all wages due." The term "booking up" is understood to mean the Thursday in each week. Fifteen shillings of the amount sued for was earned by the plaintiff in the week of his service, which ended at noon on Thursday, and the amount was then fixed. He worked till the forenoon of Friday, earning the balance claimed, and then left his service without any reasonable excuse:—Held, that the wages earned in the week ending on Thursday were forfeited as the rules were so framed as to protect the master by making the workman always liable to forfeit something if he left without notice. *Walsh v. Walley*, 43 Law J. Rep. (n.s.) Q. B. 102; Law Rep. 9 Q. B. 367.

*Bond to secure faithful services: alteration of terms of service: discharge of surety.*  
[See PRINCIPAL AND SURETY, 20, 21.]

(B) LIABILITY OF MASTER FOR INJURY TO SERVANT.

(a) Breach of statutory duty.

4.—A company for the manufacture of cotton employed a servant to grease the bearings between the fly-wheel and the spur-wheel of a steam-engine in their factory. The fly-wheel revolved in a wheel race parallel to a wall and on one side of it, and the spur-wheel revolved, parallel, on the other side. The extreme distance between the two wheels was two feet ten inches, and the wall was two feet three inches thick. In a hole made in this wall the servant stood or sat while he greased the bearings. The wheel race was one which ought to have been fenced or otherwise secured within 7 & 8 Vict. c. 15, s. 21. The fly-wheel on the side next the wall and the edge of the wheel race on that side were not fenced. The servant having been at this work for five days, was found on the sixth lying dead on the bearings, and it was not disputed that he must have been caught and killed by the fly-wheel. The administratrix of the deceased having brought an action, on behalf of the widow and child, against the company for negligence in not fencing the wheel race, as required by the statute,—Held, assuming that the deceased was not guilty of contributory negligence either in undertaking the employment or in conducting it, that the action was maintainable. *Britton v. The Great Western Cotton Company*, 41 Law J. Rep. (n.s.) Exch. 99; Law Rep. 7 Exch. 130.

(b) Ignorance of servant of defective state of machinery.

5.—Declaration by the plaintiff as administratrix of G. W., deceased, that the defendants were owners of a machine about which the deceased was employed to do work for them, and in the course of his employment it was necessary for him to get into the machine; that by the negligence and default of the defendants, the machine was constructed unsafely and in a defective and improper manner, and was by reason of not being sufficiently guarded, in an unsafe and unfit condition for being used and entered, which the defendants well knew; and by reason of the premises, and also by reason, as the defendants well knew, of no sufficient or proper apparatus having been provided by the defendants to protect the deceased, while employed about the machine, from injury arising from the unsafe and unguarded state thereof, while the deceased was in the course of his employment the machine was suddenly put in motion, and caused injuries to him whereof he died. On demurrer,—Held, that it was not necessary to aver in the declaration that the deceased was ignorant of the defective state of the machine; and further, that the averments sufficiently alleged that the accident was the result of the negligence of the defendants. *Watling v. Oastler*, 40 Law J. Rep. (n.s.) Exch. 43; Law Rep. 6 Exch. 73.

*Cabowner and cabdriver: liability of cabowner for supplying cabdriver with dangerous horse.* [See NEGLIGENCE, 30.]

## (C) RIGHT OF ACTION BY MASTER FOR LOSS OF SERVICE.

[See also SEDUCTION.]

6.—To a declaration alleging that by reason of the negligence of the defendant's servant the plaintiff's daughter and servant was killed, and claiming damages for loss of services and for the burial expenses paid by the plaintiff, the defendant pleaded—first, that the daughter and servant was killed on the spot by the act complained of, so that the plaintiff did not and could not sustain damage entitling him to sue; and secondly, that the act complained of was a felonious act on the part of the defendant's servant, and that the servant had not, before the action tried, been committed or prosecuted in any way in respect of the same:—Held, *per totam Curiam*, that the second plea afforded no answer to the declaration; and held by Kelly, C.B., and Pigott, B., that the first plea afforded a good answer, on the ground that, apart from Lord Campbell's Act (9 & 10 Vict. c. 93), no civil action is maintainable against a person who has by negligence caused the death of another. But held by Bramwell, B., that the first plea afforded no answer, and that the action was maintainable. *Osborne v. Gillett*, 42 Law J. Rep. (N.S.) Exch. 53; Law Rep. 8 Exch. 88.

## (D) LIABILITY OF MASTER FOR ACTS OF SERVANT.

## (a) Evidence of employment of servant by master.

7.—K., a master stevedore, having contracted to unload the defendant's ship, employed D., one of the ship's crew, at the defendant's request, to assist in the work. K. could have refused to have so employed D. if he thought him incompetent; and during the time K. employed him D. could not have been employed by the master of the ship on the ship's work, and though D. was paid by the defendant, such pay was deducted from what K. received for the unloading. In the course of such employment D. so negligently worked a winch used in the unloading as to injure the plaintiff, one of K.'s men, with whom D. was put to work by K.'s foreman:—Held, that the defendant was not responsible for such injury, as at the time of the accident D. was not working for the defendant, but for K. *Murray v. Currie*, 40 Law J. Rep. (N.S.) C. P. 26; Law Rep. 6 C. P. 24.

*Unforeseen accident by acts of skilled workmen.* [See NEGLIGENCE, 25.]

*Liability of chairman of a public meeting for an assault by an officer acting under his orders.* [See ASSAULT, 1.]

## (b) Whether servant acting within the scope of his employment.

8.—The fact that a passenger in an omnibus is struck by the driver's whip is *prima facie* evidence of negligence by the driver in the course of his employment; and even if it appear that the blow was struck at the servant of another omnibus with whom there had been a dispute, and who had jumped on the omnibus step to get its number, it

is a question for the jury whether the blow was struck by the driver in private spite or in supposed furtherance of his employer's interests. *Ward v. The General Omnibus Company* (Exch. Ch.), 42 Law J. Rep. (N.S.) C. P. 265.

9.—One W. being employed to cart certain iron to a wharf, and the defendant, a stevedore, to ship it on board a ship alongside, the defendant's foreman, who was acting for him, being dissatisfied with the uncarting of the iron by W.'s carters, got into the cart, threw out some iron, and in so doing injured the plaintiff. Two of the plaintiff's witnesses said it was the duty of W.'s carters to put the iron on the ground, and of the stevedore then to take it, and this was the only evidence as to the duty of the defendant and his servants:—Held, by Grove, J., and Deuman, J., that it was a question for the jury whether, in the particular case, the foreman was acting within the scope of his employment; but by Brett, J., that the Judge was bound to say that what was done by him was done before his employment by the defendant commenced. *Burns v. Poulson*, 42 Law J. Rep. (N.S.) C. P. 302; Law Rep. 8 C. P. 563.

10.—The defendants were proprietors of a sewage-farm, of which B. was manager. The farm was separated from the plaintiff's land by a brook. In order to improve the drainage from the farm, and to benefit the neighbourhood, B. scoured the brook, pared down the bank of the plaintiff's land, and cut down the bushes there growing. These acts were trespasses, and B. had no express authority from the defendants to commit them:—Held, that the defendants were not liable to be sued by the plaintiff in respect of the acts above mentioned, as they were not done upon the sewage farm. *Bolingbroke v. The Local Board of Health of Swindon New Town*, 43 Law J. Rep. (N.S.) C. P. 287; Law Rep. 9 C. P. 575.

11.—The plaintiff went to the booking office of the defendants, a railway company, and asked for a passenger's ticket, in order that he might travel upon the railway. B., a ticket clerk in the employ of the defendants, handed to him a ticket, and also money for the change he was entitled to receive. The money so handed to the plaintiff contained a foreign coin, which he refused to receive. B. refused to take it back, and the plaintiff threw it down upon the counter, saying, "I will have my right money." Thereupon B. seized the plaintiff, and gave him into custody, charging him with putting his hand into the till, and attempting to steal money therefrom:—Held, that there was no implied authority from the defendants to give the plaintiff into custody, and that in an action brought by him against the company for false imprisonment, he must be nonsuited. *Allen v. The London and South-Western Railway Company*, 40 Law J. Rep. (N.S.) Q. B. 55; Law Rep. 6 Q. B. 65.

*Scope of employment: railway porter: wrongful removal of a passenger.* [See CARRIER, 2.]

*Liability of railway company for false imprisonment by inspector.* [See FALSE IMPRISONMENT.]

(c) *Liability as against licensee to use premises.*

**12.**—The stations of the defendants and another railway company adjoined and were open to each other, and the passengers by either railway had long been permitted to reach it by passing through the station of the other company. The plaintiff, while so passing across the platform of the defendant's station to get to the other, was injured by a portmanteau, which fell from a truck, owing to the negligence of a porter of the defendants:—Held, without deciding what would have been the case if the accident had happened through the condition of the defendants' premises, that they were liable, as the injury was caused by the misfeasance of one of their servants in the course of his employment, and there was no presumption that the plaintiff had agreed to undergo greater risks than if he had been one of the defendants' passengers. *Tebbutt v. The Bristol and Exeter Railway Company*, 40 Law J. Rep. (N.S.) Q. B. 78; Law Rep. 6 Q. B. 73.

[And see NEGLIGENCE, 23.]

(d) *Dangerous animal: evidence of knowledge of servant.*

*Negligence in custody of animal: scienter: knowledge of servant the knowledge of master.* [See NEGLIGENCE, 1, 2.]

(e) *Negligence of fellow servant: common employment.*

**13.**—There is not, between the owners of a ship and a pilot whom they are compelled to employ, an implied contract that the pilot shall take upon himself the risk of injury from negligence of the shipowner's servants. And where a pilot went on board a vessel, in the course of his duty, in a district in which pilotage is compulsory, and while he was on board, a boat, which had been negligently slung by servants of the shipowners, fell on and killed him:—Held, that his widow could recover in an action against the shipowners brought by her, as executrix, under Lord Campbell's Act. *Smith v. Steele*, 44 Law J. Rep. (N.S.) Q. B. 60; Law Rep. 10 Q. B. 125.

**14.**—The owners of a colliery who have appointed a certificated manager under the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 26, are not liable for an injury to a workman in the colliery caused by the negligence of the manager, as there is nothing in the statute to make him other than fellow workman of the person injured. *Howells v. The Landore Siemens Steel Company*, 44 Law J. Rep. (N.S.) Q. B. 25; Law Rep. 10 Q. B. 62.

## (E) SUMMARY JURISDICTION UNDER MASTER AND SERVANT ACT, 1867.

(a) *Complaint against servant for not entering into service.*

**15.**—Upon complaint against a servant in husbandry under the Master and Servant Act, 1867, 30 & 31 Vict. c. 141, for not entering into service  
DIGEST, 1870-1875.

according to his agreement, the fact that there was no written contract deprives the magistrates of jurisdiction. *Banks v. Crossland*, 44 Law J. Rep. (N.S.) M. C. 8; Law Rep. 10 Q. B. 97.

By the Master and Servant Act, 1867 (30 & 31 Vict. c. 141), s. 3, nothing in the Act is to apply to a contract of service other than a contract within the meaning of the enactments described in the first schedule to the Act. Among these enactments are 20 Geo. 2. c. 19, and 4 Geo. 4. c. 34; and by the last of these (section 3) the power of imprisoning servants in husbandry for breach of contract is conferred upon magistrates, but is (where the breach is not entering into the service) restricted to cases where the contract is in writing and signed by the contracting parties. The appellant, having failed to enter into service according to his contract, was summoned under 30 & 31 Vict. c. 141, before magistrates. It appeared that on the 11th of November, 1873, he was hired verbally as a servant in husbandry for one year, to commence on the 23rd, and received three shillings as his fastening money. The magistrate dismissed the information, holding, first, that it was necessary that the contract should be in writing to satisfy section 4 of the Statute of Frauds; secondly, that under the Master and Servant Act, 1867, above mentioned, the want of a written contract took away their jurisdiction:—Held, that the magistrates were right on both points. *Ibid.*

(b) *Breach of contract to employ.*

**16.**—By a contract between a coal miner and his employer, it was stipulated that the contract should not be determined without a fortnight's notice on either side. The employer dismissed the miner without notice:—Held, that, under section 4 of 30 & 31 Vict. c. 141, he could recover compensation for such breach of contract upon information before justices, charging that the employer had refused to pay the wages due and owing for breach of contract by the employer in not giving a fortnight's notice. *Shaw v. Alderson*, 44 Law J. Rep. (N.S.) M. C. 160.

(c) *Claim for wages.*

**17.**—M. and D., journeymen painters, took out a summons returnable before a justice of the peace for the recovery of a sum of money alleged to be due to them for wages from C., claiming also a further sum as damages for the detention of such wages. The justice heard the summons under the Master and Servant Act, 1867 (30 & 31 Vict. c. 140), s. 9, and dismissed the same upon the merits. M. and D. then issued plaints in the County Court against C. to recover the wages alone, but judgment was given for the defendant on the ground that the case was *res judicata*:—Held (per Cockburn, C.J., Blackburn, J., and Mellor, J., *dissentiente*), that the County Court Judge was right, and that the justice of the peace having jurisdiction under secs. 4 and 9 of the Master and Servant Act, 1867, and having exercised that jurisdiction, the matter was *res judicata*. *Millett*

*v. Coleman; Dawson v. Coleman*, 44 Law J. Rep. (N.S.) Q. B. 194.

Wages due from an employer to a journeyman may be summarily recovered by summons before a justice of the peace under the Master and Servant Act, 1867, secs. 4 and 9, and this although the servant does not make any claim for damages in respect of the non-payment of such wages, but seeks to recover the wages alone. The jurisdiction given to a justice of the peace, "wherever any question, difference or dispute shall arise as to the rights or liabilities of either of the parties," extends to a claim for the non-payment of wages, which may be recovered by such summary process as "compensation or damage." *Ibid*.

Semble—that the provisions of the Master and Servant Act, 1867, giving by inference such a summary remedy, are substituted for the provisions to the same effect of 20 Geo. 2. c. 19, and that, therefore, the proper statute under which to proceed summarily for the recovery of wages is the later Act. *Ibid*.

(d) *Absence without lawful excuse.*

18.—The appellant, a fire-iron forger in the employment of fire-iron manufacturers at Sheffield, was summoned before a magistrate for having absented himself from their service without just cause, or lawful excuse, under the Master and Servant Act, 1867, 30 & 31 Vict. c. 141, s. 9. An order was made directing the defendant to pay 11*l.* 14*s.* as compensation to the complainants. It appeared that on the 25th of February, 1871, the appellant agreed to work for his employers for the term of five years. On the 1st of April, 1873, he was summoned for absenting himself, and ordered to pay 11*l.* 8*s.*, with costs, and the money not being paid he was ordered to be imprisoned in the House of Correction for three months. On the 6th of June, 1873, he was again summoned for not returning to his work, and was ordered to find security to fulfil his contract, and in default was again sentenced to three months' imprisonment. After his liberation he continued to absent himself, and a fresh summons was taken out, and the order appealed against made:—Held, that the previous orders were not a bar to the subsequent complaint, and the order made upon it. *Cutler v. Turner*, 43 Law J. Rep. (N.S.) M. C. 124; Law Rep. 9 Q. B. 502.

### MEDICAL ACT.

1.—Under the Apothecaries Act (55 Geo. 3. c. 194), s. 21, which is not repealed by the Medical Act, 1858 (21 & 22 Vict. c. 90), ss. 31, 32, a member of the College of Surgeons, registered as a surgeon only under the latter Act and having no further qualification, cannot recover for medicines administered by him in a case not requiring surgical treatment. *Leman v. Fletcher*, 42 Law J. Rep. (N.S.) Q. B. 214; Law Rep. 8 Q. B. 319.

2.—A licentiate of the Society of Apothecaries cannot recover his charges for advice and

medicine in a case not requiring surgical treatment, where it appears that at the date of his services he did not possess his qualification, and was not registered under the Medical Act, 1858 (21 & 22 Vict. c. 90), s. 15, though he is so registered on the day of the trial of the action. *Leman v. Houseley*, 44 Law J. Rep. (N.S.) Q. B. 22; Law Rep. 10 Q. B. 66.

The plaintiff was a member of the College of Surgeons, and registered as such under 21 & 22 Vict. c. 90, but had no further qualification. He brought an action for medicines, advice, and attendances in a case not requiring surgical treatment; and it was held by this Court (see last case) that he could not recover, as the Apothecaries Act, section 21, was not repealed by the later Act, which only enabled a physician to recover according to his qualification. Subsequently to this decision the plaintiff was examined for and obtained his diploma as an apothecary, and was placed on the medical register as a medical and surgical practitioner. He then took proceedings to recover the amount due to him for medicines, &c., in a case precisely similar to that of *Leman v. Fletcher*:—Held, that in section 32 of 21 & 22 Vict. c. 90, it was clearly intended that a practitioner should have been examined and have become qualified at the time of the services in respect of which he was allowed to recover; and though, if he were qualified, at the time of his services, he might possibly procure himself to be registered before the trial, he could not cure his want of qualification. *Ibid*.

*Turner v. Reynall* (14 Com. B. Rep. N.S. 328; 32 Law J. Rep. (N.S.) C. P. 164) considered. *Ibid*.

### MERCANTILE LAW AMENDMENT ACT, 1856.

*Seizure by sheriff: "actual seizure."* [See JUDGMENT, 2.]

### MERCHANT SHIPPING ACTS.

[The Merchant Shipping Acts amended and in part repealed. 36 & 37 Vict. c. 85.]

[The same Acts amended as regards unseaworthy ships. 38 & 39 Vict. c. 88.]

The word "ship," in 25 & 26 Vict. c. 63, s. 33, applies to a vessel which substantially goes to sea and only uses oars as an auxiliary power, and where a collision took place between a steamship and a fishing coble of ten tons burthen, twenty-four feet in length, decked forward only, with two moveable masts, and a sail for each, and which was accustomed to go twenty miles out to sea, and to remain out for some hours at a time, and was usually under sail, but was sometimes propelled by oars when convenient, it was held to be a collision between two ships within that section. *Ex parte Ferguson and Hutchinson*, 40 Law J. Rep. (N.S.) Q. B. 105; Law Rep. 6 Q. B. 280.



*Limitation of ship's liability under.* [See SHIPPING LAW, F 23, 24.]  
*Infringement of regulations.* [See SHIPPING LAW, F 25.]

[30 & 31 Vict. c. 6 extended. 34 & 35 Vict. c. 15.]  
 [Repeal of certain enactments as to Metropolitan Police Magistrates. 38 & 39 Vict. c. 4.]  
 [Provisions for the due supply of water to the metropolis. 34 & 35 Vict. c. 113.]

## MERGER.

*Of mortgage term.* [See MORTGAGE, 33.]

## MERSEY DOCK ACTS.

By the Mersey Dock Acts the cargo of any ship from a foreign or colonial port using certain ports must be received, weighed, and loaded off by one set of porters under the direction of a master porter:—Held, that these Acts relate to the possibility of injury in the receiving, weighing, and loading off the goods, and do not alter the legal liability prior to their delivery to the master porter. *The Emilien Marie*, 44 Law J. Rep. (n.s.) Adm. 9.

[And see SHIPPING LAW, P 1.]

## METROPOLIS.

### (A) BUILDINGS.

- (a) *General line of building.*
- (b) *"Vacant ground."*
- (c) *Dangerous structure.*
- (d) *District surveyor's fees.*

### (B) STREETS.

- (a) *Repair of footway over private cellar.*
- (b) *New street.*
  - (1) *Expenses of paving.*
  - (2) *Liability to repair.*
  - (3) *Apportionment of sewers rates.*

### (C) METROPOLITAN COMMONS.

### (D) METROPOLIS GAS ACT, 1860.

[Amendment of the law relating to slaughter-houses and certain other businesses in the metropolis. Absolute prohibition against establishing anew the businesses of blood boiler, bone boiler, manure manufacturer, soap boiler, tallow melter, and knacker. Certain other offensive trades not to be established without sanction of local authority. 37 & 38 Vict. c. 67.]

[The Metropolis Management Acts amended. 38 & 39 Vict. c. 33.]

[Section 3 of the Married Woman's Property Act, 1870, applied to Metropolitan Board of Works Consolidated Stock. 34 & 35 Vict. c. 47.]

[Further provision made respecting the borrowing of money by the Metropolitan Board of Works. 33 & 34 Vict. c. 24.]

[The Metropolitan Board of Works (Loans) Acts amended. 38 & 39 Vict. c. 65.]

[The equal distribution over the metropolis of a portion of the charge for the poor. 33 & 34 Vict. c. 18.]

### (A) BUILDINGS.

#### (a) *General line of building.*

1.—In a proceeding before the magistrate under section 75, for erecting a building beyond the general line of buildings without the consent of the Metropolitan Board of Works, the magistrate is not bound by the decision of the superintending architect of such board as to the general line of buildings, but is at liberty to exercise his own judgment as to what is such general line. *Simpson v. Smith*, 40 Law J. Rep. (n.s.) M. C. 89; Law Rep. 6 C. P. 87.

2.—Where there is a known "owner or occupier," the proper person to proceed against for an infringement of the 75th section of the Metropolis Local Management Amendment Act (25 & 26 Vict. c. 102), is such owner or occupier, and not "the builder," and a summons upon the builder is only valid whilst he is engaged in the work. *Brutton v. The Vestry of St. George, Hanover Square*, 41 Law J. Rep. (n.s.) Chanc. 134; Law Rep. 13 Eq. 339.

The offence, six months after the commission or discovery of which complaint is, under the 107th section of the same Act, to be made, is committed when first an intrusion is made upon the general line of building, and the time begins to run from the day such intrusion is discovered. *Ibid.*

Accordingly, where a vestry on the 25th of August discovered that an owner of a house had on the 24th of August put up the framework of a conservatory which intruded on the space beyond the general line, and was finished on the 23rd of September, but such vestry, not having received the certificate of the superintending architect until the 2nd of the following March, took no step till the 4th of March, when they issued a summons against the builder, who had in the meantime been paid, and had gone abroad,—Held, upon a bill filed by the occupier to restrain demolition, first, that the summons was issued against the wrong person; secondly, that it was out of time. *Ibid.*

3.—The limitation clause, section 107, of 25 & 26 Vict. c. 102, imposing a limit of six months for making a complaint for the payment of any penalty or forfeiture for an offence against that Act, does not apply to a complaint for the erection of a building beyond the general line of buildings of a street without the consent of the Metropolitan Board of Works, contrary to the 75th section of the Act, which provides the means of obtaining an order for the demolition of such buildings. *Brutton v. The Vestry of St. George, Hanover Square* (41 Law J. Rep. (n.s.) Chanc. 134; Law Rep. 13 Eq. 339) upon this point dis-

sented from: *The Vestry of Bermondsey v. Johnson*, 42 Law J. Rep. (N.S.) M. C. 67; Law Rep. 8 C. P. 441.

(b) "Vacant ground."

4.—The "vacant ground" mentioned in section 75 of the Metropolis Management Amendment Act, 1872, does not include ground which is the site of buildings recently pulled down, and the section therefore is inapplicable to such ground. *Auckland v. The Westminster Local Board of Works*, 41 Law J. Rep. (N.S.) Chanc. 723; Law Rep. 7 Chanc. 597.

Some houses were taken by a railway company under their powers, and were pulled down by the company in the course of constructing their line. The site was afterwards sold by the company as building ground:—Held, that the Metropolitan Board of Works had no power under section 75 to restrict the purchaser from covering the whole site of the former houses with buildings. *Ibid*.

The Court will exercise jurisdiction in such a case notwithstanding the statutory powers to apply to a magistrate. *Ibid*.

Semble—that if any control is to be exercised over such building, it must be under the 74th section. *Ibid*.

(c) *Dangerous structure.*

5.—Where the Metropolitan Board of Works, acting under the compulsory powers of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), s. 73, and the Metropolitan Building Act, 1869 (32 & 33 Vict. c. 82), have taken proceedings before a magistrate for the purpose of compelling the owner of a dangerous structure to repair or secure it, they are entitled to recover the reasonable costs of serving the requisite notices on the defendant, but no costs in respect of the forms for such notices, or general office expenses relating to them. *The Metropolitan Board of Works v. Flight*, 43 Law J. Rep. (N.S.) M. C. 46; Law Rep. 9 Q. B. 58.

(d) *District surveyor's fees.*

6.—The fee to which a district surveyor is entitled under the above section "for inspecting the arches or stone floors over or under public ways" is a fee of 10s. in respect of each building to which any given number of arches is intended to be appropriated, and not in respect of each arch. An appeal lies under 20 & 21 Vict. c. 43, from the decision of a magistrate on a summons by a district surveyor, notwithstanding section 106 of the Metropolitan Building Act. *Power v. Wigmore*, Law Rep. 7 C. P. 386.

7.—The appellant laid out part of an estate, of which he was seised in fee, for building purposes. He agreed with L. that so soon as L. should have erected and covered in buildings upon four plots of land, he would demise to L. the several plots of land and the buildings thereon for the term of ninety-nine years, from the 29th of September, 1865, at the rent of a peppercorn, until the 24th of June, 1870, and from

thence at the yearly rent of 28l. during the remainder of the term. The buildings were to be completed by the 24th of June, 1870. This was not done, but the time was extended by the appellant, and the buildings were completed in or about September, 1870. The respondent, the district surveyor, having become entitled to fees in respect of surveying the buildings, claimed them in October from L., and subsequently from the appellant:—Held, that the appellant was not the "owner" of the buildings within the meaning of sections 3 and 51 of 18 & 19 Vict. c. 122, so as to be liable to pay the said fees to the respondent. *Cannell v. Hanson*, 41 Law J. Rep. (N.S.) M. C. 8; Law Rep. 7 Q. B. 55, *nom. Caudwell v. Hanson*.

(B) STREETS.

(a) *Repair of footway over private cellar.*

8.—In front of a house situate in a London square was an area and cellar. The cellar was formed of brick walls, one forming the outer wall of the area, and another running parallel to such outer wall. The covering to the cellar was formed of large flagstones, the ends of which rested on the walls. From the year 1830, when the houses were built and the flagstones were laid down, the flagstones were used by the public as a footway, and became by reason of the traffic worn down, cracked, and dangerous. The vestry called upon the owner to repair the cellar and its covering. He refused to do so, whereupon the vestry did the work, and proceeded against him to recover the expenses:—Held, that the vestry were bound to keep the flagstones in repair, and could not recover from the appellant any part of the expenses of doing so. *Hamilton v. The Vestry of St. George, Hanover Square*, 43 Law J. Rep. (N.S.) M. C. 41; Law Rep. 9 Q. B. 42.

(b) *New street.*

(1) *Expenses of paving.*

9.—On the 1st of January, 1856, when the Metropolis Local Management Act passed, there was an ancient highway and public carriage way in the parish of L., within the district of the Plumstead Board of Works, which from time out of mind had been repaired by the parish. At that time there were two houses adjoining the highway, but distinct from one another. Between the 1st of January, 1856, and the 7th of August, 1862, when the Metropolis Local Management Amendment Act, 1862, passed, twenty-one more houses were built along one side of the highway, some being in a block and some detached. Between 1862 and the 23rd of June, 1869, ninety additional houses were built, of which fifty-six were built on the opposite side. Roads were made intersecting the highway, the said roads being private, and the soil thereof being in the appellant, N. The appellant, P., was the owner of some of the houses. The respondents, the said Board of Works, having determined that the highway should be made into a hard road to an extent greater than it had been

before, and that pathways should be formed, apportioned the amount which was to be paid by N., in respect of the soil of the private roads, and by P. in respect of the houses of which he was the owner:—Held, that the highway was a “new street” within the Metropolis Local Management Acts, and that the respondents had a right to throw upon the appellants the cost apportioned upon them of the work to be done. *Pound v. The Board of Works for the Plumstead District; and Northbrook v. The Same*, 41 Law J. Rep. (n.s.) M. C. 51; Law Rep. 7 Q. B. 183.

10.—By the Metropolis Management Acts, 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, the costs of paving a new street under the compulsory powers of the former Act are payable by the owners of the land and houses abutting upon and forming the street, and are to be apportioned by the vestry or district board of works:—Held, that the strips of land belonging to a railway company abutting upon a street, and kept and used for the sole purpose of repairing the arches of the railway viaduct, were chargeable to the costs of paving the street under the Act, as was also land used only as a buttress for the railway embankment, and to allow for slippings from it. *Higgins v. Harding*, 42 Law J. Rep. (n.s.) M. C. 31; Law Rep. 8 Q. B. 7.

11.—The respondent leased some land for building purposes, and formed a road for the purposes of the houses built on each side of the road. Previous to 1863–1864, the road was occupied by saw pits and building materials. From the year 1863 he placed a barrier across it, with an open space capable of being also closed by a folding bar. He continued the barrier, and frequently prevented the passage of vehicles along the road. Both he and the freeholders objected to the road being a public thoroughfare. The footways on each side of the road were made at the cost of the owners, and repaired by the vestry:—Held, that under these circumstances there had been no dedication of the road to the public, but that nevertheless it was a “new street” within s. 112 of 25 & 26 Vict. c. 102, and within s. 105 of 18 & 19 Vict. c. 120, so that the vestry had a right under the last-mentioned section to call upon the respondent to pay the amount of the estimated expenses of paving the road. *The Vestry of St. Mary, Islington, v. Barrett*, 43 Law J. Rep. (n.s.) M. C. 85; Law Rep. 9 Q. B. 278.

12.—The defendants being owners of land, laid it out for building purposes, and made roads and ways upon and across it communicating with certain ancient highways outside the land. The defendants then sold the land in lots to different purchasers, and conveyed it to them by metes, bounds and admeasurements, set forth on a plan annexed to the conveyance, upon which each lot was numbered. Each lot had a frontage upon one of the roads, and in the conveyance was stated to be situate upon the side of and adjoining such road, but neither the measurements nor the colouring of the plan on the conveyance included any part of the roads, and each lot was in the plan separated from

the road by a line. The roads so set out were dedicated to the public so far as the defendants could, by any act of theirs, dedicate the same, but no proceedings had ever been taken under the Highway Acts to make them repairable by the parish. Part of the roads when built up became streets, and the plaintiffs, the board of works of the district within which the land was situate, paved and improved the streets under the Metropolis Local Management Acts, 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, and apportioned the costs, assessing the defendants in respect of the streets and roads where bounding or abutting on the sides or ends of the streets paved:—Held, by the Court of Queen's Bench, Law Rep. 10 Q. B. 16, first, that it was evident from the conveyance that there was no intention to pass the soil of the road *ad medium filum viæ* to the purchasers of the lot; secondly, that the defendants were liable to be charged in respect of the roads as “owners of land” within the decision in *Northbrook v. The Plumstead Board of Works* (41 Law J. Rep. (n.s.) M. C. 51; Law Rep. 7 Q. B. 183; No. 9 *supra*). But held on appeal to the Exchequer Chamber, reversing the judgment of the Court below on the second point, that, supposing the soil of the roads did not pass by the conveyances, the roads were not, within the meaning of the Act, land bounding or abutting on the streets which they met or intersected, and that therefore the defendants were not liable to contribute to the expense of paving such streets. *Northbrook v. The Plumstead Board of Works distinguished. The Plumstead Board of Works v. The British Land Company*, 44 Law J. Rep. (n.s.) Q. B. 38; Law Rep. 10 Q. B. 203.

13.—By 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, the costs of paving a new street under the compulsory powers of the former Act are payable by the owners of lands as well as the owners of houses abutting on such street, and are to be apportioned by the vestry or district board, “provided that it shall be lawful for such vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do.” A district board made their apportionment and demanded the amount payable by the appellant as an owner of a house, which he refused to pay. On an application before a justice to enforce payment, the appellant objected to the mode of apportionment, and complained that other owners of premises abutting on the street had had the amount of their apportionment fixed as owners of land, when they ought to have been assessed as owners of houses:—Held, that the apportionment by the board was final and conclusive on that point, and could not be questioned before the magistrate. *Nisbett v. The Board of Works of Greenwich*, 44 Law J. Rep. (n.s.) M. C. 119; Law Rep. 10 Q. B. 465, *nom. Nesbitt*.

14.—An unsatisfied judgment recovered by a vestry for the expenses of paving a street under the Metropolis Local Management Acts against a former owner of tenements, is no bar to an action for these expenses against a tenant under a suc-

shore between Flamborough Head and the Spurn Point (formerly in the port of Bridlington suppressed by the said order) placed within them; and in the years 1868 and 1869, by orders under the former Act, persons were prohibited from taking ballast or shingle from certain parts of the shore so added to the port of Hull:—Held, that the powers conferred by 54 Geo. 3. c. 159, s. 14, are not confined to that which is geographically or popularly, or was at the time of the Act part of a particular port, but extended to the port in its legal and proper sense; and that those conferred by 9 & 10 Vict. c. 102, s. 15, are not confined to customs purposes, and that the orders of the years 1868 and 1869 were therefore valid, and persons infringing them liable to the penalty imposed by 54 Geo. 3. c. 159, s. 14. *Nicholson v. Williams*, 40 Law J. Rep. (N.S.) M. C. 159; Law Rep. 6 Q. B. 632.

### HEIRLOOMS.

By a settlement made in 1804 real estate was settled to the use of C., third Earl of Harrington, for life, with remainder to his first son, Lord Petersham, for life, remainder to the first and other sons successively of Lord Petersham, in tail male, with similar remainders in succession, to the eight other sons of the third earl for life, and their respective first and other sons in tail male; remainder to the third earl in fee. By his will made in 1824 the third earl gave chattels upon trust "for the person or persons who for the time being should, under the limitations in the settlement, be in the actual possession of the estates, to the intent that the same chattels might be deemed heirlooms, to go along and for ever be enjoyed with the estates, so far as the rules of law and equity would permit, but so, nevertheless, as that the same chattels should not, as to the effect or purpose of transmission, vest absolutely in any person who under the settlement should become seized of or entitled to the estates for an estate of inheritance either in possession or reversion, or otherwise, unless such person should attain the age of twenty-one, or dying under that age should leave issue inheritable under the limitations in the settlement." The testator gave his residuary personal estate upon trusts for investment in lands to be settled to the same uses as those declared in the settlement of 1804. The first tenant in tail in possession died under twenty-one, within the period allowed by the law as to perpetuities:—Held, that the gift was not an executory bequest:—Held, also, that the proviso that no tenant in tail should take absolutely unless he attained twenty-one, was a condition inseparably annexed to the gift, so that any tenant in tail must take subject to it, and if the proviso was void the whole gift was void. But a tenant in tail having become entitled to the chattels absolutely, either as tenant in tail or under the gift of residue, the House pronounced no opinion on the validity of the gift. *Harrington v. Harrington* (H.L.), 40 Law J. Rep. (N.S.) Chanc. 716; Law Rep. 5 E. & I. App. 87.

By Lord Westbury.—The death of the first tenant in tail in possession under twenty-one having happened within the time allowed by law for the vesting of personalty, the heirlooms on that event under the direction to accompany the real estate, were carried on to the next tenant under the limitations in the settlement. *Ibid*.

### HERIOT.

[See LIMITATIONS, STATUTE OF, 3.]

### HIGHWAY.

- (A) PRESUMPTION OF OWNERSHIP.
- (B) DEDICATION OF HIGHWAY.
- (C) LIABILITY TO REPAIR.
- (D) EXEMPTION FROM HIGHWAY RATE.
- (E) DIVERTING AND STOPPING UP.
  - (a) Notice of vestry meeting.
  - (b) Form of certificate.
  - (c) Notice of appeal.
- (F) NUISANCES AND OBSTRUCTIONS.
  - (a) Right to plough up.
  - (b) Right to carriage way across foot pavement.
  - (c) Invalidity of custom to obstruct.
  - (d) Powers of highway board to dig up highway.
  - (e) Obstruction of navigable lake.
- (G) ENCROACHMENT.
- (H) SURVEYOR OF HIGHWAYS.
  - (a) Liability for negligence.
  - (b) Liability for trespass by order of board.
  - (c) Notice of action against.
  - (d) Mandamus to, to summon a vestry.
  - (e) Surveyor's accounts.
- (I) PERSONAL LIABILITY OF MEMBERS OF HIGHWAY BOARD.

#### (A) PRESUMPTION OF OWNERSHIP.

[See PRESUMPTION.]

#### (B) DEDICATION OF HIGHWAY.

1.—A highway cannot be created by statute unless the provisions of the statute creating it are strictly followed. *Cubitt v. Maxse*, 42 Law J. Rep. (N.S.) C. P. 278; Law Rep. 8 C. P. 704.

By the General Inclosure Act, 41 Geo. 3. c. 109, ss. 8 and 9, the Commissioner, before making the allotments of the land to be enclosed, was to set out such roads as he should judge necessary, and to appoint a surveyor to form and complete the same, and until so formed and completed the parish was not to be bound to repair such roads, but after that time they were to be for ever after kept in repair by the parish. An Inclosure Commissioner appointed to act under a local Inclosure Act, subject to the provisions of 41 Geo. 3. c. 109, duly set out a road which he described in his award made in 1808, but although such road was staked out on the ground and fenced off from the adjoin-

ing allotments on either side, it was never formed and completed as required by the 41 Geo. 3. c. 109, nor was it ever used by the public:—Held, that as the requirements of the statute had not been complied with, the road so set out was not a highway created by statute, and as there had been no user, and therefore no acceptance of the road by the public, it was not otherwise a highway. *Ibid.*

[And see next case.]

### (C) LIABILITY TO REPAIR.

2.—A private road, set out under an inclosure award, may, upon proof of sufficient user by the public before the passing of the Highway Act, 5 & 6 Will. 4. c. 50, be deemed to be a highway which the parish or township is compellable to repair, though the award provides that such road is for ever thereafter to be kept in repair by the owners or occupiers of the adjoining land. *The Queen v. The Inhabitants of Bradfield*, 43 Law J. Rep. (N.S.) M. C. 155; Law Rep. 9 Q. B. 552.

3.—Under 5 & 6 Will. 4. c. 50, s. 23, where a person is about to dedicate a new road to the public, and seeks to make it repairable by the parish, and gives notice to the surveyor that at the end of three months it will be dedicated, it is the duty of the surveyor to call a vestry meeting of the inhabitants of the parish, and if such meeting decides that the road is not of sufficient utility to justify its being kept in repair at the expense of the parish, it is his further duty to summon the party proposing to dedicate before the justices at the next special sessions for highways, who are to decide on the question of the utility of the road; but if the surveyor omits to summon the party, at the next special sessions after such vestry meeting, the parish is not liable to repair the road, and a mandamus will not lie to the justices, after such special sessions have been passed over, and after the three months mentioned in the notice have expired, to view and certify that the road has been substantially made. *The Queen v. Bagge and another, Justices of Norfolk*, 44 Law J. Rep. (N.S.) M. C. 45.

Semle—a mandamus would lie to the surveyor to summon the vestry or the party before the special sessions, and semle per Blackburn, J., after the three months had expired. *Ibid.*

*Highway repairable by the inhabitants at large within the Public Health Act, 1848, sec. 69.* [See PUBLIC HEALTH, 12, 14.]

### (D) EXEMPTION FROM HIGHWAY RATE.

4.—An occupier of land, forming part of a highway district, who claims exemption from highway rates, must shew that there is some consideration for such exemption, and it is not sufficient to shew that none of the inhabitants of the land, or the occupiers thereof, have ever paid highway rates, or done statute work, or paid composition in lieu of highway rates.—Lush, J., *dissentiente*. *The Queen v. Rollitt*, 44 Law J. Rep. (N.S.) M. C. 190; Law Rep. 10 Q. B. 469.

### (E) DIVERTING AND STOPPING UP.

#### (a) Notice of vestry meeting.

5.—By the Highways Act, 5 & 6 Will. 4. c. 50, s. 84, “when the inhabitants, in vestry assembled, shall deem it expedient that any highway should be stopped up, diverted or turned . . . the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to the justices to view the same, &c.” (specifying other proceedings for stopping up or diverting the highway). By 58 Geo. 3. c. 69, s. 1, no vestry shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel, &c.

Notice of a vestry meeting was given in the words following:—“Hamlet of Trevecca.—I, the undersigned, hereby give notice that a meeting of the ratepayers of the above hamlet will be held at the Vestry Room, &c. . . . for the purpose of taking into consideration the proceedings now taken by Mr. John Parry, of —, against Mr. Rhys Davies, surveyor of the Talgarth District Highway Board, respecting Blaenanbach Road, and for other purposes connected with the highways of the above hamlet.”

The meeting so convened passed a resolution that the road should be stopped up, under the Highways Act, 5 & 6 Will. 4. c. 50, s. 84:—Held, that, having regard to the fact that proceedings had been taken for compelling the parish to repair the highway, the notice sufficiently informed the public that any steps which might be necessary for defeating these proceedings, such as stopping up the highway, would be considered by the vestry, and that the meeting was therefore duly convened. *The Queen v. Powell*, 42 Law J. Rep. (N.S.) M. C. 129; Law Rep. 8 Q. B. 403.

#### (b) Form of certificate.

6.—A certificate of two justices relative to the stopping up of a highway did not state that the surveyors, at whose request, it was alleged, the justices viewed the highway, had first duly obtained the consent of the inhabitants in vestry assembled to the proposed stopping up of the highway, after a notice in writing from the party desirous of stopping up the same, requiring the surveyors to convene a meeting of the vestry for the purpose of obtaining such consent, or that the surveyors were, at the time of the said request to view, in possession of and acting under an order in writing of the chairman of a meeting of the inhabitants in vestry assembled:—Held, in opposition to the dictum in *The Queen v. The Justices of Worcestershire* (3 E. & B. 477; 23 Law J. Rep. (N.S.) M. C. 113) that the certificate was not bad for not containing statements as to these matters. *The Queen v. Hervey*, 44 Law J. Rep. (N.S.) M. C. 1; Law Rep. 10 Q. B. 46.

[And see next case.]

respect the Vice-Chancellor that the right of working the clay must be exercised, if at all, in such a manner as not to injure the surface. *Hext v. Gill*, 41 Law J. Rep. (n.s.) Chanc. 761; Law Rep. 7 Chanc. 699.

6.—Lessees of lands subject to clauses reserving to the lessor the minerals with power to work them, making compensation, bought the reversion subject to similar clauses, which reserved the minerals with working powers of an extensive character, and provided for compensation for damage or spoil to the ground thereby:—Held, that the true construction of the particular deed was that the compensation was to be made, not merely as to future workings, &c., but also for subsequent damage accruing from the future use of existing workings, &c., and that such compensation was to be assessed with reference to the marketable value of the land, taken or damaged, for all purposes to which it was reasonably applicable, without regard to the powers of working, &c., to which it was subject, and that there was no restriction on increasing the weight in the mines. *Mordue v. The Dean and Chapter of Durham*, 42 Law J. Rep. (n.s.) C. P. 114; Law Rep. 8 C. P. 336.

7.—A plot of land was conveyed to a purchaser for the purpose of erecting a cotton mill thereon, in consideration of a perpetual rent and certain covenants by the purchaser. One of such covenants was, that the purchaser should erect and keep in repair a cotton mill upon the land. The conveyance contained a reservation to the vendor of the mines and minerals under the land, with full liberty to search for and carry away the same at pleasure, but without entering upon the surface of the land, so that compensation should be made for all damage done to the buildings on the land by the exercise of the excepted liberties. In a suit instituted by the surface owner to restrain the mine owner from working the mines so as to let down the surface and injure the buildings thereon,—Held (affirming the decision of Jessel, M.R.), that the owner of the minerals was entitled to take them all away, and in so doing, to let down the surface, subject to the obligation of making compensation for the damage done to the surface owner. *Aspden v. Seddon*, 44 Law J. Rep. (n.s.) Chanc. 359; Law Rep. 10 Chanc. 394.

#### (C) COVENANTS AS TO WORKING.

8.—A covenant in a coal mining lease to work and carry on the mines in a proper and workmanlike manner, is not to be construed as a covenant to continue working. Nor under such a covenant is the lessee bound to sink a pit if he can carry on the works by headings from an adjoining colliery. *Jegon v. Vivian*, 40 Law J. Rep. (n.s.) Chanc. 389; Law Rep. 6 Chanc. 472.

9.—Lease of three mines with covenant by the lessees to work the mines with their utmost skill, in the best manner and to the best advantage, and according to the common mode of carrying on collieries with effect:—Held, that the lessees were entitled to work any of the mines without working the others, and to discontinue

working those which they had commenced to work, and, there being evidence that such practice was common in the district, to work a lower mine before working a higher. *Lord Abinger v. Ashton*, Law Rep. 17 Eq. 358.

10.—The plaintiff, by deed, demised to the defendant certain veins of clay under certain lands of the plaintiff, with liberty to enter upon the lands for the purpose of getting the clay for a certain term, paying a certain royalty per ton for the clay dug. After covenants on the part of the defendant to pay the royalty, to cause the clay dug to be conveyed away by a certain canal to make trials for clay, to fill up pits, and not to assign, there followed a covenant by him to dig an aggregate amount of not less than 1,000 tons, nor a larger quantity than 2,000 tons of clay in each year. The plaintiff sued for a breach of this last covenant, alleging that the defendant did not dig an aggregate amount of clay of not less than 1,000 tons in each year. The defendant pleaded for a defence on equitable grounds that he could not dig such an aggregate amount, because there was not such an amount of clay under the land, and that the performance of the covenant was impossible, and that at the time of making the covenant the impossibility was unknown to the defendant:—Held, on demurrer, that the plea was good, and that the defendant's covenant only amounted to a stipulation as to the rate at which the clay was to be raised if found, and did not amount to a warranty that clay to the amount of at least 1,000 tons in each year could be dug on the land. *Clifford v. Watts*, 40 Law J. Rep. (n.s.) C. P. 36; Law Rep. 5 C. P. 577.

#### (D) DAMAGES FOR WRONGFUL WORKING.

11.—Where a coal mine has been worked by a trespasser, but under a *bonâ fide* claim of title, in taking an account of the coal wrongfully worked, he will be allowed to deduct the cost of getting and severing the coal, as well as the cost of bringing it to the pit's mouth. *Jegon v. Vivian*, 40 Law J. Rep. (n.s.) Chanc. 389; Law Rep. 6 Chanc. 472.

12.—Where a trespasser had been working a coal mine, under a *bonâ fide* claim of title, he was allowed in taking an account of the coal wrongfully worked to deduct the cost of getting and severing the coal as well as of raising it to the pit's mouth. But where there was no such claim, the landowner was held entitled to the value of the coals taken from under his land, with an allowance for raising, but none for getting, and to compensation as wayleave and royalty for all minerals taken from the defendant's own mines, and carried under his land. *Jegon v. Vivian*, 40 Law J. Rep. (n.s.) Chanc. 382; Law Rep. 6 Chanc. 742; 19 W. R. 365; and *Phillips v. Homfray*. *Fothergill v. Phillips*, Law Rep. 6 Chanc. 770.

13.—The measure of damages for wrongfully taking coal from the mine of an adjoining owner is, in the absence of fraud, the market value of the coal at the pit's mouth, deducting the actual

disbursements for severing and raising the coal. *In re the United Merthyr Collieries Company*, Law Rep. 15 Eq. 46.

14.—The defendants wrongfully broke through the boundary of their coal mine in the adjoining mine of the plaintiffs, and got therefrom a quantity of the plaintiff's coal. On a bill for an account and damages,—Held, that an account must be taken of the market value of such coal at the pit's mouth, the plaintiffs making to the defendants all just allowances for the costs of bringing the coal to the pit's mouth, but not for the costs of getting or severing the coal, and there must also be an enquiry as to damages. *The Llynor Coal and Iron Company v. Brogden*, 40 Law J. Rep. (n.s.) Chanc. 46; Law Rep. 11 Eq. 188, *nom. Llynvi Company v. Brogden*.

*Damage by working: vendor and purchaser: covenants for title, quiet enjoyment, and against incumbrances: covenant enuring to appointee of covenantee.* [See COVENANT, 5.]

#### (E) DAMAGE BY ESCAPE OF WATER.

15.—The lessees of the C. colliery being in possession of other mines adjoining, and to the rise of the C. mine, worked the C. mine by drivings from their own mine, and in exercise of powers contained in their lease made a channel through which the water flowed from their own to the C. mine by gravitation:—Held, that they were not liable to make compensation for damage caused by the water so flowing. *Jegon v. Vivian*, 40 Law J. Rep. (n.s.) Chanc. 389; Law Rep. 6 Chanc. 472.

16.—There was a hollow upon the surface of the defendants' land, caused by subsidence of the ground from their mining operations underneath. Across the land ran a brook, the course of which had been diverted and improved by the defendants. During an unusual flood, the hollow became filled with water from—first, the direct rainfall; second, the surface of the land; and third, the overflow of the diverted brook, which burst its banks. The waters thus gathered in the hollow sank, through chinks, and a cut made at the bottom by the defendants for the purpose of quarrying ore, down into their mine, and thence flowed into the adjoining mine of the plaintiff, which was on a lower level. He brought an action for the damage so done. At the trial, the above facts having been proved, the defendants proposed to give evidence to shew that, but for the diversion of the brook, more water would have escaped from it into the hole, and greater harm would have resulted to the plaintiff. The Judge ruled that such evidence would be immaterial, that the case was within *Rylands v. Fletcher* (34 Law J. Rep. (n.s.) Exch. 177; and 35 *ibid.* 154; Law Rep. 3 E. & I. App. 330), and that the defendants, having suffered the water to collect in the hollow, were absolutely liable for the consequences. The Court of Exchequer having confirmed this ruling,—Held, by the Exchequer Chamber, that the Judge stopped the case too soon, and, as,

if the defendants had adduced their evidence, there might have been a question for the jury, the cause must be tried anew; that at the second trial a distinction should be made between the divers waters which gathered in the hole, viz., the rainfall, surface and brook waters; and also that the opinion of the jury should be taken as to whether the mining operations of the defendants had been done in the reasonable, ordinary, and proper course of working the mine. *Smith v. Fletcher*, 43 Law J. Rep. (n.s.) Exch. 70; Law Rep. 9 Exch. 64.

17.—The plaintiff was lessee of a coal mine near Wigan. The defendants had recently become possessors of a field, called Eccles Field, and some other mines under it, at a little distance from the plaintiff's mine. The river Douglas flowed over the surface of the defendants' mines which were in the same dip with, but higher up than, that of the plaintiff. The object of the suit was to restrain the defendants from so working their mines, digging shafts, and proceeding to other operations, as to let in the river water to their mines, and from them, to the plaintiff's mine. The defendants demurred to the bill, but the demurrer was overruled. The authorities on the subject reviewed. *Crompton v. Lea*, 44 Law J. Rep. (n.s.) Chanc. 69; Law Rep. 19 Eq. 115.

*Rights of owner of coal mines under canal: liability of canal company.* [See CANAL, 1.]

#### (F) CUSTOM OF CORNWALL.

18.—By the custom of Cornwall, an adventurer in a cost-book mine, upon relinquishing his shares and discharging his proportion of the company's liabilities at that date, is entitled to be paid within two years his share of the then value of the stock and plant, and if the assets have been exhausted within the two years in payment of the company's debts, he is entitled to be paid by contributions from the continuing adventurers. *In re the Prosper United Mining Company; Palmer's case*, Law Rep. 7 Chanc. 286.

#### (G) ACCOUNT AGAINST MINING ASSOCIATION.

19.—Land was held under a lease by a person as trustee for a number of partners, who were not incorporated, but constituted an association for mining purposes:—Held, that the Court of Chancery had jurisdiction to decree an account against the association as equitable lessees of the land. *Wright v. Pitt*, 40 Law J. Rep. (n.s.) Chanc. 558; Law Rep. 12 Eq. 408.

#### (H) NEGLIGENCE OF STATUTORY REGULATIONS.

20.—The 23 & 24 Vict. c. 151, s. 10, provides as a general rule to be observed in a coal mine by the owner and agent that whenever safety lamps are required to be used in a mine they shall be examined and securely locked by a person duly authorised. Section 22 enacts that if any general rule shall be neglected or wilfully violated by any owner, agent or viewer, he shall be liable to a

pecuniary penalty. Safety lamps were given out in a mine to which the above Act applied without being duly locked; a competent lampman had been appointed, and there was no personal default in either the owners or the agent of the mine:—Held, that the owners and the agent of the mine were not liable to be convicted under the above statute. *Dickinson v. Fletcher*, 43 Law J. Rep. (N.S.) M. C. 25; Law Rep. 9 C. P. 1.

*Free miners of Forest of Dean.* [See FOREST OF DEAN.]

*Mining lease: arbitration clause.* [See ARBITRATION, 7.]

*Rateability to poor rate of surface land used in working mine.* [See RATE, 9.]

*Non-rateability of iron mines to poor rate.* [See RATE, 8.]

*Coal Mines Regulation Act.* [See MASTER AND SERVANT, 14.]

*Mining Act of Victoria.* [See COLONIAL LAW, 36, 37.]

### MISDEMEANOUR.

By the Epping Forest Amendment Act, 1872, the Epping Forest Commissioners were authorised to make orders prohibiting, until the expiration of the session of Parliament next after they should have made their final report under the Epping Forest Act, 1871, any inclosures of any lands within the forest, not inclosed before the passing of the Epping Forest Act, 1871; and for the prevention of any waste, injury, or destruction of vert, herbage, tree, shrubs or other growing things in or upon any land within the forest, subject in their judgment to any forestal or common rights. The Commissioners made an order that, until the expiration of the session of Parliament next after they should have made their final report under the Epping Forest Act, 1871, "All persons whosoever be, and they are hereby, prohibited from committing any waste, injury or destruction of, or to the vert, herbage, trees and shrubs, or other growing things in or upon the waste lands of Epping Forest aforesaid within the manor of Theydon Bois, in the county of Essex (including inclosures of waste lands within the said manor made within twenty years next preceding and since the 21st of August, 1871), and all which lands are distinguished on the plan hereto annexed by the colour green." The defendant, who was in occupation as tenant, of a piece of land which was part of that coloured green on the plan, and had been inclosed before the passing of the Act of 1871, but within the twenty years previous, committed waste by digging marl and clay, and was indicted for a misdemeanour in doing so contrary to the order of the commissioners:—Held, that the order was rightly made, and that a breach of it was an indictable offence punishable as a misdemeanour at common law. *The Queen v. Walker*, 44 Law J. Rep. (N.S.) M. C. 169; Law Rep. 10 Q. B. 355.

### MISTAKE.

Where money has been voluntarily paid under a mistake the remedy is at law and not in equity. *Lamb v. Cranfield*, 43 Law J. Rep. (N.S.) Chanc. 408.

*Mistake as to English law no defence.* [See ACTION, 6.]

### MORTGAGE.

- (A) VALIDITY OF MORTGAGE.
  - (a) *Mortgage by trustee under power.*
  - (b) *Mortgage by company.*
- (B) LEGAL RIGHTS OF MORTGAGEE.
- (C) WHAT PROPERTY PASSES.
  - (a) *Stock-in-trade: inventory.*
  - (b) *Fixtures.*
- (D) AGREEMENT NOT TO CALL IN MORTGAGE MONEY.
- (E) MORTGAGE BY WAY OF TRUST FOR SALE.
- (F) MORTGAGE OF POLICY OF INSURANCE.
- (G) MORTGAGE OF SHIP OR FREIGHT.
- (H) POWER OF SALE.
  - (a) *Whether extinguished on transfer.*
  - (b) *Right to surplus proceeds of sale.*
  - (c) *Effect of sale on mortgagee's legal rights.*
  - (d) *Sale of minerals apart from surface.*
- (I) PRIORITIES OF MORTGAGEES.
  - (a) *Effect of fraud or suppression.*
  - (b) *Priority by obtaining legal estate.*
    - (1) *Neglect to examine title deeds.*
    - (2) *Mortgage by underlease: assignment of reversion.*
  - (c) *Notice of sequestration.*
  - (d) *Chose in action: commission in the army: notice.*
  - (e) *Constructive notice.*
  - (f) *Further advances with notice of subsequent charge.*
  - (g) *Priority as between equitable mortgagee and creditor obtaining charge.*
  - (h) *As between depositors of earlier and later title deeds.*
  - (i) *Postponement of mortgagees under sec. 5 of Partnership Act, 1875.*
  - (k) *Priority by registration.*
  - (l) *Irish Registration Act.*
- (K) CONSOLIDATION OF SECURITIES.
- (L) MARSHALLING.
- (M) PRIMARY AND COLLATERAL SECURITIES.
- (N) MERGER OF MORTGAGE TERM.
- (O) ACCOUNTS.
  - (a) *Appropriation of balances.*
  - (b) *Mortgage of live stock.*
  - (c) *Discounts on renewal of bill.*
- (P) EQUITABLE MORTGAGE.
  - (a) *Remedy of equitable mortgagee.*
  - (b) *Deposit of share or stock certificates.*
  - (c) *Deposit of title-deeds and memorandum.*
- (Q) TRANSFER OF MORTGAGE.
- (R) TITLE DEEDS.
- (S) FORECLOSURE AND REDEMPTION SUITS.
  - (a) *Parties: judgment creditors.*
  - (b) *Foreclosure decree.*



- (1) *Jurisdiction.*
- (2) *Turning into decree for sale.*
- (3) *Form of: disputes between defendants.*
- (c) *Opening foreclosure.*
- (d) *Redemption suit.*
  - (1) *Refusal of mortgagee to account.*
  - (2) *Effect of dismissal of suit.*
- (e) *Costs.*
  - (1) *Interest on.*
  - (2) *Administration suit by mortgagee.*
  - (3) *In general.*

## (T) JURISDICTION UNDER TRUSTEE ACT.

[Mortgagors having no notice from their mortgagees of their intention to enter into possession, enabled after the 2nd of November, 1874, to sue in their own names as to the possession of the land. 36 & 37 Vict. c. 66, s. 25.]

[The legal personal representative of a mortgagee of freeholds or copyholds may now, on payment of all sums secured by the mortgage, convey or surrender, whether the mortgage be in form an assurance subject to redemption or an assurance upon trust. Protection and priority by legal estates and tacking henceforth abolished. 37 & 38 Vict. c. 78, s. 4.]

## (A) VALIDITY OF MORTGAGE.

(a) *Mortgage by trustee under power.*

[See POWER, 28.]

(b) *Mortgage by company.*

1.—A charge on future book debts, under a power to mortgage the property of a company, was upheld. *Bloomer v. The Union Coal and Iron Company*, 43 Law J. Rep. (N.S.) Chanc. 96; Law Rep. 16 Eq. 383.

*Company: power to mortgage unless expressly prohibited.* [See COMPANY D, 45.]

*Mortgage by executor.* [See EXECUTOR, 12, 13.]

## (B) LEGAL RIGHTS OF MORTGAGEE.

2.—To an action by a mortgagee on the mortgagor's covenant to pay the debt, the action being brought to recover the balance due to the mortgagee, after giving credit for the money realised on the sale of the mortgaged property, the defendant pleaded, by way of equitable defence, a plea which shewed that the plaintiff had taken possession of the mortgaged property, and had sold the same under the power of sale contained in the mortgage, and had thereby, as the plea alleged, deprived the defendant of his right to have such property re-conveyed to him upon payment of the money and interest due on the mortgage. This plea was pleaded under a master's order, which gave the plaintiff liberty to reply and demur thereto. Instead of demurring, the plaintiff applied for and obtained an order from a Judge to strike the plea out :—Held, that such Judge's order was rightly made, as the plea was clearly bad,

since it did not shew that sufficient had been realised by the sale to satisfy the debt. *Rudge v. Richens*, 42 Law J. Rep. (N.S.) C. P. 127; Law Rep. 8 C. P. 358.

## (C) WHAT PROPERTY PASSES.

(a) *Stock-in-trade: inventory.*

3.—In this case there was a mortgage of an iron foundry, and fixtures, and working plant thereon, as specified in an inventory, which was to be read and construed with the deed. The inventory included "stock-in-trade," which was not mentioned in the deed. A petition for liquidation was filed by the mortgagor, and thereupon the stock-in-trade was claimed by both the mortgagee and the trustee in the liquidation :—Held (affirming the decision of the County Court Judge), that the inventory could not, contrary to the intention of the parties, be allowed to enlarge the operation of the deed, and that as it was not, as a matter of fact, intended that the stock-in-trade should be included in the mortgage, it passed to the trustee. *Ex parte Jardine; In re M'Manus*, 44 Law J. Rep. (N.S.) Bankr. 58; Law Rep. 10 Chanc. 322.

(b) *Fixtures.*

[See that title.]

## (D) AGREEMENT NOT TO CALL IN MORTGAGE MONEY.

4.—Where an agreement is made between an intending mortgagor and mortgagee that the mortgage debt shall not be called in for a certain term, that arrangement must be understood, although it is not so expressed, to be conditional upon the punctual payment of interest; and if a mortgage deed had to be settled by the Court in pursuance of such an agreement, the deed would be worded so that the mortgagee would only be bound to continue the loan so long as the interest was duly paid. *Seaton v. Twyford*, 40 Law J. Rep. (N.S.) Chanc. 122; Law Rep. 11 Eq. 591.

Where, therefore, a mortgagee who was bound by such an agreement, before the expiration of the term for which it was agreed the debt should not be called in, but after the mortgagor's default in the payment of interest, recovered judgment in an action at law for the whole amount of his principal and interest, the Court refused a motion to stay execution, except upon the terms of the mortgagor's paying into Court the whole amount recovered in the judgment. *Ibid.*

## (E) MORTGAGE BY WAY OF TRUST FOR SALE.

5.—A mortgage of real estate made by way of a conveyance to a trustee, upon trust to sell at discretion and out of the proceeds of sale to pay the mortgage debt, and to pay the surplus moneys to the mortgagor, does not constitute an express trust in favour of the mortgagor, within the 25th section of the Statute of Limitations, 3 & 4 Will. 4. c. 27. *Locking v. Parker*, 42 Law J. Rep. (N.S.) Chanc. 257; Law Rep. 8 Chanc. 30.

Under such a mortgage the only right of the

mortgagor is to redeem, and he cannot file a bill for a sale. The only right of the mortgagee is to have the property sold, and he is not entitled to foreclose. *Ibid.*

The mortgagor's right to redeem under such a mortgage is barred by twenty years' possession by the mortgagee without any acknowledgment of the mortgagor's title. *Ibid.*

#### (F) MORTGAGE OF POLICY OF INSURANCE.

6.—The mortgagees from G. and C. of a policy of insurance on the life of G. which was settled on C. for life for her separate use, without power of anticipation, and after her death upon such trusts as she should appoint, having, during the life of G., paid the premiums on the policy:—Held, that they were entitled, on the death of G., to be at once repaid the sums so advanced with interest at four per cent., as in the nature of salvage moneys. The mortgage provided for interest at five per cent.:—Held, that the mortgagees had a right to have the extra one per cent. on the sums advanced charged on the policy moneys on the death of C. *Gill v. Downing*, Law Rep. 17 Eq. 316.

[And see INSURANCE, 6.]

#### (G) MORTGAGE OF SHIP OR FREIGHT.

[See SHIPPING LAW, O; I 16, 17.]

#### (H) POWER OF SALE.

##### (a) *Whether extinguished on transfer.*

7.—A mortgage deed, dated the 15th of June, 1825, contained a covenant to pay the mortgage debt twelve months after date, with a power of sale in case of default. A transfer of the mortgage, dated the 2nd of July, 1830, recited that the old power of sale had not been and was not intended to be exercised, and contained a covenant to pay the mortgage debt seven years after that date, with a power of sale in case of default, and also assigned the debt and all powers and remedies for recovering the same and all the benefit of the previous mortgage:—Held (reversing the decision of the Master of the Rolls), that the old power was not extinguished. *Boyd v. Petrie*, 41 Law J. Rep. (n.s.) Chanc. 378; Law Rep. 7 Chanc. 385.

##### (b) *Right to surplus proceeds of sale.*

8.—After the death of a mortgagor insolvent, the mortgagees of a policy on the life of the mortgagor, taken in their names, received the policy moneys. After satisfaction of their mortgage debt, they had a balance in their hands; this they claimed to retain against the executor of the mortgagor, to satisfy an unsecured simple contract debt due from the mortgagor to them:—Held, that they were entitled to do so. *In re Hazlefoot's Estate; Chauntler's Claim*, 41 Law J. Rep. (n.s.) Chanc. 286; Law Rep. 13 Eq. 327.

##### (c) *Effect of sale on mortgagee's legal rights.*

[See *supra*, No. 2.]

##### (d) *Sale of minerals apart from surface.*

9.—Mortgagees of real property, except the minerals, were allowed upon petition to exercise their power of sale by selling apart from the minerals, although a bill for foreclosure had been filed by them, and subsequent incumbrancers and persons interested in the equity of redemption opposed the petition. *In re Wilkinson's Mortgaged Estates*, 41 Law J. Rep. (n.s.) Chanc. 392; Law Rep. 13 Eq. 634.

#### (I) PRIORITIES OF MORTGAGEES.

##### (a) *Effect of fraud or suppression.*

10.—The plaintiff in the year 1865 entered into a partnership with L., the terms being that L. should bring in as capital the business premises, to be taken at a valuation, and so much money as might be required to make up 6,000*l.*, and that the plaintiff should bring in 6,000*l.* and pay a certain premium to L. The defendant, J. C., acted as solicitor for L. in this transaction, and furnished the valuer with the particulars of his interest in the business premises. Four years afterwards L. became bankrupt, having drawn all his capital out of the partnership, and being in debt to it at the time; and the defendant, J. C., then informed the plaintiff that he and his brother, F. C., held a mortgage on L.'s interest in the business premises for 850*l.*, the sum advanced being trust money. This mortgage had been created before the partnership was agreed upon, and neither J. C. nor L. had ever mentioned it to the plaintiff, nor was it noticed in the particulars furnished to the valuer, and the interest had been paid upon it by L. in cash, or by cheques on his private account:—Held, that J. C. was bound to make good to the plaintiff the amount of the mortgage and any interest he might have to pay on it, and that he must pay the costs of the suit. *Sterry v. Combs*, 40 Law J. Rep. (n.s.) Chanc. 595.

11.—D., a second mortgagee, with a power of sale, was fraudulently induced by his confidential solicitor to join with the first mortgagee in executing a conveyance upon a pretended sale to the solicitor, and to sign a receipt for the purchase-money; but no money was paid to him, the solicitor representing that it was a mere matter of form, and that the mortgages would remain as before. The solicitor afterwards deposited the deeds with C. by way of equitable mortgage:—Held, affirming the decision of the Court below (Law Rep. 11 Eq. 292), that D. having by his negligence enabled the solicitor to commit the fraud, C.'s equitable mortgage was entitled to priority. *Hunter v. Walters; Curling v. Walters; Darnell v. Hunter*, 41 Law J. Rep. (n.s.) Chanc. 175; Law Rep. 7 Chanc. 75 (and see *Angas v. Lee*, *ib.* 79 *n.*).

12.—In 1856 H. and C., who were trustees of a settlement, lent 7,700*l.* on mortgage of freehold lands belonging to S., the mortgage being for three years certain. C. was a solicitor, and acted in the matter both for the trustees and for S., and took possession of the title-deeds on behalf of the trustees, and paid the interest as it became due to the cestui que trust. In 1859, before the three

years had expired, S. sold part of the property in mortgage to three purchasers. The mortgage was not disclosed and S. purported to convey the legal estate to the respective purchasers in consideration in the whole of 3,080*l.*, C. again acting as solicitor to S. Such title-deeds as related only to the parts sold were handed to the respective purchasers. Between S. and C. there was a running account, and S. paid to C. the 3,080*l.*, C. giving to S. a receipt signed by him on behalf of himself and his co-trustee, H., who he alleged was abroad. H. was in England, but knew nothing of these transactions. In 1870 S. contracted to sell another part of the property in mortgage to P. for 1,500*l.* He declined on this occasion to conceal the mortgage, and pressed C. to obtain for him a re-conveyance of the parts already sold. C. then informed S. that he had appropriated the 3,080*l.*, and lost it. He then represented to H. that S. had sold different parts of the property to purchasers for 3,080*l.* and 1,500*l.* and obtained from H. a conveyance to P. of the part agreed to be sold to him, and a re-conveyance to S. of the parts sold for 3,080*l.* in order that S. might convey to the purchasers. The conveyance to P. was then completed with the knowledge of S., and the re-conveyance was handed to S. C. was to have paid the whole of the money to a joint account, but he failed to do so, and absconded taking the mortgage-deed with him. Before S. had conveyed the legal estate to the purchasers H. filed his bill against C., S., and all the purchasers:—Held, affirming the decree of Bacon, V.C. (43 Law J. Rep. (n.s.) Chanc. 169; Law Rep. 18 Eq. 215), that the purchasers were purchasers only of an equity of redemption, and that they could not avail themselves of the legal estate, the re-conveyance of which had been procured by fraud; that H. was entitled to have the re-conveyance to S. cancelled, and an account taken of what was due on the mortgage security, and also to a decree that the amount found due should be paid by S. But held, varying the same decree, that upon default of payment by S. and on the purchasers (except P.) failing to pay such amount, H. was entitled to a foreclosure (except as to the parts sold to P.) instead of a sale as directed by the Vice-Chancellor. *Heath v. Crealock*, 44 Law J. Rep. (n.s.) Chanc. 157; Law Rep. 10 Chanc. 22.

Held, also, varying the same decree, that the purchasers could not be ordered to deliver up the title-deeds in their possession, the rule being that from a purchaser for value without notice the Court takes nothing away which he has honestly acquired. *Ibid.*

If a purchaser on the completion of his purchase acquires a defective title, that defective title cannot afterwards be strengthened either by his own fraud or the fraud of any other person. *Ibid.*

13.—T. W., a solicitor, was the acting trustee of a settlement. Part of the trust funds was invested in a first legal mortgage, in the names of T. W. and his co-trustee, of property belonging to J. C., a client of T. W. At the request of J. C., who was pressed by his bankers for security for

his overdrawn account, T. W. gave up to him the title-deeds, in order that he might deposit them with the bankers, a promise being then made by J. C. to substitute another security, which was never done. Nothing was said by T. W. to his co-trustee or his cestuis que trust. J. C. deposited the title-deeds with his bankers, suppressing the mortgage. Before accepting the deposit, the bank required a certificate of title from some solicitor, and, at the suggestion of J. C., they applied to T. W., who gave a certificate that J. C. had a good title. J. C. and T. W. having both died insolvent, upon bill filed by the surviving trustee, and his cestuis que trust, against the bank, to establish the first mortgage, and to obtain delivery of the deeds,—Held, that the bank were purchasers without notice, not being affected by notice through T. W., and that a simple foreclosure decree only could be made, as in *Heath v. Crealock* (44 Law J. Rep. (n.s.) Chanc. 157; Law Rep. 10 Chanc. 22), and that no order could be made as to the deeds. *Waldy v. Gray*, 44 Law J. Rep. (n.s.) Chanc. 394; Law Rep. 20 Eq. 238.

### (b) Priority by obtaining legal estate.

#### (1) Neglect to examine title deeds.

14.—A. bought an estate and received the title-deeds tied up in a parcel: thereupon he took out the four latest deeds, including the conveyance to himself, and deposited them with the plaintiff by way of equitable mortgage: subsequently, having tied up the remaining deeds in the old wrapper, he deposited them with his bankers to secure the balance owing to them. In April, 1866, being indebted to the defendant, A. promised to give him a mortgage of the estate, and told him and H., who acted as solicitor for both, that the deeds were at the bank as a security. H., with 400*l.* supplied by the defendant, paid off the bank, and obtained the parcel on the 1st of May, 1866, when he was told that it had never been examined by the bank. H. kept the parcel in his possession without opening it till the 12th of May, 1866, when a legal mortgage was executed to A., who, as well as H., was still ignorant of the absence of the title-deeds. The 400*l.* was afterwards repaid to the defendant by A. The plaintiff having filed this bill against the defendant, seeking to foreclose him, it was dismissed with costs. *Ratcliffe v. Barnard*, 40 Law J. Rep. (n.s.) Chanc. 777; Law Rep. 6 Chanc. 652: affirming the Master of the Rolls, 40 Law J. Rep. (n.s.) Chanc. 147.

#### (2) Mortgage by underlease: assignment of reversion.

15.—P. having a term of years in a house, made a mortgage thereof to M. by way of underlease, retaining in himself a reversion of two days. He subsequently made an equitable mortgage by way of written memorandum to Padgett. He again made a third mortgage to S., and assigned to S. the original term, including the reversion of two days. S. had no notice of the equitable mortgage to Padgett:—Held, by Malins, V.C.,

that the equities being equal, S. had a legal estate by virtue of the assignment to him of the original term, and the reversion of two days, which entitled him to priority over Padgett. On the argument of the appeal, the Lords Justices expressed themselves not prepared to affirm this view, and therefore desired a further question of fact to be argued; but the case was compromised before any judgment was given. *In re Russell Road Purchase Monies*, 40 Law J. Rep. (N.S.) Chanc. 673; Law Rep. 12 Eq. 78.

[And see *supra* No. 12, and SHIPPING LAW, I 17.]

(c) *Notice of sequestration.*

16.—A decree was made against A., and sequestration issued, to avoid which A. absconded. The plaintiff then changed his solicitor by the common order, and B., the brother-in-law of A., gave the dismissed solicitor 100*l.* to induce him to appear and consent to a motion discharging the sequestration, which he did, the change of solicitors not being noticed at the time. A. subsequently became entitled, as next-of-kin of a deceased intestate, to a fund in the hands of the administrator, and mortgaged it to B. for nearly its full amount. The sequestration creditor then filed a bill against A., B., and the administrator, asking for payment of the sum to which A. had become entitled, and obtained a discharge of the order discharging the sequestration. A., who was out of the jurisdiction, was not served with the bill:—Held, first, that the omission to serve A. was no bar to the question being decided between the plaintiff and B., but that no order for payment of the fund to the plaintiff could be made without notice to A., though it would be ordered into Court. Second, that as between the plaintiff and B., the plaintiff was entitled to preference. *Ward v. Booth*, 41 Law J. Rep. (N.S.) Chanc. 729; Law Rep. 14 Eq. 195.

(d) *Chose in action: commission in the army: notice.*

17.—A notice left at a bank after business hours only operates as notice to the bank from the time when in the ordinary course of business it is opened and read. *Calisher v. Forbes*, 41 Law J. Rep. (N.S.) Chanc. 56; Law Rep. 7 Chanc. 109.

An officer in the army retired from the service by the sale of his commission. The proceeds of the sale were in the hands of the army agents on the 7th of December, but the balance payable to him, after deduction of his regimental debts, was not transferable to his account until the 8th, on which day it was so transferred. He had previously to the sale charged the proceeds of his commission with various sums of money advanced to him. One of the incumbrancers left a notice of his charge at the office of the army agents at half-past five p.m., on the 7th instant, after business hours, and when the office was closed. The other incumbrancers left similar notices as soon as the office doors were open next morning:—Held, that all the notices must be taken to have been left at the same time, and therefore the

priorities of the several incumbrancers depended on the dates of their securities. *Papillon v. Brunton* (29 Law J. Rep. (N.S.) Exch. 265) distinguished. *Ibid.*

18.—On the retirement of an officer from the army by the sale of his commission, the commission was absorbed by the Crown, and the army agents received an order from the authorities at the Horse Guards to transfer to him the price of the commission out of a fund held by them subject to the regulations and under the directions of the Horse Guards, but by those regulations the money was not actually issuable except upon the receipt of the retiring officer:—Held, reversing the decision of the Master of the Rolls, that the agents were constituted trustees of the money upon the receipt of the order to transfer, and consequently as between two equitable assignees, the one who, first after the receipt of that order, gave to the agents notice of his charge, was entitled to priority. The successful appellant in such a case, allowed to add his costs of appeal to his charge. *Addison v. Cox*, 42 Law J. Rep. (N.S.) Chanc. 291; Law Rep. 8 Chanc. 76.

(e) *Constructive notice.*

19.—A mortgagee advancing money on the security of a considerable estate, and omitting to investigate the title to a particular portion of it, will not be affected with notice of equities affecting the residue of the estate, which upon such investigation he might possibly have discovered. *Hunter v. Walters*, 41 Law J. Rep. (N.S.) Chanc. 175; Law Rep. 7 Chanc. 75.

20.—B., a builder, entitled to an agreement for a lease, sold a house to M., and subsequently obtained a lease from the ground landlord, which he deposited with Stohwasser, by way of equitable mortgage, to secure an advance from Stohwasser. Stohwasser, at the time of the advance, had no notice of B.'s title. Stohwasser subsequently took a legal mortgage of the house from B., to secure his previous advance. At the time of taking such legal mortgage a tenant of M. was in occupation of the house:—Held, that the fact that a tenant of M. was in possession gave constructive notice to Stohwasser of M.'s title. *Mumford v. Stohwasser*, 43 Law J. Rep. (N.S.) Chanc. 694; Law Rep. 18 Eq. 556.

Held, further, that Stohwasser obtained no priority over M. by taking the legal estate. *Ibid.*

Semble—that the result would have been the same if, at the time of taking the legal estate, he had had no notice of M.'s claim. *Ibid.*

Semble—that a person advancing money on an equitable security, subject to a prior equity, of which he has not notice, either actual or constructive, does not, by subsequently getting the legal estate, obtain priority, whether at the time he gets the legal estate he has or has not constructive notice of the prior equity. *Ibid.*

(f) *Further advances with notice of subsequent charge.*

21.—A brewer took from an innkeeper a mort-

page to secure 1,250*l.* and any sums afterwards due from him not exceeding 1,500*l.* At the same time and place the innkeeper gave to a distiller, subject to the brewer's security, a charge upon the mortgaged premises for a sum advanced. Subsequently, the mortgagor became indebted in further sums to the brewer:—Held, that the distiller had priority over such further sums as became owing after notice of the distiller's mortgage, and that neither an alleged custom of trade, nor the fact that the securities were given simultaneously, could alter the legal meaning of the documents. *Menzies v. Lightfoot*, 40 Law J. Rep. (N.S.) Chanc. 561; Law Rep. 11 Eq. 459.

(g) *Priority as between equitable mortgagee and creditor obtaining charge.*

22.—The devisees of an equitable estate in a freehold house deposited the title-deeds to secure the payment of a loan made to them by the depositors. The deposit was accompanied by a written memorandum charging the interest of the depositors in the property with the repayment of the sum advanced. Before the deposit a decree had been made, in a suit instituted for the administration of the testator's estate, which contained a declaration that the depositors were entitled to the house as tenants in common. After the deposit a creditor of the testator obtained in another suit a decree declaring her entitled to a charge upon the house in respect of a debt due to her from the testator. The depositors of the deeds had no notice of this claim when he advanced the money:—Held (reversing the decision of Hall, V.C.), that the depositors were entitled to priority over the creditor. *Carter v. Sanders* (2 Drew. 248; 23 Law J. Rep. (N.S.) Chanc. 679) disapproved. *The British Mutual Investment Company v. Smart*, 44 Law J. Rep. (N.S.) Chanc. 695; Law Rep. 10 Chanc. 567.

Semble—that an equitable mortgage by deposit of title-deeds made by an heir-at-law or a devisee of a legal estate would be good as against creditors of the ancestor or testator who had not obtained any judgment or decree binding the land before the mortgage was made. *Ibid.*

(h) *As between depositors of earlier and later deeds.*

23.—A person advancing money upon a letter giving an equitable charge accompanied by the deposit of a single ancient title-deed relating to the estate, and honestly giving credit to the representation of the borrower that the creditor has the title-deeds relating to the estate, has a good equitable mortgage, although the modern and really important title-deeds are not included nor enquired after, and such charge will be entitled to priority over a subsequent mortgage by the deposit of all the deeds necessary to shew a good title. *Dixon v. Muckleston*, 42 Law J. Rep. (N.S.) Chanc. 210; Law Rep. 8 Chanc. 155.

The authorities as to postponement of a prior equitable mortgage by neglect to enquire, considered. *Ibid.*

(i) *Postponement of mortgagees under sec. 5 of Partnership Act, 1875.*

24.—Money was advanced to a trader in return for a share in the profits of his business. The agreement under which the advance was made was expressly under the Partnership Act, 1865, and stipulated for a mortgage of the business premises. Subsequently these premises were conveyed to a trustee for the lender by way of mortgage to secure the advance. The mortgagor became bankrupt:—Held, that thereupon by section 5 of the said Act the mortgagees were postponed to the other creditors of the mortgagor, and they were ordered to concur with the bankrupt's trustee in selling the mortgaged premises for the benefit of the other creditors. *Ex parte Macarthur; In re Ramsden*, 40 Law J. Rep. (N.S.) Bankr. 86.

(k) *Priority by registration.*

25.—A solicitor having a power to raise money by mortgaging certain equities of redemption, raised a sum of money from one of his clients, and then, concealing this exercise of the power, raised another sum from another of his clients. Neither of the mortgagees had any independent advice. The property was situated in Middlesex, but the mortgage-deeds were not registered. The solicitor subsequently left the country in difficulties, and soon afterwards both the deeds were registered, the second mortgagee's deed being registered first in point of time:—Held, reversing the decision of the Master of the Rolls (40 Law J. Rep. (N.S.) Chanc. 345), that the first mortgage was entitled to priority, though registered subsequently to the second. *Rolland v. Hart*, 40 Law J. Rep. (N.S.) Chanc. 701; Law Rep. 6 Chanc. 678.

26.—A. took an agreement, not under seal, to execute a second mortgage of land in Yorkshire as security for money lent, but did not register:—Held, that a subsequent third mortgagee who registered, had priority over A. *Moore v. Culverhouse* (27 Beav. 639; 29 Law J. Rep. (N.S.) Chanc. 419) followed; *Wright v. Stanfield* (27 Beav. 9; 29 Law J. Rep. (N.S.) Chanc. 183) not followed. *In re Wright's Mortgage Trusts*, 43 Law J. Rep. (N.S.) Chanc. 66; Law Rep. 16 Eq. 41.

27.—In a register county, a further charge is a conveyance requiring registration, and an unregistered further charge is not simply postponed to a subsequent registered mortgage, but is void as against it, so that it cannot be tacked to the first mortgage. *Credland v. Potter*, 44 Law J. Rep. (N.S.) Chanc. 169; Law Rep. 10 Chanc. 8.

A person taking a security for a past debt was content with the mortgagor's statement that a registered deed was a mortgage to secure a certain amount, and that no more was due to the mortgagees:—Held, that he was not affected with notice of an unregistered further charge. *Ibid.*

Decree of Bacon, V.C. (43 Law J. Rep. (N.S.) Chanc. 484; Law Rep. 18 Eq. 350) affirmed. *Ibid.*

[And see SHIPPING LAW, I 16.]

(I) *Irish Registration Act.*

**28.**—The mere fact that upon the preparation of a mortgage of property in Ireland the title-deeds were not produced to the solicitor of the mortgagee does not prove fraud or negligence on the part of the solicitor so as to postpone his client's registered mortgage to a prior unregistered equitable security. The decision of the Court below affirmed on the special facts of the case and the construction of the Irish Registration Act. *Wormald v. Maitland* (35 Law J. Rep. (n.s.) Chanc. 69) questioned. *The Agra Bank v. Barry*, Law Rep. 7 E. & I. App. 135.

## (K) CONSOLIDATION OF SECURITIES.

**29.**—If two distinct mortgages (A. and B.) by the same mortgagor, each containing a trust to apply the proceeds of a sale under the power, first, in payment of costs of sale, then of the interest, and then of the principal due upon it, come into the hands of the same person as mortgagee, he may sell the lands subject to mortgage A., and apply the proceeds in payment of arrears of interest on mortgage B. before reducing the principal of A. *Thompson v. Hudson*, 40 Law J. Rep. (n.s.) Chanc. 28; Law Rep. 6 Chanc. 320.

**30.**—The principle of consolidation of securities does not apply to a mere bailment of deeds to secure one of the debts. *Crickmore v. Freeston*, 40 Law J. Rep. (n.s.) Chanc. 137.

*Quære*—whether the principle applies to a case in which the mortgagor is not relying upon his right to redeem but on a right at law. *Ibid.*

**31.**—A mortgagee of a life estate and policies of assurance had also obtained subsequent judgments, being charges under 1 & 2 Vict. c. 110, on the life estate. There were intervening incumbrances on the life estate only. On his first mortgage being discharged out of the life estate,—Held, that the next incumbrancer was entitled, on the principle of marshalling, to be paid out of the policies, and that the first mortgagee could not by consolidating his securities throw his subsequent charges on the policies so as to prevent this. *Ford v. Tynte*, 41 Law J. Rep. (n.s.) Chanc. 758.

## (L) MARSHALLING.

[See last case.]

## (M) PRIMARY AND COLLATERAL SECURITIES.

**32.**—D., on the 27th of October, 1862, made an equitable mortgage of his N. estate to his bankers, to secure advances made on his current account. On the 4th of May, 1863, he made a similar mortgage to them of his W. and S. estates to secure further advances thereon. He had, prior to October, 1862, devised his N. and S. estates to the plaintiffs in the suit, and his W. estate to one of the defendants in it. At the death of D., in November, 1863, there was owing on the securities to the bankers the sum of 18,886*l.* 1*l.* 1*d.* of which 17,450*l.* 10*s.* 5*d.* was incurred up to the 4th of May, 1863, and 1,436*l.* 0*s.* 8*d.* between that date and the death of D. A suit was instituted,

the N. estate was sold, and with the purchase-money, and a portion of the rents of it and of the S. estate, the whole of the debt due to the bank was discharged. The plaintiffs insisted that they were entitled to contribution from the devisee of the W. estate, according to its value :—Held, that the N. estate was the primary security for the first and larger advance, and that the two estates according to their values were rateably chargeable with the second and smaller advance. *Lipscomb v. Lipscomb* (38 Law J. Rep. (n.s.) Chanc. 90; Law Rep. 7 Eq. 501) approved and followed. *De Rochefort v. Dawes*, 40 Law J. Rep. (n.s.) Chanc. 625; Law Rep. 12 Eq. 540.

## (N) MERGER OF MORTGAGE TERM.

**33.**—A mortgage was made for a term of years, and subsequently the reversion was conveyed to a trustee for sale to secure a further advance and the prior advances :—Held, that the terms were not merged, though portions had been sold by the trustee with the concurrence of the mortgagee. *Locking v. Parker*, 42 Law J. Rep. (n.s.) Chanc. 257; Law Rep. 8 Chanc. 30.

## (O) ACCOUNTS.

(a) *Appropriation of balances.*

**34.**—If a mortgagee, even when his interest is in arrear, enter into possession and sell part of the mortgaged estate under a power of sale in his mortgage, and after payment of his costs and interest then due, retain a balance of the proceeds in his hands, that balance will be considered as applied in reduction of the principal debt, and future interest can be charged only on the amount of the debt so reduced. *Thompson v. Hudson*, 40 Law J. Rep. (n.s.) Chanc. 28; Law Rep. 6 Chanc. 320.

(b) *Mortgage of live stock.*

**35.**—Mortgage of a station and stock with a stipulation that the mortgagee might pay "the license fees or rent, fines, penalties and other charges payable in respect of the station or run or the stock thereon or in relation thereto," and charge them on the mortgaged property if the mortgagor failed to pay them :—Held, that advances for payment of government rent due and for scab licenses might be charged, but not sheep wash. *Fenton v. Blackwood*, Law Rep. 5 P. C. 167.

(c) *Discounts on renewal of bill.*

**36.**—Mortgage by A. of a station and stock to his agents to secure the repayment of a sum of money for which he had given them his acceptance, with interest, and to secure the payment of any bill which the mortgagees might receive or take by way of renewal. The bill having been renewed from time to time, the mortgagees paid on A.'s behalf the discounts on renewal payable to the bank who had discounted the bill, but instead of keeping a separate account of the moneys so paid as moneys secured by the mortgage, they included them in their general account with A., charging him interest and mercantile commission :

—Held, nevertheless, that the moneys paid were advanced to A. on the security of the mortgage, and not simply in account current on his personal security. *Fenton v. Blackwood*, Law Rep. 5 P. C. 167.

*As between the mortgagor and mortgagee of policy.* [See supra No. 6.]

(P) EQUITABLE MORTGAGE.

(a) Remedy of equitable mortgagee.

**37.**—The proper remedy for an equitable mortgagee with a deposit of title-deeds is by a decree for foreclosure, and not a sale. *Price v. Bury*, MSS., followed. *Confer Lib. Reg.* 25th of January, 1854, per L.C. and L.JJ. *James v. James*, 42 Law J. Rep. (n.s.) Chanc. 386; Law Rep. 16 Eq. 153.

(b) Deposit of share or stock certificates.

**38.**—As the registered owner of shares or stock in any company may be only entitled as trustee, any one who advances money upon an equitable deposit of share or stock certificates, or upon an assignment in equity of shares or stock without obtaining a transfer of the legal estate, does so subject to the risk of having his equitable title overridden by a pre-existing, though undisclosed, equitable title. *The Shropshire Union Railway Canal Company v. The Queen*, 45 Law J. Rep. (n.s.) C. L. 30; Law Rep. 7 E. & I. App. 497.

If any one absolutely entitled to shares or stock, places them for his own purposes in the name of a sole trustee, and allows such trustee to hold the certificates of the share or stock, he does so at the risk of having his equitable title defeated by the execution of a legal transfer of the shares or stock by his trustee to a purchaser or mortgagee without notice. His right may also be forfeited in favour of an equitable mortgagee by his own misconduct or misrepresentations, but such misconduct must be very distinct and the burden of proving it rests with him who relies on it as the ground for displacing the cestui que trust's equitable interest. These principles are as applicable to corporations as to individuals. *Ibid.*

(c) Deposit of title-deeds and memorandum.

**39.**—Notice to a person under contract to sell an estate that his vendee has agreed to make a valid assignment of the contract, if so requested, does not put the vendor upon enquiry whether his vendee has been requested to make, or has made such valid assignment. *Shaw v. Foster* (H. L.), 42 Law J. Rep. (n.s.) Chanc. 49; Law Rep. 5 E. & I. App. 321.

Where a deposit of title-deeds is accompanied with a memorandum in writing, the kind and amount of charge intended to be created by the deposit must be ascertained solely by reference to the written document. *Ibid.*

*Deposit of deeds with banker.* [See BANKER, 6-8.]

(Q) TRANSFER OF MORTGAGE.

**40.**—The interest on a mortgage being in Digest, 1870-1875.

arrear, the mortgagees in June, 1864, ordered it to be put up for sale under their power of sale. The mortgagor was a trustee, and he had committed a breach of trust in not keeping down the interest out of the rents of the property. He procured a person to take a transfer of the mortgage, who on the 14th of June, in order to stop the sale, paid the mortgagees 195*l.* for arrears of interest and costs. In September, 1864, he paid the mortgagees a further sum of 55*l.* for interest. The investigation of the title was not completed for some time, and the transfer of the mortgage was not executed until August, 1865, by which time further interest to the amount of 122*l.* had accrued due. The transfer deed recited that the principal debt, the 122*l.* interest and 45*l.* costs, were due to the mortgagees, and by it they assigned to the transferee the principal debt and the last-mentioned sums for interest and costs, and conveyed the property, subject to the equity of redemption. Contemporaneously with the transfer another deed was executed, by which the mortgagor purported to capitalise the arrears of interest and costs, and to charge the amount of them, with interest thereon, upon the estate. The title to the property gave notice to the transferee of the breach of trust which had been committed. A redemption suit having been instituted by the cestui que trust against the transferee and the trustee,—Held (reversing a decision of Hall, V.C.), that the transferee was entitled to charge against the estate the sums which he had paid for interest and costs before the execution of the transfer. Held also (reversing the Vice-Chancellor's decision), that there was no ground for depriving the transferee of the costs of the suit. *Cottrell v. Finney*, 43 Law J. Rep. (n.s.) Chanc. 562; Law Rep. 9 Chanc. 541.

*As to extinguishment of power of sale on transfer of mortgage with new power.*  
[See supra No. 7.]

(R) TITLE DEEDS.

[And see supra Nos. 12, 13.]

**41.**—A mortgage was made of estate A. for 300*l.*, in which sureties joined to secure the debt. Another mortgage of estate B. was made by the same mortgagor to the same mortgagee to secure 1,500*l.*, and the title-deeds of other property belonging to the mortgagor's wife were deposited as collateral security for 300*l.*, part of the 1,500*l.* The first 300*l.* was paid off partly by the sureties. Afterwards, the other principal security was realised, and the 1,500*l.* paid off. The mortgagee resisted the delivery of the deposited deeds on the ground that the sureties might have an equity against them, and the sureties were made parties to a suit for delivery of the deeds. The sureties did not assert any claim in the suit:—Held, that the mortgagor was entitled to a decree for delivery of the deeds, and to the costs of the suit against the mortgagee, and that the principle of consolidating securities did not apply to a mere bailment of deeds to secure one of the debts. *Crickmore v. Freeston*, 40 Law J. Rep. (n.s.) Chanc. 137.

In such a case the proper remedy is by interpleader, and if a person having a right to file an interpleader bill does not do so, but awaits the suit of one of the claimants, he will, if the plaintiff establishes his claim, be ordered to pay the costs of the suit. *Ibid.*

Quære—whether the principle of consolidating securities applies to a case in which the mortgagor is not relying upon his right to redeem but on a right at law. *Ibid.*

#### (S) FORECLOSURE AND REDEMPTION SUITS.

##### (a) Parties: judgment creditors.

42.—The plaintiff in a foreclosure suit had made parties as defendants certain judgment creditors who had not taken the steps necessary to obtain a charge on the land under 27 & 28 Vict. c. 112. One of these, immediately on being served with a copy of the bill, wrote a letter saying he claimed no interest. The others disclaimed by answer:—Held, that they were not necessary parties. *Mildred v. Austin* (Law Rep. 8 Eq. 220) disapproved of. *The Earl of Cork v. Russell*, 41 Law J. Rep. (N.S.) Chanc. 226; Law Rep. 13 Eq. 210.

##### (b) Foreclosure decree.

###### (1) Jurisdiction.

43.—When the Crown is interested in an equity of redemption, the Court cannot make a decree for foreclosure against it, but may order the property to be sold. *Bartlett v. Rees*, 40 Law J. Rep. (N.S.) Chanc. 599; Law Rep. 12 Eq. 395.

44.—The Court has jurisdiction to make a foreclosure decree in respect of lands situate out of the jurisdiction. *Paget v. Ede*, 43 Law J. Rep. (N.S.) Chanc. 571; Law Rep. 18 Eq. 118.

###### (2) Turning into decree for sale.

45.—After decree for foreclosure in a foreclosure suit, the decree was turned into one for a sale on consent of all parties, except the mortgagor, who was out of the jurisdiction, and against whom the decree had been taken *pro confesso*. *Woodford v. Brooking*, Law Rep. 17 Eq. 425.

###### (3) Form of: disputes between defendants.

46.—In a foreclosure suit, when there is a dispute amongst the defendants as to their priorities, the Court will not give them successive rights of redemption, but will appoint one day at the expiration of six months from the filing of the chief clerk's certificate, on which any may redeem, and after which all will be foreclosed. *Bartlett v. Rees*, 40 Law J. Rep. (N.S.) Chanc. 599; Law Rep. 12 Eq. 395.

###### (c) Opening foreclosure.

47.—A mortgagee in possession who receives a sum by way of rent from the mortgaged property in the interval between the filing of the chief clerk's certificate and the day fixed for payment, thereby opens the account and cannot get a final order without getting another certificate fixing another day for redemption. *Allen v. Edwards*, 42 Law J. Rep. (N.S.) Chanc. 455.

48.—The final order in a foreclosure suit cannot be obtained if rents have been received by the mortgagee since the account was taken. *Prees v. Coke*, Law Rep. 6 Chanc. 645.

##### (d) Redemption suit.

###### (1) Refusal of mortgagee to account.

49.—A mortgagor filed a bill for redemption against a mortgagee who had been in possession for 19½ years, praying that the usual accounts might be taken with rests, and by his interrogatories required the defendant, the mortgagee, to set forth an account of "all rents and profits" received by him. The defendant, in his answer, mentioned the existence of a lease without stating the amount of rent reserved, but refused to set forth any accounts in his answer. On exceptions to the answer as evasive and insufficient,—Held, that the answer was evasive in mentioning the lease without stating the rent, but that, on the rent being stated, the answer would be considered sufficient. The exceptions were, therefore, technically allowed, the costs being reserved till the hearing. *Elmer v. Creasy*, 42 Law J. Rep. (N.S.) Chanc. 807.

###### (2) Effect of dismissal of suit.

50.—The rule that the dismissal, for any other cause than want of prosecution, of a mortgagor's bill for redemption, operates as a foreclosure against him, does not apply to the case of an equitable mortgage by deposit of deeds. *Marshall v. Shrewsbury*, 44 Law J. Rep. (N.S.) Chanc. 302; Law Rep. 10 Chanc. 250.

##### (e) Costs.

###### (1) Interest on.

51.—Where a mortgagee's costs are ordered to be added to his security, and to be a charge on the mortgaged estate, the amount so charged carries interest. It makes no difference that the mortgage is by grant of a redeemable annuity. Interest in such a case was allowed at the rate of 4 per cent. per annum. *Lippard v. Ricketts*, 41 Law J. Rep. (N.S.) Chanc. 595; Law Rep. 14 Eq. 291.

###### (2) Administration suit by mortgagee.

52.—Where the mortgagee of a reversionary interest under a will, the mortgagor having died intestate, filed a bill for administration of the testator's estate, and was then paid the money due on the mortgage and his costs of suit:—Held, on motion to dismiss the bill, that the mortgagee was not entitled to six months' interest in lieu of notice, but he was allowed his costs of the motion, as he had been paid off in a summary way. *Letts v. Hutchins*, Law Rep. 13 Eq. 176.

[See COSTS IN EQUITY, 21, 22.]

###### (3) In general.

Costs of mortgagee: appeal for costs and costs of appeal. [See COSTS IN EQUITY, 12.]



*Costs of foreclosure suits.* [See COSTS IN EQUITY, 24.]

*Costs of transferee of mortgage having notice of breach of trust.* [See supra No. 40.]

*Disclaimer by defendant: costs of subsequent proceedings.* [See COSTS IN EQUITY, 40.]

(T) JURISDICTION UNDER TRUSTEE ACT.

[And see TRUST, E.]

53.—The Court has no jurisdiction under the Trustee Act, 1850, to appoint a person to convey lands in mortgage for the estate therein of a joint mortgagee out of the jurisdiction of the Court. *In re Osborn's Mortgage Trust*, 40 Law J. Rep. (N.S.) Chanc. 706; Law Rep. 12 Eq. 392.

54.—A mortgagor of copyholds having refused for twenty-eight days to make a surrender in accordance with his covenant, an order was made vesting the legal estate in the mortgagee, subject to the proviso for redemption. *In re Crowe's Mortgage*, 41 Law J. Rep. (N.S.) Chanc. 32; Law Rep. 13 Eq. 26.

MORTMAIN.

[See CHARITY.]

*Civil Code of Lower Canada: rules of construction.* [See COLONIAL LAW, 16.]

MUNICIPAL CORPORATION.

(A) POWERS OF MUNICIPAL CORPORATIONS.

(a) *Powers as to dangerous buildings.*

(b) *Buildings used as watch-houses.*

(c) *Powers of corporation acting as local board.*

(d) *Right to take tolls.*

(e) *Expenses payable out of borough fund.*

(B) QUALIFICATIONS OF ALDERMEN, TOWN COUNCILLORS, AND BURGESSES.

(C) MUNICIPAL ELECTIONS.

(a) *Under the Municipal Corporation Acts.*

(b) *Under the Ballot Act, 1872.*

(D) CORRUPT PRACTICES.

(a) *Petition.*

(1) *Who may be made respondent.*

(2) *Amendment.*

(3) *Costs.*

(b) *Particulars: form and delivery of.*

(c) *Amendment of list of objections.*

(d) *Several offences: cumulative penalties.*

[Provisions for enabling the costs of parliamentary proceedings by corporations for the benefit of the inhabitants to be charged on borough funds, &c. 35 & 36 Vict. c. 91.]

[22 Vict. c. 35, s. 4, repealed. 34 & 35 Vict. c. 67.]

[Provisions made for the prevention of corrupt practices at municipal elections. 35 & 36 Vict. c. 60.]

[New provisions as to regulations of municipal elections and new forms of notices, nomination, and ballot papers. 38 & 39 Vict. c. 40.]

(A) POWERS OF MUNICIPAL CORPORATIONS.

(a) *Powers as to dangerous buildings.*

1.—By 30 & 31 Vict. c. xxxvi. s. 38, it was enacted that “if the surveyor of the city” of M., “or, in his absence, any other duly qualified surveyor, shall certify in writing that there is imminent danger from any building, the corporation” of the city “shall and may, without any presentment, notice or other formality, cause the same to be taken down either wholly or in part, or to be repaired or secured in such manner as the corporation shall think requisite.” By section 5 it was enacted that if any summons, demand or notice or other such document under the Act “require authentication by the corporation, the signature of the town clerk thereto shall be a sufficient authentication.” The plaintiff was the owner of some houses in M.; the surveyor to the city certified in writing that there was imminent danger from them, and thereupon the town clerk, in the name of the corporation, directed the surveyor to cause the houses to be secured in such manner as he should think requisite. The directions by the town clerk to the surveyor were given without any express antecedent authority from the corporation. In one of the certificates given by the surveyor, two of the plaintiff's houses, which were occupied together and had internal communication, were described as a “building, No. 95, Market Street.” The plaintiff's houses were in part taken down. The corporation by its subsequent proceedings adopted and acted upon the directions of the town clerk. The plaintiff sued the corporation for wrongfully taking down his houses, and proposed to shew that there was not imminent danger from them at the time when the surveyor to the city gave the certificates:—Held, first, that the certificates were conclusive as to whether danger was imminent, and that the corporation was bound to act upon them; secondly, that by force of the statutory provisions, the directions by the town clerk to the surveyor must be deemed the acts of the corporation, which had also ratified his proceedings; and, thirdly, that the certificate of the surveyor sufficiently described the plaintiff's two houses as a “building, No. 95, Market Street.” *Cheetham v. The Mayor, &c., of Manchester*, 44 Law J. Rep. (N.S.) C. P. 139; Law Rep. 10 C. P. 249.

(b) *Buildings used as watch-houses.*

2.—Section 84 of 5 & 6 Will. 4, c. 76, as to buildings used as watch-houses being given up for the use and accommodation of constables, only applies to buildings so used in places under the control of local authorities prior to the passing of the Act. *Baldwin v. White*, Law Rep. 10 Q. B. 279.

(c) *Powers of corporation acting as local board.*

3.—The Local Government Act, 1858 (21 & 22

Vict. c. 98), s. 24—which enacts that in corporate boroughs the local boards “shall be the mayor, aldermen and burgesses acting by the council”—does not make the local board a new and separate body, but in substance enacts that in corporate boroughs the corporation shall be the local board; and if in making contracts the name and style of the corporation “acting as the local board” is used, the corporation is the essential body and contracting party and may be sued as such on the contracts. *Andrews v. The Mayor, &c., of Ryde*, 43 Law J. Rep. (N.S.) Exch. 174; Law Rep. 9 Exch. 302.

*Consent of, as local board, to license for slaughter-houses.* [See TOWNS IMPROVEMENT CLAUSES ACT, 3.]

*Local Board of Health: power to take lands for public improvements: right to take more land than actually required.* [See LANDS CLAUSES ACT, 1.]

(d) *Right to take tolls.*

[See TOLL.]

(e) *Expenses payable out of borough fund.*

4.—A waterworks company, established to supply water to the borough of S., was empowered by Act of Parliament to make rules and regulations, which before coming into force were to be approved of by two justices of the borough. Certain of such proposed rules and regulations having been brought before the justices for approval, it was thought by the corporation that they should be opposed. Expenses were incurred in so opposing them, and the opposition was, in great part, successful. The company also promoted a bill in Parliament, with the view of obtaining further powers. The corporation conceiving that the bill was objectionable, opposed it in Parliament, and eventually it was withdrawn. Orders were made for the payment, out of the borough fund, of the expenses incurred in opposing the rules and regulations, and the bill promoted by the company:—Held, that as the expenses above mentioned could not be expenses “necessarily incurred in carrying into effect the provisions” of the Municipal Corporation Act, within the 92nd section of that Act, and as they did not fall within any of the payments specified in the Act, they were not chargeable upon the borough fund, and that the orders were invalid. *The Queen v. The Corporation of Sheffield*, 40 Law J. Rep. (N.S.) Q. B. 247; Law Rep. 6 Q. B. 652.

Semle—that if there had been a surplus fund, it might be applied towards the payment of such expenses. *Ibid.*

5.—A member of the constabulary force of the borough of Liverpool was made the subject of a libellous article in a newspaper, in reference to his conduct as inspector of public-houses, in giving a good character to an applicant for a license, at the meeting of the magistrates of the borough in Licensing Session, whom he knew to have been the keeper of a house of ill fame. Upon an intimation from, though without the official sanction of his superior authorities, he

took criminal proceedings by way of summons before a magistrate against the publisher of the libel, and incurred expenses thereon. The Watch committee, with the subsequent approbation of the Town Council, made an order on the borough treasurer for the payment of a sum of money on account of such expenses. The Liverpool Borough Fund has a surplus:—Held, that such order was not in respect of an “allowance,” nor a charge or expense for the purposes of the constabulary force within the meaning of section 82 of 5 & 6 Will. 4. c. 76, nor an application of the fund for the public benefit of the inhabitants of the borough within section 92, and that a rule must go for a *certiorari* to bring up the order for the purpose of being quashed. *The Queen v. The Mayor and Town Council of Liverpool*, 41 Law J. Rep. (N.S.) Q. B. 175.

#### (B) QUALIFICATIONS OF ALDERMEN, TOWN COUNCILLORS, AND BURGESSES.

6.—The disqualification of a burgess to act as an alderman dates from the time when he ceases to occupy the qualifying premises, and not from the time when he is struck off the burgess list, and therefore a *quo warranto* to try by what right such person holds the office of alderman must be applied for within twelve months after he ceases to occupy. *Ex parte Birkbeck*, Law Rep. 9 Q. B. 256.

7.—A town councillor, disqualified by reason of having compounded with his creditors, cannot resign his office and then be re-elected, as his disqualification incapacitates him from resigning. In order that he may be re-elected, it is necessary that the council should first declare his office void, as required by the Municipal Corporations Act, s. 52. *Hardwick v. Brown*, Law Rep. 8 C. P. 406.

8.—Where the name of a burgess in a municipal borough within the Municipal Corporation Act, 1835, was inserted in the burgess roll in respect of a “house,” and upon objection duly made it was proved before the Revision Court held in October, 1874, that his qualification was not in respect of a “house,” but was in respect of a “counting-house,”—Held, that section 18 gave no power to amend the list, and that the name was rightly expunged. *The Queen v. The Mayor of Chipping Wycombe*, 44 Law J. Rep. (N.S.) Q. B. 82.

9.—Under the Municipal Corporation Acts, the assessors chosen to hold a Court with the mayor to revise the burgess lists of a borough divided into wards, under 7 Will. 4 & 1 Vict. c. 78, s. 4, are eligible for election as councillors of their ward at the election held in the November of the year in which they were so chosen assessors, and have revised the lists of the ward. *Ex parte Molesworth; In re the Municipal Election of the City of Chichester and Adames*, 41 Law J. Rep. (N.S.) Q. B. 12; Law Rep. 7 Q. B. 209.

10.—There is nothing in the Municipal Franchise Act, 1869, 32 & 33 Vict. c. 55, or in the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), which enables a married woman to

be placed on the burgess roll, and to vote at the election of town councillors. And semble, that a woman who marries after her name has been placed on the burgess roll is also disqualified from voting. *The Queen v. Harrauld*, 41 Law J. Rep. (N.S.) Q. B. 173; Law Rep. 7 Q. B. 361.

### (C) MUNICIPAL ELECTIONS.

#### (a) *Under the Municipal Corporation Acts.*

**11.**—A voting paper used at the election of an alderman under the Municipal Corporation Acts (7 Will. 4 & 1 Vict. c. 78, ss. 13, 14), does not require a stamp. *The Queen v. Strachan*, 41 Law J. Rep. (N.S.) Q. B. 210; Law Rep. 7 Q. B. 463.

**12.**—By the Municipal Corporation Act, 5 & 6 Will. 4. c. 76, s. 44, "if a burgess be rated in respect of distinct premises in two or more wards, he shall be entitled to be enrolled and to vote in such one of the wards as he shall select, but not in more than one." At an election of councillors for a borough which was divided into wards a burgess, who was on the roll for two wards, voted for the defendant in one ward, and immediately afterwards voted in the other ward:—Held, on the authority of *The Queen v. Tugwell* (37 Law J. Rep. (N.S.) Q. B. 275; Law Rep. 3 Q. B. 704, 713), that the vote was good, and that the voter having voted in one ward had irrevocably made his selection, which was not affected by what took place afterwards. *The Queen v. Harrauld*, 42 Law J. Rep. (N.S.) Q. B. 211; Law Rep. 8 Q. B. 418.

#### (b) *Under the Ballot Act, 1872.*

**13.**—Although a parliamentary or municipal election will be void by the common law of Parliament, if it be so conducted that either there be no real electing by the constituency at all, or it be not really conducted under the subsisting election law, which is now an election by ballot, yet if there be no reasonable ground to believe that a majority of the electors may have been prevented from voting in favour of the candidate they preferred, and if the election be substantially an election by ballot, the election will not be void by the common law of Parliament, notwithstanding there may have been mistake or misconduct in the use of the machinery of the Ballot Act. *Woodward v. Sarsons*, 44 Law J. Rep. (N.S.) C. P. 293; Law Rep. 10 C. P. 733.

The 13th section of the Ballot Act, 1872 (35 & 36 Vict. c. 33), is only declaratory of what would have been the law applicable to elections under that Act if that section had not existed, and therefore to render an election invalid for non-observance of the rules or forms of the Ballot Act, the non-observance must be so great as to amount to a conducting of the election contrary to the principle of an election by ballot, and be such that it either did or might have affected the result of the election. *Ibid.*

The enactment in the 2nd section of the Ballot Act, 1872, as to the ballot paper being secretly marked by the voter, is an absolute enactment, and must therefore be obeyed strictly, but the manner in which the voter is to mark such paper

is enacted only in the directory part of the statute, and therefore it is sufficient if it be obeyed substantially. *Ibid.*

At a municipal election held under the Ballot Act, 1872, the presiding officer at one of the polling stations marked upon the face of every ballot paper which he gave out to each elector at such station the number of the voter appearing on the burgess roll. The number so marked was not in fact seen so as to be identified, but it could have been seen at the counting. At another of the polling stations the presiding officer placed each of the ballot papers, which he had marked by the direction of voters unable to read in the ballot box, wrapped up in the declaration of inability to read made by the voter for whom the vote was marked, and each such vote could have been, but was not, in fact, identified at the counting. It appeared that no voter had been prevented from voting, and that these errors of the presiding officers did not affect the result of the election, the majority of electors not being thereby prevented from effectually exercising their votes in favour of the candidate they preferred:—Held, that the election was therefore not void, either by the common law of Parliament or under the Ballot Act, 1872. *Ibid.*

Held, also, that the ballot papers which had been so marked on their face by the presiding officer with the number of the voter were void and ought not to be counted, but that the ballot papers, which had been wrapped in the declarations of inability to read, were not on that account to be rejected, but ought properly to be counted. *Ibid.*

A ballot paper which bears the voter's signature is void, and must be disallowed, as also must be disallowed a ballot paper which has the name of the candidate written by the voter instead of a cross opposite to the printed name of the candidate. The mere fact of two crosses being put, or of the cross being of a peculiar form, or of there being another mark with the cross, or of there being a straight line instead of a cross, or of the cross being put on the left-hand side of the candidate's name instead of on the right-hand side, will not vitiate the ballot paper, and the same should not be rejected on that account, unless there be evidence of an arrangement that such peculiar marks were to be indications of identity. *Ibid.*

**14.**—A candidate at a municipal election under the Ballot Act, 1872 (35 & 36 Vict. c. 33), has a right as such candidate to be present in the polling station during the polling, although he does not either himself undertake the duties of an agent, or assist his agent in the performance of such duties; and therefore the presiding officer at the station has no authority to exclude such candidate therefrom, if he does not interfere with the polling or in any other way misconduct himself. *Clementson v. Mason*, 44 Law J. Rep. (N.S.) C. P. 171; Law Rep. 10 C. P. 209.

**15.**—At a municipal election N. was nominated for the office of councillor by a bad nomination under the Municipal Election Statutes (5 & 6

Will. 4. c. 76, and 22 Vict. c. 35), but by another nomination paper he was well nominated. There being more candidates than there were vacancies to be filled up, a poll was taken according to the Ballot Act, 1872 (35 & 36 Vict. c. 33). In drawing up the ballot paper, the mayor entered the name of N. twice, as if he were two candidates, and described him in one entry, viz., No. 6, according to the description of him in his correct nomination paper, and in the other entry, viz., No. 5, according to his description in the incorrect nomination paper. A number of voters voted for N., by putting a cross opposite his name in entry No. 6, and some others who had not so voted, voted for him by putting a cross opposite his name in the entry No. 5. If both could be counted as votes given for him he was duly elected, but if they could not be so counted, he was not elected:—Held, that the ballot paper, which ought to contain a list of the candidates and not of their nominations, was wrongly drawn up, but that it was a mistake, which being in the use of the form given in schedule 2 of the Ballot Act, 1872, and not affecting the result of the election, was cured by section 13 of that Act, and therefore, counting and treating the votes according to section 35 of 5 & 6 Will. 4. c. 76, the number of votes which had been really given for N. entitled him to be elected. *Northcote v. Pulsford*, 44 Law J. Rep. (n.s.) C. P. 217; Law Rep. 10 C. P. 476.

*Duties of presiding officer.* [See **BALLOT ACT.**]

#### (D) CORRUPT PRACTICES.

##### (a) *Petition.*

##### (1) *Who may be made respondent.*

**16.**—A person who assumes to be elected, though not in fact elected, may be made a respondent to a municipal election petition presented under 35 & 36 Vict. c. 60, against his election. *Yates v. Leach*, 43 Law J. Rep. (n.s.) C. P. 377; Law Rep. 9 C. P. 605.

There were two candidates, M. and L., for the office of councillor at a municipal election. M. had the majority of votes, and was declared elected, but being disqualified he did not accept the office, upon which L. claimed to be elected, made the declaration of acceptance of office prescribed by 5 & 6 Will. 4. c. 76, s. 50, and sat and acted as councillor. Both M. and L. were thereupon made respondents to a petition against the election presented under 35 & 36 Vict. c. 60. They each gave notice under section 18 of that Act that he did not intend to oppose the petition. The Court held that L. was properly made respondent, and refused an application made by him to have his name struck out as respondent. *Ibid.*

**17.**—An unsuccessful candidate at a municipal election cannot properly be made a respondent to a petition presented under the Corrupt Practices Municipal Elections Act, 1872 (35 & 36 Vict. c. 60), against the return of the successful candidates with whom he has coalesced for the purpose of canvassing the burgesses. *Lovering v. Dawson*,

44 Law J. Rep. (n.s.) C. P. 321; Law Rep. 10 C. P. 711.

##### (2) *Amendment.*

**18.**—L. is a borough divided into wards, and on the 4th of December, 1873, the respondent was elected a town councillor for the north ward. A petition was presented against his return, within twenty-one days from the 4th of December, which alleged that the respondent employed persons, "who were included in the register for the said ward of the said borough as burgesses, for payment and reward at the above election as canvassers for the purpose of the said election." On the 16th of January, 1874, an order was made at chambers amending the petition, by inserting the words "and other wards," after the words "who were included in the register for the said ward." A rule having been obtained to set aside the order,—Held, that before the insertion of the words the petition charged only corrupt practices with voters at the election for the north ward, and that after the insertion it charged corrupt practices with those who were not voters at that election; that the effect of the alteration was to make a new petition after twenty-one days from the date of the election, that there was no jurisdiction to make the amendment, and that the rule to set aside the order must be made absolute. *Maude v. Lowley* (No. 2), 43 Law J. Rep. (n.s.) C. P. 105; Law Rep. 9 C. P. 165.

##### (3) *Costs.*

**19.**—The barrister who tries an election petition under 35 & 36 Vict. c. 60 has an absolute discretion in ordering how the costs of the proceedings on such petition are to be defrayed by the parties to it, and he may order such costs to be paid to a person who has been made a respondent improperly by the petitioner; and the superior Court has no jurisdiction to review his order. *Lovering v. Dawson*, 44 Law J. Rep. (n.s.) C. P. 321; Law Rep. 10 C. P. 726.

##### (b) *Particulars: form and delivery of.*

**20.**—A petition having been presented, on the ground of corrupt practices, against the election of the respondent as town councillor, and the 3rd of February having been fixed for the trial thereof, an order was made on the 16th of January at chambers, directing the petitioners within one week to deliver particulars of the persons alleged to have been bribed and treated, "by whom, when and where;" of the persons alleged to have been retained and employed as canvassers, "by whom, when and where;" and of persons to whom money was paid on account of conveyance of voters to the poll, "by whom, when and where:"—Held, that the order ought to be varied by extending the time for the delivery of the particulars to the 27th of January, one week before the trial, and by inserting the words, "as far as is known," before the words, "by whom, when and where," where-soever the latter words occurred in the order. *Maude v. Lowley* (No. 1), 43 Law J. Rep. (n.s.) C. P. 103; Law Rep. 9 C. P. 165.

*(c) Amendment of list of objections.*

**21.**—A petitioner under the Corrupt Practices (Municipal Elections) Act, 1872, having omitted to deliver a list of objections six days before the time of trial, as is required by the seventh of the General Rules made under the provisions of that Act, he applied to the Court for leave to give evidence against the validity of certain votes recorded at the municipal election, and to file a list of objections *nunc pro tunc*.—Held, that the Court had no jurisdiction to grant the application; for the power of amendment conferred by the seventh rule related only to petitions presented in due time, and did not relate to petitions delivered after the prescribed period. *Nield v. Batty*, 43 Law J. Rep. (N.S.) C. P. 73; Law Rep. 9 C. P. 104.

*(d) Several offences: cumulative penalties.*

**22.**—The corrupt acts forbidden by 17 & 18 Vict. c. 102, s. 2, which is applied to municipal elections by 35 & 36 Vict. c. 60, s. 3, constitute separate offences, and any person committing at the same election more than one of the forbidden corrupt acts is liable to several penalties. *Milnes v. Bale*; *Same v. Corbet*; *Same v. Lea*; *Same v. Colsey*, 44 Law J. Rep. (N.S.) C. P. 336; Law Rep. 10 C. P. 591.

The first count of a declaration in a penal action charged the defendant with corruptly giving money to several voters at a municipal election; the second count charged him with corruptly agreeing to give money to them. Plea, that the defendant had been sued, and judgment had been recovered against him for bribery committed at the said election.—Held, upon demurrers to the declaration and plea, that the plaintiff was entitled to judgment. *Ibid*.

## MUSIC.

*Music and dancing license.* [See PUBLIC ENTERTAINMENT.]

## MUTUAL BENEFIT SOCIETY.

The Bombay Civil Fund was formed to provide retiring pensions for civil servants, and annuities and portions for their widows and children. The fund was constituted by the subscriptions of the members, and by a grant from the Government. It was managed by a committee, the members of which resided in Bombay, and by the rules the property of the fund was vested in the committee of managers as trustees. In fact, however, the funds were always in the hands of the Government as a floating debt due to the association. A suit having been instituted by the representatives of the widow of a member of the association, against the trustees of the fund and the Secretary of State for India, claiming payment of an annuity which they alleged ought to have been paid to her in her lifetime,—Held, that there was no fiduciary

relation between the trustees of the fund and a person making a claim against the fund, and that therefore the plaintiffs could only recover the arrears of the annuity which accrued due within six years before the filing of the bill. *Edwards v. Warden*, 43 Law J. Rep. (N.S.) Chanc. 644; Law Rep. 9 Chanc. 49.

Held, also, that even assuming that the suit ought to have been instituted in Bombay, still inasmuch as the defendants resident in India had appeared unconditionally, had not moved to discharge an order made for service of the bill on them in India, and had not raised any objection to the jurisdiction by demurrer or plea, and as the Government of India in fact held the money, and had taken no objection to the suit, the Court ought to decide the question in dispute. *Ibid*.

By the original rules of the fund the annuity to which the widow of a member was entitled depended upon the amount of his property at the time of his death. The rules were afterwards altered so as to give the widow of a member a fixed annuity independently of the amount of her husband's property. But it was provided that, to entitle a member to the benefit of this provision on behalf of his family, he must, after he had accepted a retiring annuity, subscribe to the fund one per cent. per annum on his annuity, or one per cent. on the total value of his annuity at the time of acceptance. A member retired while the altered rules were in operation. They were suspended a few months after his retirement, and the suspension was not removed till after his death. He never paid or tendered the subscription due from him.—Held, that the contract with the association was in the nature of a contract of insurance, and that, the premium not having been paid or tendered, no claim could be sustained by the member's widow against the association under the new rules. *Ibid*.

[The above case varied on appeal. Law Rep. 1 App. Cas. 304.]

## NATIONAL DEBT.

**1.**—Where stock has been transferred to the Commissioners for the Reduction of the National Debt by reason of no application for dividends having been made, a re-transfer cannot be obtained, nor can enquiries be directed as to the beneficial title to the stock in the absence of a legal representative of the person in whose name the stock stood at the date of the transfer. *In re Ashmead's Trust*, 42 Law J. Rep. (N.S.) Chanc. 314; Law Rep. 8 Chanc. 113.

When a person establishes a right to the re-transfer of stock which has been transferred to the Commissioners for the Reduction of the National Debt, he is only entitled to a re-transfer of the stock and the payment of the amount of the dividends, but not to the invested accumulations of such dividends. *Ibid*.

**2.**—Stock in the name of a trustee who never acted was transferred to the Commissioners for Reduction of the National Debt. A re-transfer

was ordered to the trustee, with a direction for him to transfer to the beneficiary. *Ex parte Jameson*, 44 Law J. Rep. (N.S.) Chanc. 480; Law Rep. 19 Eq. 430.

### NATURALIZATION.

[Repeal of previous Acts, 33 & 34 Vict. c. 14.]  
[Aliens empowered to acquire and hold real property in the United Kingdom. British subjects empowered to renounce their allegiance as such on becoming naturalized in other countries. 33 & 34 Vict. c. 14; amended by Act passed in the same session, 33 & 34 Vict. c. 102.]

### NECESSARIES.

[See ADMIRALTY, 13; BARON AND FEME, 1.]

### NEGLIGENCE.

#### (A) NEGLIGENCE IN THE CARE OF ANIMALS.

- (a) *Scienter: knowledge of servant.*
- (b) *Runaway horses.*
- (c) *Injury to passenger in omnibus.*
- (d) *Keeping dangerous horse in field.*

#### (B) NEGLIGENCE IN KEEPING PROPERTY IN UNSAFE CONDITION.

- (a) *Poisonous leaves and clippings of trees.*
- (b) *Negligence in care of ship.*
- (c) *Using defective wagon on railway.*
- (d) *Dangerous state of highway.*
- (e) *Unsafe bridge.*
- (f) *Neglect to repair fences, &c.*
- (g) *Dangerous grating over sewer.*
- (h) *Maintenance of towing path.*
- (i) *Level crossings over railway.*
- (k) *Damage by fire from railway banks.*
- (l) *Escape of water.*

- (1) *Collecting water on land.*
- (2) *As between occupiers of upper and lower floors.*

- (3) *Escape from pipe of waterworks company.*

- (m) *Insufficiently buoying sunken anchor.*
- (n) *Injury to consignee using premises.*
- (o) *Unforeseen accident from acts of skilled workmen.*

#### (C) CONTRIBUTORY NEGLIGENCE.

#### (D) NEGLIGENCE BY PERSONS IN PARTICULAR RELATIONS.

- (a) *Valuer or arbitrator.*
- (b) *Patent agent.*
- (c) *By solicitor.*
- (d) *By broker.*
- (e) *By innkeeper.*
- (f) *Cabowner letting out cab to cabdriver.*
- (g) *Livery stable keeper.*
- (h) *Bailee of bills for encashment.*

#### (E) STATUTORY NEGLIGENCE.

#### (F) DAMAGES.

#### (A) NEGLIGENCE IN THE CARE OF ANIMALS.

##### (a) *Scienter: knowledge of servant.*

1.—In an action against a publican for knowingly keeping a ferocious dog, a witness deposed that, having been attacked by the dog at a previous time, he complained to the barmen, who were serving the defendant's customers. Another witness also proved that, having been attacked on a different occasion by the dog, he likewise complained to the barmen. At the trial the plaintiff was nonsuited, on the ground that the foregoing circumstances did not amount to knowledge in the defendant of the dog's ferocity:—Held (per Lord Coleridge, C.J., and Keating, J., *dissentiente* Brett, J.), that as the complaints had been made to persons who, in the defendant's absence, were managing his business, there was *prima facie* evidence of knowledge in the defendant of the dog's ferocity, and that the nonsuit must be set aside. *Applebee v. Percy*, 43 Law J. Rep. (N.S.) C.P. 365; Law Rep. 9 C.P. 647.

2.—The defendant owned a mischievous dog, which was kept at his stables under the care and control of his coachman, who knew the dog to be mischievous. The defendant supposed the dog to be quite harmless. The plaintiff having been bitten by the dog, and having brought an action for the injuries, the Judge directed the jury that there was evidence of the scienter, since the knowledge of such a servant was enough to make the defendant liable:—Held, that the direction was right. *Baldwin v. Casella*, 41 Law J. Rep. (N.S.) Exch. 167; Law Rep. 7 Exch. 325.

##### (b) *Runaway horses.*

3.—The plaintiff was walking along a public street, when the defendant, seated on the box of his carriage which was drawn by two horses and driven by a man then under his control, came down a cross street. The horses, frightened by the barking of a dog, ran away. The driver was unable to hold them in, but told the defendant to leave them to him. The defendant accordingly sat passive, while the driver, trying to turn the horses so as to prevent them from running into a shop window opposite, pulled them aside towards the spot where the plaintiff then happened to be, but on nearing her, endeavoured vainly to draw them away from her. They ran against her, and she being hurt, sued the defendant for negligence and trespass. The jury found the defendant free from negligence, and that the occurrence was mere accident:—Held, that he was not liable in trespass. *Holmes v. Mather*, 44 Law J. Rep. (N.S.) Exch. 176; Law Rep. 10 Exch. 261.

##### (c) *Injury to passenger in omnibus.*

4.—In an action against an omnibus proprietor for injury to a passenger, it was proved, on behalf of the latter, that he was sitting inside the omnibus, and was injured by one of the horses kicking the front panel constituting the back of his seat, and that on a subsequent examination marks of other kicks were seen:—Held, that there was evidence of negligence of the defendants to go to the

jury. *Simpson v. The London General Omnibus Company*, 42 Law J. Rep. (N.S.) C. P. 112; Law Rep. 8 C. P. 390 *nom. Simson*.

(d) *Keeping dangerous horse in field.*

5.—The defendants were occupiers of a plot of land, which was separated from a field of the plaintiff's by a wire fence. The defendants turned into their plot of land an entire horse; and the plaintiff put into his field a mare. The defendants' horse and the plaintiff's mare got together upon either side of the fence, and the horse by biting and kicking through the fence injured the mare. The horse did not trespass upon the plaintiff's field by crossing the fence. Upon previous occasions he had been watched, and the plaintiff had warned the defendants to keep him away from the mare. The plaintiff having sued for the injury to the mare, the County Court Judge held that there was no case to go to a jury.—Held, that the plaintiff was entitled to judgment; for there was evidence that a trespass had been committed, and the damage was not too remote. *Ellis v. The Loftus Iron Company*, 44 Law J. Rep. (N.S.) C. P. 24; Law Rep. 10 C. P. 10.

(B) NEGLIGENCE IN KEEPING PROPERTY IN UNSAFE CONDITION.

(a) *Poisonous leaves and clippings of trees.*

6.—Declaration that the defendant was possessed of yew trees upon land belonging to him and in his occupation, the clippings of which trees were to his knowledge poisonous to horses and cattle, whereupon it became his duty to take due care to prevent the clippings from being put or placed upon land, other than his own or in his occupation, where the horses and cattle of his neighbours and others might be enabled to eat them. Breach, that the defendant took so little care of the clippings that they were put and placed upon land other than his own or in his occupation, whereby the horses of the plaintiff were enabled to eat the clippings, and were poisoned and killed.—Held, on demurrer, that this declaration was bad, as it was consistent with the inference, that the clippings had been carried from the defendant's land by a stranger, or through some cause over which the defendant had no control. *Wilson v. Newberry*, 41 Law J. Rep. (N.S.) Q. B. 31; Law Rep. 7 Q. B. 31.

(b) *Negligence in care of ship.*

7.—The defendants' vessel, through the negligence of their servants, took the ground and becoming unmanageable in consequence, was driven against and damaged the plaintiff's sea wall. She could not be removed from her position against the wall without being broken up. During the time occupied in landing the cargo, which was done with reasonable care, speed and diligence, further damage was done to the wall by the vessel bumping against it. The declaration stated in the first count that the vessel was wrecked by the negligence of the defendant's servants, and thereby injured the plaintiff's wall; and in the second count that

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the defendants' vessel had been wrecked and driven against the wall, and did and was continuing to do injury to it, and that by reasonable care the defendants might have prevented her from doing and continuing to do further injury to the wall:—Held, affirming the judgment of the Court below (39 Law J. Rep. (N.S.) Exch. 163), that the plaintiffs were entitled to recover the damage claimed in the first count. *The Lords Bailiffs and Jurats of Romney Marsh v. The Corporation of the Trinity House* (Exch. Ch.), 41 Law J. Rep. (N.S.) Exch. 106; Law Rep. 7 Exch. 247.

(c) *Using defective wagon on railway.*

8.—A railway company allowed a truck belonging to a wagon company to come on their line. The truck having a patent defect was put aside for repairs, but was afterwards used on the line when injury occurred to the plaintiff arising from a latent defect, which might have been discovered on examination, but which examination it was not the duty of the railway company to make; but the jury found that it was the duty of the railway company before allowing the truck to be used to have required some distinct assurance from the wagon company that it had been thoroughly examined and repaired:—Held, that this finding was not immaterial, and that the plaintiff was entitled to a verdict. *Richardson v. The Great Eastern Railway Company*, Law Rep. 10 C. P. 486; reversed, on appeal, Law Rep. 1 C. P. Div. 343.

(d) *Dangerous state of highway.*

9.—The defendant had been appointed by the vestry surveyor of highways. The vestry resolved that a part of a highway should be raised, and ordered the defendant to employ men to do it. He contracted with G. to do the work, at so much per yard, and the vestry found the materials. G. employed his own men, and proceeded to perform the work. The defendant did not personally interfere with the work. G. left the road in such a state that the plaintiff, in driving along by night, was overturned and injured. The defendant did not give any direction that the road should be left in such a state:—Held (in an action by the plaintiff), that the defendant was not liable. *Taylor v. Greenhalgh*; *Pendlebury v. the Same*, 43 Law J. Rep. (N.S.) Q. B. 168; Law Rep. 9 Q. B. 487.

10.—A local board of health being, under the 117th section of the Public Health Act, 1848, surveyor of highways, is liable to an action at the suit of a person, who, when passing along the highway, is injured by reason of the servants of the local board negligently leaving a heap of stones upon the highway. *Foreman v. The Mayor, &c., of Canterbury*, 40 Law J. Rep. (N.S.) Q. B. 138; Law Rep. 6 Q. B. 214.

Quære—whether, if the negligence was that of the surveyor appointed by the board under section 37, and who could not be removed without the approval of the General Board of Health, there would be such liability. *Ibid*.

(e) *Unsafe bridge.*

11.—The plaintiff was walking on a highway

under a bridge forming part of a line of railway, when a brick fell from its place in the perpendicular pier of the bridge, and injured him. He at the time heard a noise as of a train passing above:—Held, by the Exchequer Chamber, affirming the decision of the Queen's Bench (39 Law J. Rep. (N.S.) Q.B. 200), that these facts were sufficient evidence of negligence on the part of the railway company to go to the jury. *Kearney v. The London, Brighton, and South Coast Railway Company* (Exch. Ch.), 40 Law J. Rep. (N.S.) Q.B. 285; Law Rep. 6 Q.B. 759.

(f) *Neglect to repair fences, &c.*

12.—The plaintiff and the defendant were occupiers of adjoining closes of land separated by a fence, situated on the defendant's close, and the property of the defendant. For more than forty years the fence had been repaired whenever repairs were necessary by the owner and occupiers of the defendants' land, and on several occasions the fence had been repaired by the defendant and his predecessors in title upon notice from the occupier for the time being of the plaintiff's close. The defendant sold the fallage of the wood on his close to one H., who proceeded to fell the trees, and some of his servants felled a tree in so negligent a manner that it caused a gap in the fence through which the plaintiff's cattle entered the defendant's close, and having eaten some of the foliage of a yew tree they died in consequence. In an action in the County Court the Judge found as a fact that there was an obligation on the part of the defendant to keep the fence in repair for the purpose of preventing cattle lawfully in the plaintiff's close from escaping into the defendant's close, and that the escape of the cows was caused by negligence of the servants of H., but that the defendant had not received notice that the fence was broken down. Upon these facts, the Judge held that the defendant was not responsible for the injury to the plaintiff:—Held, that the decision was wrong as it appeared from the evidence that the defendant was bound at his peril at all times to maintain the fence and without notice to repair it, and the damage done to the cattle was proximately due to the defective state of the fence. *Lawrence v. Jenkins*, 42 Law J. Rep. (N.S.) Q.B. 147; Law Rep. 8 Q.B. 274.

13.—Cattle belonging to the plaintiff were at about eleven o'clock at night driven along an occupation road which crossed a branch line of the defendants' railway on a level. As they were passing over the crossing they became frightened owing to a number of trucks being shunted by the defendants in a negligent manner, and six or seven of them escaped from the control of their drovers, and were not seen till four o'clock in the morning, when they were found dead or dying on the main line of the defendants' railway, which they appeared to have reached owing to the defects in the fence of a garden and orchard adjoining the railway:—Held, that there was sufficient evidence, that the death of the cattle was the natural result of the defendants' negligence. *Sneesby v. The*

*Lancashire and Yorkshire Railway Company*, 43 Law J. Rep. (N.S.) Q.B. 69; Law Rep. 9 Q.B. 263.

*Statutory duty: obligation of railway company to fence adjoining lands.* [See RAILWAY, 26, 27.]

*Neglect by tenant under covenant to repair.* [See LEASE, 13, 14.]

(g) *Dangerous grating over sewer.*

14.—A local board of health had vested in them, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 43, a sewer which ran under a highway of which, by virtue of the same Act, they were surveyors. A grid or grating in the highway, used for the purpose of carrying the surface water from the road into the sewer, was allowed by the defendants to get out of repair, by reason of which a horse of the plaintiffs was injured:—Held, that, whether the defendants were liable or not, as surveyors of the highway, the grid must be taken to be part of the sewer, and they were liable, as owners of the sewer and grid, for their negligence in not keeping the latter in repair. *White v. The Hindley Local Board of Health*, 44 Law J. Rep. (N.S.) Q.B. 114; Law Rep. 10 Q.B. 219.

(h) *Maintenance of towing path.*

15.—The defendants were a corporation constituted for the purpose of the upper navigation of the river Thames by the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), and under the powers of that Act and of the previous statutes relating to the navigation which had become vested in them the defendants had constructed bridges and other works, and had acquired the right to use the whole of the towing-paths along the river, and to take toll for the same. In the exercise of such right the defendants took an aggregate toll in one sum for the use of the entire navigation and towing-paths, which included the works the defendants had constructed, as well as the natural soil which had been worn into the track of a towing-path. Part of such natural towing-path got into a dangerous state by the action of the water, and in consequence thereof the plaintiff's horses whilst using it in towing a barge, for which the proper toll had been paid to the defendants, fell into the river and were drowned:—Held, by the Court of Exchequer Chamber, affirming the decision of the Court of Common Pleas (41 Law J. Rep. (N.S.) C.P. 241; Law Rep. 7 C.P. 458) (Cleasby, B., *dissentiente*), that as the defendants took one toll for the use of the entire towing-path, parts of which were artificial, it mattered not that the place where the accident happened was not artificial, but that it was the duty of the defendants to take reasonable care that the whole of the towing-path was in such a state as not to expose those using it to undue danger, and that for a neglect of such duty the defendants were responsible to the plaintiff although they were a public body receiving their powers for public purposes. Held, *per totam Curiam*, that the towing-path was not confined to the mere beaten track but included so much of the bank as might ordinarily be used by horses when



towing barges. And semble, the defendants would not be liable for the defective state of the towing-paths, if such state were a latent one, of the existence of which the defendants might be ignorant though using reasonable care, or if they were to give notice of it to those who pay the tolls, or to inform them that they must take the towing-paths as they find them. *Winch v. The Conservators of the River Thames*, 43 Law J. Rep. (N.S.) C. P. 167; Law Rep. 9 C. P. 378.

(i) *Level crossings over railway.*

[See RAILWAY.]

(k) *Damage by fire from railway banks.*

16.—In an action charging that by negligence of the defendants, a railway company, in the management of their railway engines and banks, cut grass was heaped on the banks and ignited, and a fire occasioned, which spread along a stubble field to the plaintiff's cottage, and set it on fire; there was evidence that the summer being exceptionally hot, the country was in an unusually dry state, and fires had in consequence happened, that the hedges and grass on the banks of the railway had been trimmed by the defendants' workmen, and the trimmings left in little heaps on the banks for a fortnight, so as to become highly combustible; that some few minutes after a train had passed, a fire was observed on one of the railway banks, which consumed some of these trimmings, and burnt through the hedge fence into the stubble field; and that there being a high wind, the fire was carried across the field and over a lane, to the plaintiff's cottage which it burnt:—Held (Blackburn, J., *dubitante*), that there was evidence of negligence to go to the jury. Held, also, *per totam Curiam*, that negligence being established, the defendants were liable for all the consequences, although the extension of the fire to the plaintiff's cottage was an accident which no reasonable person could have anticipated. *Smith v. The London and South-Western Railway Company*, 40 Law J. Rep. (N.S.) C. P. 21; Law Rep. 6 C. P. 14.

(l) *Escape of water.*

(1) *Collecting water on land.*

17.—The proprietor of collected water is not liable, without negligence, for its escape, caused by *vis major*; and a fall of rain of a kind which could not reasonably have been anticipated, amounts to *vis major*. *Nichols v. Marsland*, 44 Law J. Rep. (N.S.) Exch. 134; Law Rep. 10 Exch. 255.

Semble—the rule as to the liability of the proprietor of stored water does not apply when a fresh agency intervenes between the water and the damage. *Fletcher v. Rylands* (37 Law J. Rep. (N.S.) Exch. 116) distinguished. *Ibid*.

18.—The plaintiff's mine was flooded by water which had, after an unusual rainfall, accumulated in an excavation made by the defendants on their land, and had escaped thence through their mine into the plaintiff's, which was situated at a lower level:—Held, that although the defendants in

making the excavation had no intention of collecting water therein, and although they provided an outlet for such an amount of water as might be looked for in ordinary seasons, the case was still governed by *Rylands v. Fletcher* (37 Law J. Rep. (N.S.) Exch. 171; Law Rep. 3 E. & I. App. 330), and the defendants were liable for the damage sustained by the plaintiff. *Smith v. Fletcher*, 41 Law J. Rep. (N.S.) Exch. 193; Law Rep. 7 Exch. 305.

[And see MINE, 15–17.]

(2) *As between occupiers of upper and lower floors.*

19.—Where the owner and occupier of a building lets the lower floor to a tenant, and remains himself in occupation of the upper floors and roof, he is under no liability to the tenant, either implied from the contract between them or arising from duty independent thereof, to make compensation for damage done to this lower floor by an escape of water from the roof caused by an accident (such as a rat gnawing a hole in a water-pipe), which could not have been prevented by the exercise of reasonable care and vigilance. *Carstairs v. Taylor*, 40 Law J. Rep. (N.S.) Exch. 129; Law Rep. 6 Exch. 217.

20.—The plaintiff carried on business on the ground floor of a house, and the defendants carried on business in offices on the second floor. A quantity of water oozed through the ceiling and damaged the plaintiff's stock-in-trade, and it was discovered that the water had escaped from a water-closet in the private offices of the defendants, owing to the valve having got out of order, so that the water flowed into the pan, completely filling it. There was no evidence of negligence with regard to the fittings of the water-closet on the part of the defendants, nor did it appear that they knew that the valve was out of repair:—Held, that the defendants were not liable, as there was no obligation on them under all circumstances and at all hazards to keep the pipes from overflowing and their room water-tight. *Ross v. Fedden*, 41 Law J. Rep. (N.S.) Q. B. 270; Law Rep. 7 Q. B. 661.

(3) *Escape from pipe of waterworks company.*

21.—The defendants, a waterworks company, laid down and maintained, under powers conferred on them by Act of Parliament, a pipe for the purpose of conveying water. The pipe was carried along a turnpike-road, the soil of which was in K., who owned the land on both sides. He employed the plaintiff to make a tunnel under the surface of the road which was at that spot raised upon an embankment. In the course of the work the plaintiff was obstructed by water which, without the knowledge of anyone, escaped from the pipe. The trustees of the road and the surveyor of highways had consented to the tunnel being made by K. The plaintiff gave notice to the defendants, who repaired the pipe, but not until after the plaintiff had suffered injury by reason of the obstruction to his works:—Held, that the plaintiff could not maintain an action against the defendants. *Cattle v. The Stockton Waterworks*

*Company*, 44 Law J. Rep. (n.s.) Q. B. 139; Law Rep. 10 Q. B. 453.

(m) *Insufficiently buoying sunken anchor.*

22.—The defendants, under a local Act, constructed a pier and landing-stage. The pier was a solid structure, which did not extend to low water mark, but the landing-stage floated on the river, and was moored below low water mark by anchors fixed in the bed of the river, a bridge being made to connect the landing-stage with the pier. Part of this landing-stage was beyond the limits marked on the deposited plans, but it, with its mooring anchors, received the approval of the Admiralty, pursuant to the 8th section of the Act. One of the mooring anchors to which the floating stage was attached was insufficiently buoyed to indicate its position under the water, and thereby injured a boat of the plaintiffs, which, whilst lawfully navigating the river, and without any negligence of the plaintiffs, struck against such anchor:—Held, in an action for the injury to the plaintiffs' boat, that the landing-stage and works were authorised by the Act; but that there was a cause of action against the defendants for negligence in insufficiently buoying the anchor, which caused the injury to the plaintiffs' boat. *Jolliffe v. The Wallasey Local Board*, 43 Law J. Rep. (n.s.) C. P. 41; Law Rep. 9 C. P. 62.

(n) *Injury to consignee using premises.*

23.—The plaintiff consigned a heifer to a station of the defendants. On arrival, there being only one porter to shunt the horse box containing the heifer to a place from which it could be unloaded, the plaintiff assisted. There was evidence to shew that he did so by permission of the station master. While so doing another train, through the negligence of the defendants' servants, entered the station, and ran over and injured the plaintiff. In an action by him,—Held, that the evidence shewed that he was a mere volunteer, and therefore on the same footing as the servants of the company, but that the consent of the station master to the plaintiff's acting as he did was binding on the company, who were bound to take reasonable care for the security of the plaintiff. *Wright v. The London and North-Western Railway Company*, 44 Law J. Rep. (n.s.) Q. B. 119; Law Rep. 10 Q. B. 298: affirmed, on appeal, 45 Law J. Rep. (n.s.) Q. B. 570; Law Rep. 1 Q. B. D. 252.

24.—A coal depôt of a railway company had a railway siding, under which were cells into which the coals were tipped from the trucks, so as to fall into the carts of the consignees, which were backed into the cells from a roadway which was at a lower elevation than the railway. It was the practice of the persons coming to receive the coals to assist the defendants' servants in tipping their coals, and for that purpose they passed along a flagged pathway on the siding running by the side of the trucks. Some coals arrived consigned to the plaintiff, who went to receive delivery, but found that his truck could not be tipped, as the cells were all full. With the permission of the

station master, he passed along the flagged pathway till he came to his coals, stepped on to the buffer of the truck, and threw down some pieces of coal to the roadway, where his servant was with a cart. He stepped back on to the flagged way, and one of the flags, which was in an insecure state gave way, and he, fell into one of the cells and was injured:—Held (affirming the judgment below, 38 Law J. Rep. (n.s.) Exch. 147), that, although the plaintiff in getting his coals was not doing so in the ordinary mode, yet the defendants were under the same obligation to provide for his safety as if he had been pursuing the ordinary mode, and that he was not a mere licensee, but engaged with the consent of the defendants in doing something incidental to the completion of the contract between himself and the defendants, in which both he and the defendants had an interest, and therefore the defendants were bound to take due and reasonable care for his security upon their premises. *Holmes v. The North-Eastern Railway Company* (Exch. Ch.), 40 Law J. Rep. (n.s.) Exch. 121; Law Rep. 6 Exch. 123.

(o) *Unforeseen accident from acts of skilled workmen.*

25.—Where the execution of a work, which, if carefully and properly done, need not result in accident to passers-by, is entrusted to skilled and proper workmen, there is no obligation on a railway company whose line adjoins the work to take special precautions to avert from their passengers a danger which can only be apprehended on the supposition that the workmen engaged will do their work negligently; at all events, if the company have no control over the workmen, and are otherwise not responsible for their acts, and by Lord Westbury, not even if those proper and skilled workmen were employed directly by the company. *Daniel v. The Metropolitan Railway Company* (H.L.), 40 Law J. Rep. (n.s.) C. P. 121; Law Rep. 5 E. & I. App. 45.

(C) CONTRIBUTORY NEGLIGENCE.

26.—The plaintiffs, colliery owners, possessed a siding on one of the lines of the defendants, a railway company, and a bridge over the siding with a headway of eight feet. The course of business was for the defendants to bring the plaintiffs' empty waggons on to the siding and leave them, and for the plaintiffs then to deal with them as they thought fit. At the plaintiffs' colliery it was the custom to leave off work at 12.30 p.m. on Saturdays, and resume it at 6 a.m. on Mondays. On a Saturday afternoon at 2.30 p.m. the defendants brought and left on the siding some of the plaintiffs' waggons, all empty but one, which being loaded with a disabled waggon was eleven feet high, and therefore could not pass under the bridge. The loaded waggon and the others were known to a person in charge of the plaintiffs' works, during the absence of the workmen at 2.30 on that day, to be on the siding, and were left standing there. On Sunday night, after dark, the defendants' servants brought an engine and a long train of the

plaintiffs' empty waggons on to the same siding, and with this train pushed the loaded waggon up to the bridge, and on the waggon being stopped by the bridge, without looking to ascertain the cause, gave such momentum to the engine that the waggon with its load knocked the bridge down, and injured other property of the plaintiffs. The plaintiffs having sued the defendants for negligence, and the jury having found a verdict for the defendants on the ground that there was contributory negligence on the part of the plaintiffs, —Held (by the majority of the Exchequer Chamber, reversing the decision of the Exchequer, 43 Law J. Rep. (N.S.) Exch. 73; Law Rep. 9 Exch. 71), that there was evidence for the jury of such contributory negligence in the plaintiffs as would disentitle them from recovering. *Radley v. The London and North-Western Railway Company* (Exch. Ch.), 44 Law J. Rep. (N.S.) Exch. 73; Law Rep. 10 Exch. 100.

27.—The plaintiffs, guardians of the poor, appointed the defendant, who was the manager of a bank, to be their treasurer. He received no remuneration from them nor profit from the sums deposited in his hands, those sums being dealt with by the bank as other funds deposited by customers. B., the clerk to the guardians, allowed L., a clerk in his employ, to draw up orders on the treasurer for payment of money. These orders were paid across the bank counter, as cheques usually are. L. drew up orders in such a manner as to enable himself to increase the amount after they had been duly signed by the guardians and countersigned by the defendant, and he did increase them accordingly by various sums, in most instances by 10l., the syllable "teen" being added after the written word four, six, eight or nine, and a 1 being inserted before the figure 4, 6, 7, 8 or 9, in spaces left by L. for the purpose. The orders thus fraudulently increased were presented at the bank and paid in the ordinary way, and the payment of the excess was due solely to the fact that the defendant's clerks were misled by want of proper caution on the part of the guardians and their clerk in signing the orders. In some cases L. forged the indorsement of payees; in others he both increased the amounts and forged the indorsements. The guardians sued their clerk for negligence in his duty, but settled the action on his consenting to a Judge's order to stay proceedings on payment of a certain sum. They then brought a similar action against the defendant:—Held, that the clerk and the treasurer were not joint tortfeasors so as to make the compromise of the action against the one a bar to the action against the other, but, nevertheless, that the plaintiffs were disentitled, by the negligence of themselves and their clerk, to recover against the defendant. Held, also, that although the treasurer was not within the protection afforded to a "banker" by 16 & 17 Vict. c. 59, s. 19, yet the account of the guardians must be deemed to have been kept with the bank itself, and the Act operated to discharge the bank, and consequently the defendant, its servant, from liability in respect of the payment of the orders of which the indorsements were forged.

*The Guardians of Halifax Union v. Wheelwright*, 44 Law J. Rep. (N.S.) Exch. 121; Law Rep. 10 Exch. 183.

*Collision of trains: identification of plaintiff with driver guilty of contributory negligence.* [See CARRIER, 10, 11.]

[And see SHIPPING LAW, 27–30.]

(D) NEGLIGENCE BY PERSONS IN PARTICULAR RELATIONS.

(a) *Valuer or arbitrator.*

28.—The plaintiff purchased the goodwill, stock and effects of a business at a valuation, the amount of which was to be fixed by valuers, one to be appointed on each side for that purpose, and in case of difference by an umpire to be chosen by the valuers. The plaintiff employed the defendant as his valuer, and the defendant and the valuer appointed by the vendor fixed between them the amount of valuation. In an action for negligence in making such valuation, by which the value of the goodwill was fixed too high, the plaintiff applied to administer interrogatories to the defendant to ascertain the basis on which he had agreed with the valuer of the defendant to calculate the valuation:—Held, that the defendant had not acted in the matter as an arbitrator, but as a valuer only, and was therefore liable to his employer for negligence, and the plaintiff accordingly was allowed to administer the interrogatories. *Turner v. Goulden*, 43 Law J. Rep. (N.S.) C. P. 60; Law Rep. 9 C. P. 57.

*Action for, against auctioneer for not making a binding contract of sale.* [See AUCTION, 2.]

*Liability of average adjuster, as arbitrator.* [See ARBITRATION, 16.]

(b) *Patent agent.*

29.—A patent agent is expected to know the law relating to the practice of getting patents. Where, therefore, such agent who was employed to procure a patent, being not aware of the decision of the Lord Chancellor in *Re Bates and Redgate*, 38 Law J. Rep. (N.S.) Chanc. 501; Law Rep. 4 Chanc. App. 577 (which makes it necessary, notwithstanding provisional specification has been filed, to take care that the patent is sealed before another patent for the same invention is obtained by a later applicant), delayed four months between filing the provisional specification and applying to have the patent sealed, whereby a subsequent applicant for a patent for the same invention was able to get his patent sealed first, and so prevent such agent from procuring a patent for his employer,—Held, evidence of negligence, for which such patent agent might be liable in an action at the suit of his employer. *Lee v. Walker*, 41 Law J. Rep. (N.S.) C. P. 91; Law Rep. 7 C. P. 121.

(c) *By solicitor.*

*Liability of solicitor for negligence in neglecting to register his pendens, and inducing client to take insufficient security.* [See ATTORNEY, 23, 24.]

(d) *By broker.*

*Broker: liability for want of skill.* [See *BROKER*, 1.]

(e) *By innkeeper.*

*By innkeeper.* [See *INNKEEPER*, 2, 3.]

(f) *Cabowner letting out cab to cabdriver.*

**30.**—Where the plaintiff, a cabdriver, was furnished by the defendant, a cabowner, with a horse and cab for the day, on the terms that the plaintiff was to pay a fixed sum for their use, and have the earnings for himself, and the defendant personally furnished the plaintiff with a horse which he, the defendant, had lately bought and not tried in a cab, and which (though the defendant did not know it) was unfit for the required purpose, and ran away and injured the plaintiff:—Held, by the majority (Grove, J., and Byles, J.) of the Court, that the relation between the defendant and the plaintiff was that of bailor and bailee, with a warranty that the horse was reasonably fit, and further, per Byles, J., that even if it was that of master and servant, the personal interference of the defendant was evidence of such negligence as would make him liable; but per Willes, J., that the relation was that of master and servant, and in the absence of knowledge, the defendant was not liable. *Fowler v. Lock*, 41 Law J. Rep. (N.S.) C. P. 99; Law Rep. 7 C. P. 272.

[This case came, on appeal, to the Court of Exchequer Chamber, and that Court, after taking time to consider, ordered a new trial, Bramwell, B., stating that some of the Judges thought, as Willes, J., did, in the Court below, that the plaintiff was a mere servant, whilst others of the Judges did not think that he was a mere servant, but that, though the plaintiff took the horse as a bailee, it did not necessarily follow that he did so with a warranty that the horse was reasonably fit, and that it might be that he took it with the risk attaching to an unknown horse. The cause was accordingly tried a second time before Denman, J., at the London sittings after Trinity Term, when the jury found, inter alia, secondly, that the defendant did not take reasonable precaution to supply the plaintiff with a reasonably fit horse on the occasion. A verdict having been returned generally for the plaintiff, Francis, for the defendant, applied in Michaelmas Term, 1874, for a new trial, but the Court considered (see Law Rep. 10 C. P. 90) that the second finding of the jury put an end to the case, as, whether the plaintiff was servant or bailee, the defendant was liable for negligence, which was the result of such second finding, and therefore no rule was granted.]

(g) *Livery stable keeper.*

**31.**—The defendant, a livery stable keeper, had contracted with a builder to erect a building, of which the lower part was to be a shed intended for the reception of carriages, and the upper part to be used for other purposes. Two carriages and horses of the plaintiff were placed under the shed when the lower part of the building had been

completed, but whilst the contractor's workmen were still on the upper floor. The building was blown down by a high wind, and the carriages were injured. It was not disputed that the builder was one whom a careful and prudent person might trust, and that the defendant had no notice of any negligence on the contractor's part; but it was proposed to prove that, owing to the neglect of the contractor and his workmen, the building was, in fact, unskillfully built and unsafe. The Judge, at the trial, ruled that the defendant's liability was that of an ordinary bailee for hire, and that all he was bound to do was to use ordinary care in the keeping of the plaintiff's carriages; and that if, in causing the shed to be built, he did all that a careful man would do, he would be exempt from liability for an event which was caused by the careless or improper conduct of the builder, of which the defendant had no notice:—Held, that the direction was right, for it could not reasonably be inferred that the defendant had warranted that the shed was reasonably fit for the purpose to which it was applied, inasmuch as this would charge him with a trust beyond what the nature of the thing put it in his power to perform, and although it was reasonable to require him to use due care to ascertain whether the building was secure, and by himself and his servants to take due care to maintain it in a proper state, it would be unreasonable to go further. *Searle v. Laverick*, 43 Law J. Rep. (N.S.) Q. B. 43; Law Rep. 9 Q. B. 122.

(h) *Bailee of bills for encashment.*

**32.**—A., being indebted to B., deposited with C. certain bills drawn in A.'s favour as security, C. undertaking to be responsible for them "until the effectual encashment thereof, which encashment is entrusted to A.:"—Held, that C. was not guilty of breach of duty in allowing A. to take the bills when due, for encashment at his discretion, and was not bound to see that he handed over the proceeds to B. *Trefz v. Canelli*, Law Rep. 4 P. C. 277.

(i) *By servant: liability of master.* [See *MASTER AND SERVANT*, 7-14.]

## (E) STATUTORY NEGLIGENCE.

**33.**—When a specified duty is imposed by statute upon a public body, it is, in the absence of express enactment, to be assumed that the Legislature intended to exempt the public body from liability to make compensation for alleged omissions to fulfil that duty, unless negligence can be proved to exist. *Hammond v. The Vestry of St. Pancras*, 43 Law J. Rep. (N.S.) C. P. 157; Law Rep. 9 C. P. 316.

The Metropolis Management Act, 1855, section 72, imposes upon certain vestries, amongst them the defendants, the duty of keeping the sewers in their respective parishes properly cleared, cleansed and emptied. The plaintiff was the occupier of a messuage in the defendants' parish, and received injury from the overflow of a sewer; the

overflow happened without any default on the part of the defendants:—Held, that the plaintiff could not maintain an action against the defendants for the injury which he had suffered. *Ibid.*

**34.**—Injunction granted to restrain a railway company in the negligent exercise of its statutory powers; e.g. in taking insufficient precautions to secure adjoining houses. *Biscoe v. The Great Eastern Railway Company*, Law Rep. 16 Eq. 636.

*By railway company in respect of level crossings.* [See RAILWAY, 22–25.]

*By railway company in respect of fences.* [See RAILWAY, 26, 27.]

*By coal mine owner.* [See MINE, 20.]  
*Action for breach of statutory duty.* [See ACTION, 2, 3.]

*Liability of surveyor of highways.* [See HIGHWAYS, 15, 16.]

*Liability of master for injury to servant.* [See MASTER AND SERVANT, 4, 5.]

*Liability of person who has by negligence caused another's death.* [See MASTER AND SERVANT, 6.]

#### (F) DAMAGES.

**35.**—The damages in an action for negligence causing personal injury to the plaintiff are not subject to any deduction therefrom of money paid to him by an insurance office under a policy of insurance against accident, as compensation for the same injury. *Bradburn v. The Great Western Railway Company*, 44 Law J. Rep. (N.S.) Exch. 9; Law Rep. 10 Exch. 1.

*Remoteness of damage.* [See DAMAGES, 17–22.]

#### NEGOTIABLE INSTRUMENT.

[See BILL OF EXCHANGE, SCRIP CERTIFICATE.]

#### NOTICE OF ACTION.

[See ACTION, 10–12.]

#### NOVATION.

[See COMPANY, E.]

#### NUISANCE.

(A) WHEN RESTRAINED IN EQUITY.

(B) ACTION FOR.

(C) ABATEMENT OF.

(a) *Smoke nuisance.*

(b) *Water dropping from bridge over highway.*

(c) *Overcrowding houses.*

(d) *"Owner" of premises.*

(D) INDICTMENT: INDICENCY.

(A) WHEN RESTRAINED IN EQUITY.

[See INJUNCTION, 17–26.]

**1.**—A sewage company was under covenant with a local board to keep their own works in working order, so as to admit the free flow of sewage in sewers of the board. A demurrer to a bill seeking to restrain the company from causing or permitting sewage to remain in the sewers of the board was overruled. *The Nuneaton Local Board v. The General Sewage Company*, 44 Law J. Rep. (N.S.) Chanc. 561; Law Rep. 20 Eq. 127.

#### (B) ACTION FOR.

**2.**—In order to maintain an action for a public nuisance, the plaintiff must prove that he has suffered a particular, direct, and substantial injury. *Benjamin v. Storr*, 43 Law J. Rep. (N.S.) C.P. 162; Law Rep. 9 C.P. 400.

The defendants were auctioneers, and received large quantities of goods to be sold at their rooms. The plaintiff kept a coffee-house near to the defendants' place of business, and complained that the vans which delivered goods at their rooms blocked up the public street, so as to darken his coffee-shop, and to compel him to burn gas during daylight, and that the horses caused unpleasant smells, which rendered his customers unwilling to frequent his house. The declaration did not specifically charge that the plaintiff was annoyed by the smells, but alleged that by reason of the obstruction the plaintiff's house was rendered inconvenient. At the trial, evidence was allowed to be given of the bad smells, and a verdict was found for the plaintiff:—Held, that the injury to the plaintiff was particular, direct, and substantial, so as to entitle him to maintain an action, and that, under the allegation in the declaration that the plaintiff's house was rendered inconvenient by the obstruction, he could give evidence as to the unpleasant smells. *Ibid.*

*Right to carriage way across foot pavement.*

[See HIGHWAY, 10.]

#### (C) ABATEMENT OF.

(a) *Smoke nuisance.*

**3.**—By 29 & 30 Vict. c. 90, s. 19, the word "nuisances," under the Nuisance Removal Acts, shall include any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance:—Held, that in the event of such a nuisance existing, the occupier of the premises is liable to be charged and to have an order made upon him for the abatement of the nuisance, although it may have arisen or have been continued by the act of a servant employed by him upon the premises. *Barnes v. Akroyd*, 41 Law J. Rep. (N.S.) M.C. 110; Law Rep. 7 Q.B. 474.

**4.**—By the 18 & 19 Vict. c. 121, s. 14, any person not obeying an order of justices to abate a nuisance complained of shall, if he fail to satisfy the justices that he has used all due dili-

gence to carry out such order, be liable for every such offence to a penalty of not more than ten shillings per day during his default. By 29 & 30 Vict. c. 90, s. 19, sub-sec. 3, any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance, is to be included under the word "nuisance" in the Nuisances Removal Acts. An order of abatement of such last-mentioned nuisance was made by justices, which was not complied with, and subsequently nineteen summonses were issued for disobedience of the said order, laying the disobedience to have occurred on nineteen distinct days, and such summonses were returnable and heard on the same day, when the justices convicted on each of the summonses, and imposed a penalty of ten shillings upon each summons, with a separate set of costs in respect of each summons and conviction:—Held, that the sending forth black smoke from the chimney was the nuisance, and that each summons was issued in respect of a distinct offence, and that the convictions were right. *The Queen v. Waterhouse*, 41 Law J. Rep. (n.s.) M. C. 115; Law Rep. 7 Q. B. 345.

5.—By the Sanitary Act, 1866, 29 & 30 Vict. c. 90, part 2, s. 14, the expression "Nuisance Removal Acts" shall mean 18 & 19 Vict. c. 121, and 23 & 24 Vict. s. 77, as amended by this (the second) part of this Act, and this part of this Act shall be construed as one with the said Acts. By section 19, the word "nuisances" under the Nuisances Removal Acts, shall include, *inter alia*, any fireplace or furnace which does not, as far as practicable, consume smoke arising from the combustible used in such fireplace or furnace, and is used within the district of a nuisance authority for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufactory or trade process whatsoever, any chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance. In 18 & 19 Vict. c. 121, s. 8, there is a definition of certain nuisances, and by section 44, "The provisions of this Act shall not extend or be construed to extend to mines of different descriptions, so as to interfere with or obstruct the efficient working of the same, or to the smelting of ores and minerals, or to the manufacturing of the produce of such ores and minerals":—Held, by Blackburn, J., and Mellor, J., (Lush, J., dissenting), that the nuisances enumerated in section 19 of the later Act must be regarded as if they had been included in the nuisances specified in section 8 of the earlier Act, and that a nuisance caused by smoke from furnaces used in the manufacture of bichrome, a product of ore and minerals, was excepted by the proviso in section 44 from the summary provisions of the Acts. *Norris v. Barnes*, 41 Law J. Rep. (n.s.) M. C. 154; Law Rep. 7 Q. B. 537.

(b) *Water dropping from bridge over highway.*

6.—By 18 & 19 Vict. c. 121, s. 8, the word "nuisances" shall include "any premises in such a state as to be a nuisance or injurious to health."

A complaint was made against the appellants (a railway company), under the above statute, in respect of a "nuisance" alleged to exist in and upon their premises, a railway bridge crossing over a public street, by reason of a want of proper and sufficient means to prevent the percolation and overflow of water upon persons passing under or near to the said premises. It was proved that during rainy weather, and for some time afterwards, the water in a dirty state percolated through the bottom of the bridge, which was formed of wooden planks, and fell upon the persons passing along the street:—Held, that although there might be a nuisance, in respect of which the appellants were liable to be indicted, they were not liable to be proceeded against under this Act, inasmuch as the word "nuisances" in section 8 must be read in the sense of nuisances injurious to health, and the percolation of water as above mentioned could only be said to be indirectly a nuisance injurious to health. *The Great Western Railway Company v. Bishop*, 41 Law J. Rep. (n.s.) M. C. 120; Law Rep. 7 Q. B. 550.

(c) *Overcrowding houses.*

7.—A house which is so overcrowded as to be dangerous or prejudicial to the health of the inmates, is included within the definitions of "nuisances" in section 19 of 29 & 30 Vict. c. 90, although it be occupied by one family only, and proceedings may be taken under that Act to compel the abatement of the nuisance. *The Guardians of the Rye Union v. Payne*, 44 Law J. Rep. (n.s.) M. C. 148.

(d) *"Owner" of premises.*

8.—By the Nuisances Removal Act, 1855 (incorporated with the Sanitary Act, 1866), section 2, the word "owner" includes any person receiving the rents of the property, in respect of which that word is used, from the occupier of such property on his own account, or as trustee or agent for any other person . . . or who would receive the same if such property were let to a tenant. Proceedings were taken against the appellant under these Acts for a nuisance caused by the defective construction of a privy. It appeared that the house to which the privy belonged was let by A. to H. for a term of years at a rack rent, and that the appellant received the rent reserved by the lease as agent for the representatives of A. H. occupied the entrance or shop floor only, having underlet the residue of the premises, including the privy, to a yearly tenant at a rack rent:—Held, that the appellant was not "owner" of the premises within the meaning of the statutes, as he did not receive the rent paid by the occupier of the premises in which the nuisance arose. *Cook v. Montagu*, 41 Law J. Rep. (n.s.) M. C. 119; Law Rep. 7 Q. B. 418.

(D) INDICTMENT: INDECENCY.

9.—A urinal situate on the side of a public footpath and open to the public, but built in compartments, is such a public place as to make

an act of indecency committed in the urinal and witnessed by two persons an indictable nuisance. *The Queen v. Orchard* (3 Cox C. C. 248) questioned. *The Queen v. Harris*, 40 Law J. Rep. (N.S.) M. C. 67; Law Rep. 1 C. C. R. 283.

#### OBSCENE BOOK.

"The Confessional Unmasked" was a book on the practice of the Church of Rome with reference to auricular confession, and contained several very obscene passages. It was published by a society called the Protestant Electoral Union, whose object was not to corrupt the public mind, but to protest against the teaching of the Romish priesthood, and to expose what it termed the iniquity of the Confessional. But notwithstanding that such was the object of the society in publishing it, the Court of Queen's Bench in *The Queen v. Hicklin*, held the publication to be a misdemeanor at common law, and the book an obscene book within the meaning of Lord Campbell's Act, 20 & 21 Vict. c. 83. After that decision the society published a new edition in which some of the most obscene passages were omitted, but there remained sufficient to render the work not distinguishable in principle from the former edition. One G. M. having been tried at the Court of Quarter Sessions for selling this new edition, a report of such trial was published, in which the new edition of "The Confessional Unmasked" was fully set out, although at the trial it was not read aloud, but taken as read. In other respects the report was substantially a correct report of the trial:—Held, in accordance with the decision in *The Queen v. Hicklin* (37 Law J. Rep. (N.S.) M. C. 89; Law Rep. 3 Q. B. 360), that the report was an obscene book within the 20 & 21 Vict. c. 83. Held also, that being offensive to public decency, it was not privileged as the report of proceedings in a Court of justice. *Steele v. Brannan*, 41 Law J. Rep. (N.S.) M. C. 85; Law Rep. 7 C. P. 261.

The power of appeal to the quarter sessions given by 20 & 21 Vict. c. 83, does not take away the jurisdiction of the magistrate under 20 & 21 Vict. c. 43, to state a case under that Act for the opinion of one of the Superior Courts on a point of law arising under 20 & 21 Vict. c. 83. *Ibid.*

#### OPTION.

*As to term of lease.* [See LEASE, 5.]  
*As to term of loan.* [See DEBTOR AND CREDITOR, 5.]  
*As to time of payment.* [See DEED, 9.]

#### OVERSEERS.

*Accounts of.* [See POOR, 2, 3.]

#### PARENT AND CHILD.

[See BASTARDY; INFANT; SEDUCTION.]

- (A) GIFT BY PARENT TO CHILD.
- (B) GIFT BY CHILD TO PARENT.
- (C) CUSTODY AND RELIGIOUS EDUCATION OF CHILD.
- (D) MAINTENANCE OF CHILD.
- (E) POWER TO APPOINT GUARDIAN.
- (F) ABANDONMENT OF CHILD.

- (A) GIFT BY PARENT TO CHILD.

[See ADVANCEMENT.]

- (B) GIFT BY CHILD TO PARENT.

[See UNDUE INFLUENCE, 3, 4.]

- (C) CUSTODY AND RELIGIOUS EDUCATION OF CHILD.

1.—The Court, in exercising the power given to it by 22 & 23 Vict. c. 61, s. 4, with respect to the custody of children, will allow, in the interest of the children, the intervention of a third person after the final decree in a suit for judicial separation as in a suit for dissolution of marriage. *Godrich v. Godrich*, 43 Law J. Rep. (N.S.) P. & M. 2; Law Rep. 3 P. & D. 134.

The wife obtained a decree of judicial separation on the ground of cruelty, and had the custody of the children committed to her. A year afterwards their grandfather applied for leave to intervene, for the purpose of shewing that she was not a fit person to have the custody of the children, and the Court allowed the intervention. *Ibid.*

2.—Although the Judge of the Divorce Court has a discretionary power to deprive a father of the custody and control of his children, it is not competent to the father, upon the compromise of a divorce suit, by contract, to deprive himself of such custody and control, for this would be to renounce a duty. *Hamilton v. Hector*, 40 Law J. Rep. (N.S.) Chanc. 692; Law Rep. 6 Chanc. 701.

But where a deed of separation between husband and wife contained provisions that the children should remain at such schools as the husband should select, and that both parents should have reasonable access to them, and that the holidays of the children should be passed by them at such places and in such manner as the trustees of the deed should from time to time direct, having regard, as far as practicable, to the wishes of each of the parents,—Held, reversing the decision of the Master of the Rolls, that this was not such an abnegation by the father of his parental control as the Court would refuse to carry out on the grounds of public policy. *Ibid.*

3.—Although an agreement before marriage that the children of the marriage should be brought up in a different religion from that of their father is not binding at law or in equity, yet the Court will take such agreement into account in considering whether the father has abandoned his right to have his children brought

up in his own religion. Where there was such an agreement, and after the death of the father, it appeared that it was for the benefit of the child that she should remain with the mother's family and be brought up in their religion, the Court declined to order her to be brought up in the father's religion, notwithstanding that she had not so far imbibed the doctrines of the religion of her mother's family as would render it dangerous to change her religious education. *Andrews v. Salt*, Law Rep. 8 Chanc. 622.

*Custody of child: habeas corpus: child under fourteen: guardianship for nurture.* [See HABEAS CORPUS.]

[And see INFANT, 11; DIVORCE, 44-46; WARD OF COURT.]

#### (D) MAINTENANCE OF CHILD.

4.—A mother is not bound to maintain her son, and if she does, and seeks to recover from him or his estate advances made for his maintenance after his majority, she must prove a contract in order to establish a debt. *In re Cottrell's Estate*; *Joyce v. Cottrell*, 40 Law J. Rep. (N.S.) Chanc. 70; Law Rep. 12 Eq. 566.

*Lower Canada: alimentary provision: debt of trustee.* [See COLONIAL LAW, 11.]

#### (E) POWER TO APPOINT GUARDIAN.

5.—A father cannot appoint a testamentary guardian to his illegitimate children. *Sleeman v. Wilson*, Law Rep. 13 Eq. 36.

6.—The authority conferred on a father by 12 Car. 2. c. 24, ss. 8, 9, to appoint a guardian of his children during their minority, is not limited to the mere nomination of a particular guardian. He may also, if he should think fit, authorise the guardian whom he appoints in his will to nominate a co-guardian or successor in the office. *In the goods of Parnell*, 41 Law J. Rep. (N.S.) P. & M. 35; Law Rep. 2 P. & D. 379.

A. appointed B. and C. executors of his will and guardians of his daughter D., and directed that in the event of the death of either of them the survivor should appoint a co-guardian to act with him. B. obtained probate of the will and died, leaving part of the estate unadministered. C. appointed F. to be a guardian jointly with himself of D. during her minority, and renounced probate and administration of the estate of A. The Court granted administration (with the will annexed) of the unadministered estate of A. to F. as substituted testamentary guardian of D., the universal legatee for life named in the will. *Ibid.*

#### (F) ABANDONMENT OF CHILD.

7.—The prisoner was the father of a child under two years of age. The child was in the custody of the mother, who was living apart from the prisoner. The mother brought the child to him, and left it outside the door of his house at about 7 o'clock p.m. He was inside, and she called out, "Bill here's your child, I can't keep it; I am

gone." She left, and the prisoner afterwards came out of the house, stepped over the child, and went away. An hour and a half afterwards the child was still lying in the road outside the wicket of the garden; it was dressed in short clothes, and had nothing on its head. The prisoner's attention was called to the child when he came home, after a further interval of an hour and a half. He said that he should not touch it, and that those that brought it there must come and take it. The child was found at 1 a.m. lying in the road cold and stiff:—Held, that the prisoner was rightly convicted of having abandoned and exposed the child, within the meaning of the 24 & 25 Vict. c. 100, s. 27. *The Queen v. White*, 40 Law J. Rep. (N.S.) M. C. 134; Law Rep. 1 C. C. R. 311.

#### PARKS REGULATION ACT.

By the Parks Regulation Act, 1872, 35 & 36 Vict. c. 15 (passed June 27, 1872), s. 4, "If any person does any act in contravention of any regulation contained in the first schedule annexed hereto, he shall, on conviction by a Court of summary jurisdiction, be liable to a penalty not exceeding five pounds; but the regulations contained in the said schedule shall not take effect until the expiration of one calendar month after the passing of this Act." By section 9, "Any rule made in pursuance of the first schedule to this Act shall be forthwith laid before both Houses of Parliament, if Parliament be sitting, or if not, then within three weeks after the beginning of the then next ensuing session of Parliament; and if any such rules shall be disapproved of by either House of Parliament within one month after the same shall have been so laid before Parliament, such rules, or such parts thereof as shall be disapproved of, shall not be enforced." By Regulation 8 in schedule 1, "No person shall deliver, or invite any person to deliver, any public address in a park, except in accordance with the rules of the park;" and by Regulation 19, "Rules of the Park" mean rules made by the ranger as to matters within his jurisdiction, and as to other matters, rules made by the Commissioners of Works and Public Buildings.

Rules for Hyde Park were made and published on the 1st of October, 1872, signed by the Ranger and under the seal of the Commissioners of Works. By rule 11, "No public address may be delivered, except within forty yards of the notice-board on which this rule is inscribed." By rule 13, "No public address may be delivered unless a written notice of the intention to deliver the same, signed with the names and addresses of two householders residing in the metropolis, be left at the office of the Commissioners of Her Majesty's Works and Public Buildings, at least two clear days before: such notice must state the day and hour of intended delivery. After such a notice has been received, no other notice for the delivery of any other address on the same day will be valid."



The appellant, in the November following, and before the meeting of Parliament, delivered a public address in Hyde Park, more than forty yards from a notice-board on which the rule above mentioned was inscribed, and having been summoned before a police magistrate was convicted and fined:—Held, that the conviction was right, as it was the intention of the Legislature that the rules should come into operation in the recess, and before the approval of Parliament had been obtained, and that in case Parliament should disapprove of them, they should cease to be further enforced; that the rules were sufficiently authenticated by having the signature of the ranger and the seal of the commissioner attached to the same copy; that they were within the jurisdiction of either the ranger or the commissioner; and that there was nothing in section 11 which prevented the appellant from being convicted, as at the date of the Act there was no right of way or of holding public meetings in Hyde Park. *Bailey v. Williamson*, 42 Law J. Rep. (N.S.) M. C. 49; Law Rep. 8 Q. B. 118.

#### PARLIAMENT.

##### (A) PRIVILEGE OF PARLIAMENT.

##### (B) ELECTION OF MEMBERS.

###### (a) *Bribery and corruption.*

(1) *Corrupt practices by agent before joint candidature.*

(2) *Votes after notice of disqualification by bribery.*

###### (3) *Election petitions.*

(i) *What matter may be enquired into.*

(ii) *Inspection of marked register.*

(iii) *Certificate of witness.*

(iv) *Effect of dissolution of Parliament.*

(v) *Scrutiny.*

(vi) *Costs.*

(b) *Election expenses: right of returning officer.*

(c) *Duties of presiding officer.*

(d) *Return to the clerk of the Crown.*

##### (C) REGISTRATION.

(a) *Register, how far conclusive.*

(b) *Qualification.*

(1) *For county vote.*

(i) *Peer of Parliament.*

(ii) *Forty shilling freeholder.*

(iii) *Rent-charge.*

(iv) *Interest in land: equitable freehold.*

(v) *Lessee of chattel rent-charge.*

(vi) *Sub-lessee.*

(vii) *Occupation franchise: rateable value.*

(viii) *Rating members of firm.*

(ix) *Separate landlords and rating.*

(x) *Borough vote: unity of occupation.*

(2) *For borough vote.*

(i) *Rating qualification.*

(ii) *Dwelling-house.*

(iii) *Successive occupation.*

(iv) *Occupation as "owner or tenant."*

(v) *Residence.*

(vi) *Lodger franchise.*

(c) *Notice of claim.*

(d) *Notice of objection.*

(1) *Sufficiency.*

(2) *Service by post.*

(3) *Property in borough.*

(e) *Amendment of description, &c.*

(1) *County vote.*

(2) *Borough vote.*

(f) *Practice on appeals.*

[Amendment of the law relating to the appointment of Revising Barristers. 35 & 36 Vict. c. 84.]

[The powers of 28 Vict. c. 27 and 21 & 22 Vict. c. 78 extended to Select Committee of either House of Parliament in the cases of bills for confirming provisional orders. (N.B. The above statutes are mis-described in the Act now under notice, the one as 28 Vict. c. 28, the other as 22 Vict. c. 78.) 33 Vict. c. 1.]

[Institution of voting by ballot at, and amendment of the law relating to, parliamentary and municipal elections. 35 & 36 Vict. c. 33.]

##### (A) PRIVILEGE OF PARLIAMENT.

1.—A peer of Parliament is subject to the provisions of the Bankruptcy Act, 1861. *The Duke of Newcastle v. Morris*, 40 Law J. Rep. (N.S.) Bankr. 4; Law Rep. 4 E. & I. App. 661.

2.—The provisions of the Bankruptcy Act, 1869 (secs. 121 and 122), relating to the vacating of his seat in Parliament by a member of the House of Commons who has been adjudged bankrupt do not apply to the case of a member whose affairs are in liquidation by arrangement. *Ex parte Pooley*; *In re Russell*, 41 Law J. Rep. (N.S.) Bankr. 67; Law Rep. 7 Chanc. 519.

The duty cast upon the Court of Bankruptcy by the 122nd section, of certifying a member's bankruptcy to the Speaker, is an *ex officio* duty as between the Court and the House of Commons, and application for such a certificate should not be made by a creditor. *Ibid.*

*As to incapacity of a peer of Parliament to vote.* [See *infra* Nos. 16, 16.]

##### (B) ELECTION OF MEMBERS.

(a) *Bribery and corruption.*

(1) *Corrupt practices by agent before joint candidature.*

3.—In December, 1873, I. assented to have his name as a candidate associated with that of P. at the next election for the borough of B.; but at that time no dissolution of Parliament was expected to take place before 1875. A dissolution, however, unexpectedly took place towards the end of January, 1874, when I. coalesced with P. in the candidature for the said borough of B., and,

after a contest, was returned as duly elected with P. for such borough. Between December, 1873, and the dissolution of Parliament, P. had, through his agents, distributed coal amongst the voters, under circumstances such as to make him guilty, though not personally, of corrupt practices, and for this P. was afterwards unseated. I. was out of England when the coal was so distributed, and up to the time of his election he was ignorant of any such corrupt practices, and had done nothing to sanction them:—Held, that I. was not responsible for what had been so corruptly done before the joint candidature, so as to make him guilty of corrupt practices by an agent. *In re the Boston Election Petition*; *Malcolm v. Ingram*, 44 Law J. Rep. (N.S.) C. P. 121; Law Rep. 10 C. P. 168.

(2) *Votes after notice of disqualification by bribery.*

4.—Bribery by a candidate at a Parliamentary election, though rendering his election void, and by 31 & 32 Vict. c. 125, making him incapable of being elected during seven years, does not so affect his capacity to be a candidate at that election as to make all votes given for him by voters, with knowledge of such bribery, the same as if they had not been given at all, and thus to seat an opposing candidate. *Launceston Election Petition*; *Drinkwater v. Deakin*, 43 Law J. Rep. (N.S.) C. P. 355; Law Rep. 9 C. P. 626.

Quære—whether a notice of a candidate's disqualification is sufficient which informs the voter of the existence of the fact which has rendered the candidate disqualified, without informing the voter of the consequences of his voting for such disqualified candidate. *Ibid.*

(3) *Election petitions.*

(i) *What matter may be enquired into.*

5.—Where the unsuccessful candidate at a parliamentary election petitions, a recriminatory case of bribery, &c., is gone into against him, and the Judge certifies his opponent not duly elected, and reports a belief in the purity of the election on his part, on a petition against him as the successful candidate at a second election, cases of bribery, &c., by and for him at the previous election may be enquired into, at least if not known after the use of due diligence, and so not gone into on the recriminatory case in the previous petition. *Stevens v. Tillett*; *Norwich Election Petition*, 40 Law J. Rep. (N.S.) C. P. 58; Law Rep. 6 C. P. 147.

(ii) *Inspection of marked register.*

6.—Leave to inspect the marked register of voters will be granted under the Ballot Act, 1872 (35 & 36 Vict. c. 33), schedule 1, part 1, rule 42, whether the petition against the return of a candidate at a parliamentary election does or does not pray for a scrutiny. *James v. Henderson*, 43 Law J. Rep. (N.S.) C. P. 238.

7.—A petition, praying a scrutiny, was presented against the return of the respondent at a parliamentary election for the borough of P. The petitioner now applied for the leave of the Court

to inspect the marked register of voters, the rejected ballot papers, and the counterfoils thereof. The foregoing documents had been sealed up together, and the ground of the application was stated to be the saving of expense, for if it could be known who were the voters whose votes had been rejected, it would be unnecessary to incur costs by investigating their qualifications:—Held, that the petitioner ought to be allowed to inspect the marked register; but, held, per Grove, J., and Denman, J. (Brett, J., dissenting), that he was not entitled to the production of the rejected ballot-papers and the counterfoils thereof. *Stowe v. Jolliffe* (No. 1), 43 Law J. Rep. (N.S.) C. P. 173; Law Rep. 9 C. P. 446.

(iii) *Certificate of witness.*

8.—A witness who has answered all such questions as are mentioned in 26 & 27 Vict. c. 29, s. 7, is entitled to his certificate; and if the commissioners refuse it, their decision may be reviewed by mandamus. *The Queen (on the prosecution of Lovibond) v. Price*, Law Rep. 6 Q. B. 411.

(iv) *Effect of dissolution of Parliament.*

9.—Where Parliament was dissolved before the day appointed for the trial of an election petition presented under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), the Court ordered the money which had been deposited as security for costs pursuant to section 6 of that Act, to be returned to the petitioners. *In re the Exeter Election Petition*; *Carter v. Mills*, 43 Law J. Rep. (N.S.) C. P. 111; Law Rep. 9 C. P. 117.

10.—The delivery of judgment upon an election petition upholding the return of the respondent thereto and awarding him costs, began at 10 a.m. and finished at 10.35 a.m. The report of the Judge and his certificate were sent by post at noon to the Speaker of the House of Commons. Upon the same day upon which the foregoing judgment was delivered Parliament was dissolved by a royal proclamation, but the exact time when the proclamation was issued by the Queen was not ascertained. The Judge's report and certificate did not reach the Speaker before the dissolution:—Held, that the delivery of the judgment and the order for the payment of the costs being judicial acts, must be taken to have happened before the dissolution, and that by force thereof the respondent was entitled to his costs after the Parliament had ceased to exist. *Marshall v. James*, 43 Law J. Rep. (N.S.) C. P. 281; Law Rep. 9 C. P. 702.

(v) *Scrutiny.*

11.—The Ballot Act, 1872, s. 25, enacts that "where a candidate, on the trial of an election petition claiming the seat for any person, is proved to have been guilty by himself or by any person on his behalf of bribery . . . in respect of any person who voted at such election, . . . there shall, on a scrutiny, be struck off from the number of votes appearing to have been given to such candidate one vote for every person who voted at

such election, and is proved to have been so bribed.' P. having been accepted by the Liberal party in the borough of B. as a candidate at the next election, he afterwards distributed amongst the inhabitants coals by means of tickets bearing the signature of his political agent. Many of the inhabitants who accepted the coals were voters in the borough, and were not objects of charity. The coals were given corruptly. Parliament being soon after dissolved, P. was declared to be returned as member by a majority of votes over M., another candidate. A petition having been presented against the return of P. claiming the seat for M., P. was adjudged to be unseated on the ground of bribery. A scrutiny having been held, M. claimed to strike off the poll for P. one vote for every elector who had accepted the coals, and had voted at the election, without ascertaining for whom he had in fact voted. The voters were not called to deny that they had received the coals corruptly:—Held (per Lord Coleridge, C.J., and Brett, J., *dubitante* Grove, J.), that the bribery contemplated in the Ballot Act, 1872, s. 25, was a corrupt bargain made with an elector by or on behalf of the candidate, and that under that enactment it was necessary to prove a guilty intent in the voter. But Held (per Lord Coleridge, C.J., and Grove, J., *hesitante* Brett, J.), that a *prima facie* case of corruption had been made out against the voters, which they were bound to displace; and that as they were not called to rebut the inference of corruption, one vote for every elector who received the coals and voted at the election must be struck off the poll of P. *Malcolm v. Ingram*, 43 Law J. Rep. (n.s.) C. P. 331; Law Rep. 9 C. P. 610, *nom. Malcolm v. Parry*.

*Quære*, whether the voters inculpated were entitled, after P. had been unseated, to appear by counsel upon the petition, and defend themselves from the charge of bribery. *Ibid*.

(vi) *Costs*.

[See *supra* No. 10.]

*Taxation: allowance of lump sum: instructions for brief*. [See *Costs at Law*, No. 23.]

(b) *Election expenses: right of returning officer*.

**12.**—A returning officer at a parliamentary election has no right to insist, as a condition to taking the poll, on a candidate paying or giving security for paying his proportion of the money required to meet the election expenses. *The Havverfordwest Election Petition; Davis v. Kensington*, 43 Law J. Rep. (n.s.) C. P. 370; Law Rep. 9 C. P. 720, *nom. Davies*.

Where, therefore, at an election for a borough returning only one member to Parliament two candidates were duly nominated as required by the Ballot Act, 1872, but, because one of them would not deposit or give security for the sum required of him to meet his proportion of the election expenses the returning officer refused to notice his nomination, and without taking a poll returned the name of the other candidate as duly

elected, it was held that such election was void. *Ibid*.

(c) *Duties of presiding officer*.

[See *BALLOT ACT*.]

(d) *Return to the clerk of the Crown*.

**13.**—The return of an elected candidate under section 2 of the Ballot Act, 1872, has not been made to the clerk of the Crown in Chancery within the meaning of the enactment until he or some clerk in his office has had an opportunity of recording the receipt of it, and making the proper return to the clerk in Parliament; therefore, where the certificate of return was received at the office of the clerk of the Crown at eight in the evening, after office hours, by only a woman in charge of the office, who had authority to receive the same and to give a receipt for it, but not to do any other act with reference to it, the return was held not to have been made before the following day. *The Poole Election Petition; Hurdle v. Waring*, 43 Law J. Rep. (n.s.) C. P. 209; Law Rep. 9 C. P. 435.

(C) *REGISTRATION*.

(a) *Register, how far conclusive*.

**14.**—The register of parliamentary voters is, by force of the Ballot Act, 1872, conclusive not only on the returning officer, but also on any tribunal which has to enquire into elections, except in the case of persons ascertained by the proviso in section 7. The persons "prohibited" from voting by the proviso are not those who, from failure in the incidents or elements of the franchise, could be successfully objected to on the revision of the register on the ground of the receipt of alms, the receipt of parochial relief, non-residence within the proper distance of a borough, non-occupation, or insufficient qualification; the persons "prohibited" from voting are those who, from some inherent or for the time irremovable quality in themselves, have not the status of parliamentary electors, for instance, peers, women, persons holding certain offices or employments, and persons convicted of crimes, which disqualify them from voting. *Stowe v. Jolliffe* (No. 2), 43 Law J. Rep. (n.s.) C. P. 265; Law Rep. 9 C. P. 734.

(b) *Qualification*.

(1) *For county vote*.

(i) *Peer of Parliament*.

**15.**—A peer of Parliament is incapacitated by law from voting at elections for members of the House of Commons, and is therefore not entitled to have his name on the register of voters. *Earl Beauchamp v. The Overseers of Madresfield; Marquis of Salisbury v. The Overseers of South Mimms; Same v. Bontems; Same v. Bulwer*, 42 Law J. Rep. (n.s.) C. P. 32; Law Rep. 8 C. P. 245.

**16.**—An Irish peer, who, at the time of registration, is not a member of the House of Commons, is incapacitated by law from voting at parliamentary elections, and therefore is not en-

titled to have his name inserted on the register of parliamentary electors. *Rendlesham v. Howard*, 43 Law J. Rep. (n.s.) C. P. 33; Law Rep. 9 C. P. 252.

(ii) *Forty shilling freeholder.*

17.—The claimant to a county vote borrowed 300*l.* of a building society in which he held three shares, and mortgaged freehold tenements of which he was the owner in fee to such society for securing to it "the subscriptions, payments, redemption moneys, and fines in relation to the sum of 300*l.* by monthly instalments of 3*l.* 9*s.*," extending over ten years. The annual value of the tenements was 31*l.* 4*s.*, and the annual payment to the society was 41*l.* 8*s.*, two-thirds of which were in discharge of principal, and one-third of interest. The claimant had only two years more of such payments to make, and he might redeem the property for 73*l.* 1*s.*:—Held, that the claimant had an interest in the property of the value of 40*s.*, by the year, within the meaning of 8 Hen. 6. c. 7, and was therefore entitled to a vote for the county. *Rolleston v. Cope*, 40 Law J. Rep. (n.s.) C. P. 160; Law Rep. 6 C. P. 292.

18.—Where a number of persons were possessed of land as tenants in common in fee, and during the year ending the 31st of July, 1871, a sum was expended by them in laying on water for the convenience of their tenants, and the rental was slightly increased in consequence, and if the sum so expended were added to the other deductions proper to be made from the gross annual value, the interest of each tenant would be reduced below 40*s.* a year:—Held, that the sum expended for laying on water ought not to be deducted, as it did not appear that the original rental could not have been obtained from the premises without such expenditure being made. *Buckley v. Wrigley*, Law Rep. 7 C. P. 185.

(iii) *Rent-charge.*

19.—A rent-charge was granted to A., B., and C. to hold to the said A., B., and C. to the use of the said A., B., and C., their heirs and assigns for ever as tenants in common:—Held, that such grant took effect at common law and not by operation of the Statute of Uses (27 Hen. 8. c. 10), and that therefore neither A., B., or C. had the actual possession of such rent-charge as required by 2 Will. 4. c. 45, s. 26, to entitle him to be registered as a voter in respect of his interest in the same until he had actually received such rent or some part thereof. *Webster v. The Overseers of Ashton-under-Lyne*; *Orme's case*, 42 Law J. Rep. (n.s.) C. P. 38; Law Rep. 8 C. P. 281.

20.—Where the conveyance granting a rent-charge operates under the Statute of Uses, 27 Hen. 8. c. 10, the person to whose use the rent charge is granted is, by force of the statute, in the actual possession of such rent-charge, within the meaning of section 26 of the Reform Act, 2 Will. 4. c. 45, as soon as the grant is executed, according to the decision in *Hechts v. Blain*, 42 Law J. Rep. (n.s.) C. P. 146; Law Rep. 8 C. P. 306, which the Court followed. *Webster v. The Overseers of Ashton-under-Lyne*; *Hadfield's case*, 42 Law J. Rep. (n.s.) C. P. 38; Law Rep. 8 C. P. 306.

21.—In a claim to vote for a county the qualification was stated to be "rent-charge on freehold house":—Held, that, inasmuch as there is but one kind of rent-charge, namely, a freehold rent-charge, which can confer a vote, the qualification was sufficiently stated; but that if it were inaccurate, it could be amended by inserting the word "freehold" before the word "rent-charge." *Sherwin v. Whyman*, 43 Law J. Rep. (n.s.) C. P. 36; Law Rep. 9 C. P. 243.

(iv) *Interest in land: equitable freehold.*

22.—Before the Thames Navigation Act, 1870, the shareholders in Putney Bridge had only a right to the toll for the passage over the bridge, but not to any land belonging to the bridge (the toll being vested in trustees, in trust for the shareholders, and the land in trustees, in trust for certain other persons), and therefore such shareholders were not qualified to be on the list of county voters as having, in respect of their shares, any estate in land. By the Thames Navigation Act, 1870, the bridge and lands belonging thereto, as well as the tolls, were vested in a committee of management appointed from the shareholders of the bridge, but they were so vested, "subject to the trusts" on which the same were held at the passing of that Act:—Held, therefore, that such shareholders were no more qualified as such to be on the list of county voters, than they had been before the passing of that Act. *Wadmore v. Dear*; *Same v. The Overseers of Putney*, 41 Law J. Rep. (n.s.) C. P. 49; Law Rep. 7 C. P. 212.

23.—A hospital, consisting of a master and three "ancient brethren," was incorporated, and by the terms of its constitution, as afterwards regulated by statute, its revenues, derived from lands vested in the corporation, were received by the master, who annually, after paying thereout taxes and other outgoings and reserving one-third to himself, was to pay 25*l.* to each of the three ancient brethren, 70*l.* to the chaplain, and after reserving a balance, not exceeding 60*l.*, to meet current expenses, was to divide the residue between certain other brethren called "younger brethren," who were added to the number of the brethren from time to time, as the revenues of the charity increased, but no younger brother was to take under such division more than 25*l.*, and the surplus, if any, was left to accumulate until further additional brethren were appointed:—Held, that the younger brethren had no equitable estate in the lands of the hospital and that the annual payment to which they were entitled, not being a rent-charge nor a free tenement within the statute 8 Hen. 6. c. 7, they were not entitled to the county franchise. *Simey v. Marshall*, 42 Law J. Rep. (n.s.) C. P. 49; Law Rep. 8 C. P. 269.

24.—Previous to the Municipal Corporation Act, 1835, the mayor, aldermen, and burgesses of S. were possessed of certain land, and the custom and practice of the mayor, &c., was that each member of the common council should have two acres for his life, and his widow after his decease, so long as she remained such widow and resided in the borough, but that non-residence, or receipt of

parish relief, should be a forfeiture; and that the other acres should be distributed by the mayor among such persons as he selected, to be held on the same tenure and customs, certain small entrance fees and yearly rents being paid. In 1836 it was enacted by a bye-law of the corporation that in future, as vacancies occurred, this land should only be held by poor burgesses entitled to vote at the parliamentary election for the borough and their widows, resident within the borough; that they should occupy only one acre, at a rent to be from time to time fixed by the council, which was to declare whether they were poor; that the then present holders should pay an advanced rent to be fixed by the council, and should be ejected if they did not pay it; and that all former inconsistent orders, &c., as to this land should be annulled. One J. A. was, by order of the council, given possession of an acre as a poor burgess, "as tenant thereof to the council," paying a certain entrance fee, "and five shillings per annum as and for rent until further notice," subject to the right of the council to dig sand, &c.:—Held, that he had no such freehold interest as entitled him to a county vote as a freeholder. *Fernie v. Scott*, 41 Law J. Rep. (N.S.) C. P. 20; Law Rep. 7 C. P. 202.

(v) *Lessee of chattel rent-charge.*

25.—The part of the 5th section of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), which gives a county franchise to a person entitled, as lessee or assignee, to any lands or tenements for the unexpired residue of a term originally created for not less than sixty years, of the clear yearly value of not less than 5*l.*, does not alter the subject-matter of the qualification, as provided for by section 20 of the Reform Act (2 Will. 4, c. 45), and therefore the person claiming to be so entitled must be lessee or assignee of something capable of occupation, and not merely of a chattel rent-charge. *Warburton v. The Overseers of Denton*, 40 Law J. Rep. (N.S.) C. P. 49; Law Rep. 6 C. P. 267.

(vi) *Sub-lessee.*

26.—A sub-lessee is a lessee within 30 & 31 Vict. c. 102, s. 5; but it is doubtful whether he must be in occupation like a sub-lessee under 2 Will. 4, c. 45, s. 20. *Chorlton v. The Overseers of Streiford*, 41 Law J. Rep. (N.S.) C. P. 37; Law Rep. 7 C. P. 198.

(vii) *Occupation franchise: rateable value.*

27.—The rateable value of the premises required by section 6, sub-section 2, of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), for the 12*l.* occupation franchise in counties, is the real rateable value (which the Revising Barrister is at liberty to ascertain for himself), and is not necessarily the value at which such premises are rated in the rate-book. *Cooke v. Butler*, 42 Law J. Rep. (N.S.) C. P. 25; Law Rep. 8 C. P. 256.

(viii) *Rating members of firm.*

28.—A, who had been solely rated in respect

of the premises occupied by him in his business, got the overseers to alter the rating to "A. & Sons" on the occasion of his taking his two sons into partnership, and carrying on business with them on the said premises under the partnership name of "A. & Sons." When A. retired from the business, which he did some time afterwards, the two sons continued the business under the same name of "A. & Sons," and paid the rates when called for:—Held, that the sons were rated within the meaning of section 6 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), being described on the rate, though inaccurately, by the partnership name, and that such inaccuracy was cured by 6 & 7 Vict. c. 18, sec. 75. *Little v. The Overseers of Penrith*, 42 Law J. Rep. (N.S.) C. P. 28; Law Rep. 8 C. P. 259.

(ix) *Separate landlords and rating.*

29.—A man who occupies several pieces of land under different landlords, and is separately rated for them, may add their rateable values together for the purposes of a qualification under 30 & 31 Vict. c. 102, s. 6. *Huckle v. Piper*, 41 Law J. Rep. (N.S.) C. P. 42; Law Rep. 7 C. P. 193.

(x) *Borough vote: unity of occupation.*

30.—A., a minister of a church, was stated to have, as minister, such a freehold interest in the rents received from the letting of pews in the church as entitled him to a vote for the county. He occupied as such minister the parsonage-house, and in respect of such occupation acquired a right to a vote for the borough:—Held, that there was no such unity of occupation as would, according to section 24 of 2 Will. 4, c. 45, disentitle A. to the county vote. *Beswick v. Alker*, 42 Law J. Rep. (N.S.) C. P. 26; Law Rep. 8 C. P. 265.

(2) *For borough vote.*

(i) *Rating qualification.*

31.—By section 19 of the Poor Rate Assessment and Collection Act (32 & 33 Vict. c. 41), it is enacted "that the overseers in making out the poor-rate shall in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate-book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid":—Held, that this applies only where the owner has entered into "an agreement in writing with the overseers to become liable to them for the poor-rate," according to section 3 of that Act, or where there has been an order by the vestry under section 4 for rating the owner instead of the occupier, and therefore where there has been neither such agreement or order, an occupier of part of a house, who is jointly rated with the occupiers of the rest of the house for the rateable value of the whole house instead of being only separately rated for the value of the part occupied by him, is not to be deemed duly rated for a borough qualification so as to satisfy section

61 of the Representation of the People Act, 1867, which requires part of a house to be separately rated to the relief of the poor in order to be a dwelling-house within the meaning of that Act. *Cross v. Alsop*, 40 Law J. Rep. (n.s.) C. P. 53; Law Rep. 6 C. P. 315.

**32.**—The claimant to a borough franchise, who was otherwise duly qualified under 30 & 31 Vict. c. 102, to be on the list of inhabitant occupiers, had never paid a poor-rate which had been made in the June next preceding the qualifying year, and to which he had been rated in respect of the qualifying premises, but in the following October he was excused by the justices from the payment of such rate, under the 54 Geo. 3, c. 170, s. 11:—Held, that the claimant was disqualified by reason of such non-payment, and that the excusal under 54 Geo. 3, c. 170, s. 11, being after the commencement of the qualifying year, did not save him from such disqualification. *Abel v. Lee*, 40 Law J. Rep. (n.s.) C. P. 154; Law Rep. 6 C. P. 369.

The provision in section 3, sub-section 4, of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), requiring the payment of poor-rates in order to qualify a person for the borough franchise, applies to arrears of rates made before the commencement of the qualifying year. *Ibid.*

**33.**—Notwithstanding the largeness of the words in section 3, sub-section 4, of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), as to the payment of poor-rates in order to qualify a person for the borough franchise, the only poor-rates which it is necessary for that purpose that such person should have paid are those made after the 5th of January of the year preceding the qualifying year. *Cull v. Austin*; *Austin v. Cull*, 41 Law J. Rep. (n.s.) C. P. 153; Law Rep. 7 C. P. 227.

**34.**—By an agreement between a landlord and tenant, the poor-rates were to be paid by the former and included in the rent. The landlord compounded with the overseers for the poor-rates, and accordingly the premises occupied by the tenant were assessed to a composition of 4s. 8d. in respect of a poor-rate, instead of to the amount of 6s. 8d. as they would have been had they been assessed to an equal amount in the pound to that payable by other occupiers in respect of such rate. The landlord duly paid such 4s. 8d. and he afterwards paid two shillings so as to make up the full rate of 6s. 8d.:—Held, that there had not been such a payment of an equal amount in the pound to that payable by other occupiers in respect of the poor-rate as is required by 30 & 31 Vict. c. 102, sec. 3, sub-sec. 4, to qualify the occupier to the borough occupation franchise. *Durant v. Withers*, 43 Law J. Rep. (n.s.) C. P. 113; Law Rep. 9 C. P. 257.

#### (ii) Dwelling-house.

**35.**—Where a house of ordinary construction, free from structural severance, is wholly let out to several tenants, who are the exclusive rated tenants, either of one room or of two rooms communicating by the common staircase, with the joint user of the passages and staircases, and equal control over the outer door, fastened or not, and

with or without the joint user of conveniences outside such house:—Held, per Bovill, C.J., and Keating, J., that the tenements of such tenants are, and per Willes, J., and Brett, J., that they are not “dwelling-houses” within the 3rd section of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102). *Ellis v. Burch*; *Thompson v. Ward*, 40 Law J. Rep. (n.s.) C. P. 169; Law Rep. 6 C. P. 327.

**36.**—Where the nature of a person’s right to vote in the parliamentary election for a borough is inserted in the list as “dwelling-house,” he is not bound to prove a qualification under 30 & 31 Vict. c. 102, s. 3, but may shew he is qualified to vote in respect of a “house” under 2 Will. 4. c. 45, s. 27.—So held by the majority of the Court (Willes, J., Keating, J., and Collier, J.), Brett, J., dissenting. *Townshend v. The Overseers of the Poor of St. Marylebone*, 41 Law J. Rep. (n.s.) C. P. 25; Law Rep. 7 C. P. 143.

Semble—that no amendment is necessary, but that the claimant must prove that the house is a dwelling-house. *Ibid.*

**37.**—The premises in respect of the occupation of which as a dwelling-house a borough franchise was claimed consisted of two rooms, which were not structurally separated from the rest of the house of which they formed part, and were connected by a staircase and passages used by the voter in common with the tenants of the other rooms of the house, which were let out in a similar manner, the landlord not living in the house, and the outer door being under the sole control of the several tenants. These two rooms and the voter in respect of them were rated separately to the relief of the poor in all the rates made during the qualifying year, but until the first rate made after the commencement of the qualifying year these rooms had not been separately rated from the rest of the house, and there was therefore a part of the qualifying year during which the rooms were not separately rated. The Revising Barrister found as a fact that the two rooms were occupied by the voter as a separate dwelling, and were separately rated to the relief of the poor:—Held, by Keating, J., and Denman, J., that the rooms constituted “a dwelling-house” within the meaning of section 3 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102); and by Brett, J., and Honyman, J., that they were not “a dwelling-house” within the meaning of that section. *Boon v. Howard*, 43 Law J. Rep. (n.s.) C. P. 115; Law Rep. 9 C. P. 277.

#### (iii) Successive occupation.

**38.**—A claim to be registered as a parliamentary voter for a borough, under 30 & 31 Vict. c. 102, ss. 3, 26, as an inhabitant occupier of two houses in succession, is good, although, as respects the second house, the landlord is the person rated, and by his agreement with the claimant has paid the rates. *Moger v. Escott*, 41 Law J. Rep. (n.s.) C. P. 86; Law Rep. 7 C. P. 158.

#### (iv) Occupation as “owner or tenant.”

**39.**—The respondent was a sergeant in the

militia, and lived in a house within the borough of P. The house was adjacent to the stores of the militia, and upon the appointment of the respondent as sergeant it was assigned to him by the commanding-officer of the regiment; he could not leave it without the permission of the commanding-officer, who had also the power of turning him out. The respondent might have performed the duties required of him, if he had resided in another house; those duties included the care of the arms and clothing required by the militia; the house was built by the justices of the county, for the accommodation of the sergeants employed in taking care of the arms and clothing before mentioned:—Held, that the house in which the respondent lived was not occupied by him as tenant within the meaning of the Representation of the People Act, 1867, section 3. *Fox v. Dally*, 44 Law J. Rep. (n.s.) C.P. 42; Law Rep. 10 C.P. 285.

(v) *Residence.*

40.—The respondent was the rector of C., a parish lying within the parliamentary borough of W.; he obtained a license of non-residence, and was absent from C. from October, 1872, to June, 1873, remaining during that period abroad; during his absence the glebe-house, which the respondent usually inhabited, was occupied by a curate pursuant to the directions of the bishop, within whose diocese C. lay:—Held, that the respondent was not entitled to vote for W. under either 2 & 3 Will. 4. c. 45, s. 27, or 30 & 31 Vict. c. 102, s. 3. *Durant v. Carter*, 43 Law J. Rep. (n.s.) C.P. 17; Law Rep. 9 C.P. 26.

41.—The respondent was tenant of, and usually resided at a house in E., a city returning members to Parliament; the house was of greater annual value than 10*l*. He was a clergyman, and during the months of July and August, 1873, for the sake of relaxation, he exchanged duties with T., who was vicar of S., a parish situate more than seven miles from E. During that period the respondent lived in T.'s vicarage at S., and T. lived in the respondent's house at E. In September, 1873, the respondent returned to his house at E.:—Held, that the respondent had not resided in E. for six calendar months next previous to the last day of July, 1873, and that he was not entitled to be registered as a voter in the lists for E. *Ford v. Hart*, 43 Law J. Rep. (n.s.) C.P. 21; Law Rep. 9 C.P. 269.

42.—The respondent was a freeman of E., a city returning members to Parliament. He was an officer in the army, and usually was on duty with his regiment more than seven miles from E. He had from time to time leave of absence, and he then lived at his mother's house, who resided within seven miles of E. During twelve months preceding the last day of July, 1873, he had obtained three months' leave of absence, and during that period had lived in his mother's house:—Held, that the respondent had not resided within seven miles of E. for six calendar months next previous to the last day of July, 1873, and that he was not entitled to be registered as a voter in the

lists for E. *Ford v. Hart*, 43 Law J. Rep. (n.s.) C.P. 24; Law Rep. 9 C.P. 273.

(vi) *Lodger franchise.*

43.—The circumstance that the voter, for the convenience of his business, slept at a different place from the lodgings occupied by his wife and family during the twelve months immediately preceding the last day of July in any year, does not prevent his having a sufficient residence in such lodgings to qualify him for the lodger franchise, within the meaning of the 4th section of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), if he was not deprived by contract or otherwise of the power of returning to such lodgings when he chose to do so. *Taylor v. The Overseers of St. Mary Abbots, Kensington*, 40 Law J. Rep. (n.s.) C.P. 45; Law Rep. 6 C.P. 309.

44.—The residence required to qualify for the lodger franchise by section 4 of the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), need not be a continued and unbroken one, and is not insufficient merely because the lodger has also another residence elsewhere. Therefore, where the voter had an establishment in the country which he kept all the year round and resided at when not in London, and where when he was in London (which he was usually at different times during some small portion of the year) he resided at lodgings of which he was a yearly and the sole tenant, and which he *bonâ fide* occupied in the above manner during the twelve months required by the Act,—Held, a sufficient residence in the lodgings to satisfy the 4th section. *Bond v. The Overseers of St. George, Hanover Square*, 40 Law J. Rep. (n.s.) C.P. 47; Law Rep. 6 C.P. 312.

(c) *Notice of claim.*

45.—A claimant to a county vote in respect of a 12*l*. occupation qualification, under the Representation of the People Act, 1867, gave notice to the overseers that he claimed to be inserted on the list of voters for such county, and that the nature of his qualification was "land as occupier," the situation of which he described:—Held, a sufficient notice of such claim without more specifically stating that the claimant claimed to be placed on the list of 12*l*. occupiers. *Firth v. The Overseers of Widdcombe-in-the-Moor*, 41 Law J. Rep. (n.s.) C.P. 38; Law Rep. 7 C.P. 172.

(d) *Notice of objection.*

(1) *Sufficiency.*

46.—Where part of a parish is included in one of the polling districts of a county and the other part is in another of such districts, a notice of objection to a county voter which describes the objector as on the register of voters for the parish is sufficient, notwithstanding 31 & 32 Vict. c. 58, s. 22, which enacts that where a parish forms part of more than one polling district, the part of such parish in each district "shall be deemed to be a separate parish for the purposes of the revision of voters, and the lists and register of voters."

*Chorlton v. The Overseers of Tongue*, 41 Law J. Rep. (N.S.) C. P. 33; Law Rep. 7 C. P. 178.

(2) *Service by post.*

47.—The list of voters mentioned in 6 & 7 Vict. c. 18, s. 100, is, as regards county voters, the copy register sent to the overseers by the Clerk of the Peace of the county, and the overseers ought to publish it as they receive it, without alteration. Where, therefore, the overseers altered the copy of the register by changing the description of the residence of one of the voters thereon from what it had ceased to be, to what was then the real address, and published the list as so altered, and the voter being objected to, the objector, in order to prove service of the notice of objection, proved posting such notice, addressed to the voter according to the altered address published by the overseers, it was held that the notice was insufficient, not being in compliance with s. 100 of 6 & 7 Vict. c. 18, which requires the notice to be directed to the voter "at his place of abode, as described in the said list of voters." *Noseworthy v. The Overseers of Buckland-in-the-Moor*, 43 Law J. Rep. (N.S.) C. P. 27; Law Rep. 9 C. P. 233.

48.—The respondent resided at a place called W. The notice of objection to his claim to vote at a parliamentary election was posted at such time that, in the ordinary course of post, it would reach E., the nearest post-office to W., on the morning of the 19th of August. W. was two miles from E.; there was no delivery by post at W., and unless by some private accidental conveyance the respondent would not receive the notice of objection. He did not appear before the revising barrister to support his vote:—Held, that there was no evidence under 6 Vict. c. 18, s. 100, of the notice having been given to the respondent at W. on or before the 20th of August in the ordinary course of post. *Lewis v. Evans*, 44 Law J. Rep. (N.S.) C. P. 41; Law Rep. 10 C. P. 297.

(3) *Property in borough.*

49.—Under a notice of objection to a person's name remaining on the list of county voters as a freeholder, stating that the objection is to the third column, and relates to his interest in the qualifying property, it may be shewn that the property is within a borough, and gives him such a right to vote for the borough as to disqualify him, under 2 Will. 4. c. 45, s. 24, from having a county vote. *Simey v. Dixon*, 41 Law J. Rep. (N.S.) C. P. 18; Law Rep. 7 C. P. 190.

(e) *Amendment.*

(1) *County vote.*

50.—A separate list was printed and published of the county voters in respect of the occupation of lands in a parish of the rateable annual value of 12l. It was in alphabetical order and commenced with an appropriate heading, applicable only to such occupation voters; it commenced towards the end of the last sheet of the list of county voters in such parish who were otherwise qualified, and it

was continued in like alphabetical order on several succeeding sheets, but the printer by mistake interpolated, as a heading to each of these succeeding sheets, the general heading applicable to all who were entitled to vote for the county in respect of property situate in such parish:—Held, that the general heading which had been so interpolated, was not inconsistent with the list being that of the occupation voters, and did no harm, and if inaccurate the revising barrister ought to correct it under 6 Vict. c. 18, s. 40. *Mather v. The Overseers of Allendale*, 40 Law J. Rep. (N.S.) C. P. 76; Law Rep. 6 C. P. 272.

51.—The qualification in respect of which a county franchise was claimed was described on the list as "freehold rent-charge of 16l. per annum issuing out of freehold houses." In support of this the claimant proved that he was seized in fee of the land on which the houses referred to were built, and that he had let the same out on a long building lease at a yearly rent of 16l.:—Held (*Willes, J., dubitante*), that the qualification proved was a different one from that described, and that the revising barrister had no power to amend the description, as the amendment which would be required would alter the qualification described, instead of more clearly and accurately defining it, to which the power of amendment is limited by section 40 of 6 Vict. c. 18. *Nicholls v. Bulwer*, 40 Law J. Rep. (N.S.) C. P. 82; Law Rep. 6 C. P. 281.

52.—Where the number of a house has been some years back changed by competent authority, and the old number is put in the description of a man's qualification to vote in the parliamentary election in respect of such house, the revising barrister has power and ought to amend under 6 Vict. c. 18, s. 40, by substituting the new number, on proper evidence being given. *Bendle v. Watson*, 41 Law J. Rep. (N.S.) C. P. 15; Law Rep. 7 C. P. 163.

(2) *Borough vote.*

53.—A claimant to a borough vote in a borough in which there existed both occupation and freehold qualifications, described the nature of his qualification in his notice of claim to the overseers, as "house":—Held, a sufficient description of a qualification in respect of the occupation of a house of the annual value of 10l., but that if necessary for more clearly describing it, the revising barrister had power, under section 40 of 6 & 7 Vict. c. 18, to amend it by inserting the correct description in the list of voters. *Ford v. Boon*, 41 Law J. Rep. (N.S.) C. P. 28; Law Rep. 7 C. P. 150.

(f) *Practice on appeals.*

54.—A consolidated case of appeal, naming the returning officer of a borough as respondent, was signed on the 31st of October; notice of appeal was not given to him till the 4th of November; the first day appointed for hearing appeals was the 13th of November:—Held (the respondent not appearing), that the appeal could not be heard. *Brown v. Tamplin*, 42 Law J. Rep. (N.S.) C. P. 37; Law Rep. 8 C. P. 241.



**55.**—*Semble*—the Court is not bound by its former decision, though it is a Court of ultimate appeal in registration cases, and its decision in such cases is made final by 6 & 7 Vict. c. 18, s. 66; but the Court will not overrule such former decision unless it be shewn to be clearly wrong. *Webster v. The Overseers of Ashton-under-Lyne*; *Hadfield's case*, 42 Law J. Rep. (N.S.) C.P. 146; Law Rep. 8 C.P. 306.

**56.**—In a consolidated appeal from the decision of a revising barrister, the indorsement upon the case of the names of the appellant and the respondent is sufficient, and it is unnecessary to indorse the names of the persons whose appeals are consolidated. *Sherwin v. Whyman*, 43 Law J. Rep. (N.S.) C.P. 36; Law Rep. 9 C.P. 243.

## PARTIES.

### (A) TO ACTION AT LAW.

#### (B) TO SUITS IN EQUITY.

- (a) *Misjoinder of plaintiff.*
- (b) *Suits for relief on ground of fraud.*
- (c) *Parties for costs only.*
- (d) *Suit to establish common rights.*
- (e) *Suit for abatement of enclosures.*
- (f) *Representative suit by shareholder.*
- (g) *Foreclosure suit.*
- (h) *Administration and partition suits.*
- (i) *Dispensing with personal representative.*
- (k) *Suit by one cestui que trust.*
- (l) *Bill by bankrupt.*

### (A) TO ACTION AT LAW.

[See ACTION; PRACTICE AT LAW.]

#### (B) TO SUITS IN EQUITY.

##### (a) *Misjoinder of plaintiff.*

**1.**—A bill was filed by two several landowners to restrain an anticipated nuisance from intended cement works. The properties of the two plaintiffs were situate on diametrically opposite sides of the intended works, and the residence of one was close by that of the other at a considerable distance from the works. The manufacture was commenced before the evidence was closed, and the result of the evidence was to prove the existence of a nuisance affecting the one plaintiff, whilst the case of the other plaintiff failed:—Held, that the failure of the case of the one plaintiff did not affect the right of the other to relief upon the joint bill. *Umfreville v. Johnson*, 44 Law J. Rep. (N.S.) Chanc. 752; Law Rep. 10 Chanc. 580.

The bill, so far as concerned the plaintiff whose case failed, was dismissed with so much of the costs as had been occasioned by making him a co-plaintiff, and a decree for an injunction was made in favour of the other plaintiff. *Ibid.*

##### (b) *Suits for relief on ground of fraud.*

**2.**—The rule that parties to a fraud may be made parties to a bill filed for relief against the

principal in the fraud if costs be prayed against them, or for the purposes of discovery, is confined to the case of attorneys, agents and arbitrators actively participating in the fraud. *Weise v. Wardle*, Law Rep. 19 Eq. 171.

In a suit by a trustee in bankruptcy to set aside a fraudulent conveyance by the bankrupt the bankrupt is not a proper party. *Ibid.*

##### (c) *Parties for costs only.*

**3.**—The Court disapproves of the practice of making solicitors or others, who are properly witnesses, and who are not primarily chargeable with any part of the relief prayed, parties to suits with a view of charging them with costs alone. *Barnes v. Addy*, 43 Law J. Rep. (N.S.) Chanc. 513; Law Rep. 9 Chanc. 244.

##### (d) *Suit to establish common rights.*

**4.**—One freehold tenant may sue the lord of the manor on behalf of himself and all other tenants of the manor in respect of common rights. The origin and nature of the commonable rights of customary freeholders considered. Decision of the Master of the Rolls (39 Law J. Rep. (N.S.) Chanc. 636; Law Rep. 10 Eq. 105) affirmed. *Warrick v. The Provost and Scholars of Queen's College, Oxford*, 40 Law J. Rep. (N.S.) Chanc. 780; Law Rep. 6 Chanc. 716.

**5.**—A freehold tenant of a manor may sue on behalf of himself and the other freeholders having commonable rights, without suing also on behalf of the copyholders having rights coextensive with those of the freeholders. Where a freehold tenant sued not only on behalf of himself and the other freeholders having commonable rights, but also on behalf of another class of freeholders not so entitled,—Held, that this was a mere misjoinder of the plaintiffs, and that relief could be given on the bill. *Betts v. Thompson*, Law Rep. 6 Chanc. 732.

##### (e) *Suit for abatement of enclosures.*

**6.**—When a bill is filed on behalf of all the owners and occupiers of land within a district, except the defendants thereto, praying for the abatement of certain enclosures within the district, the owners and occupiers of the enclosures ought to be made defendants since their interests conflict with those of the plaintiff. If they cannot all be made defendants, some may be chosen to represent the others, and the bill be filed on behalf of all the owners and occupiers, except the defendants and the persons stated to be represented by the defendants. Such a bill is not demurrable, though of course relief can only be obtained by it against the parties before the Court. *The Commissioners of Sewers of the City of London v. Glasse*, 41 Law J. Rep. (N.S.) Chanc. 409; Law Rep. 7 Chanc. 456.

##### (f) *Representative suit by shareholder.*

**7.**—Where there is a corporate body capable of suing, that body only is the proper plaintiff in a suit for the recovery of property, whether from its officers or directors or from any other person, and a bill for that purpose cannot be sustained by

one shareholder on behalf of himself and all others except the defendants. The only exception to this rule is where the directors or majority of shareholders are doing something fraudulent against the minority, who are overwhelmed by them. *Gray v. Lewis*, and *Parker v. Lewis*, 43 Law J. Rep. (n.s.) Chanc. 281; Law Rep. 8 Chanc. 1035.

Instance of a suit within the above-stated rule, and in which the whole scheme was held to be a sham, with regard to which no liability could arise, either at law or in equity, between the three companies who were parties to it. *Ibid.*

Where the decree in one of two suits was reversed, the bill in the second suit was dismissed, but without costs. *Ibid.*

[And see COMPANY, F 2, 3.]

(g) *Foreclosure suit.*

8.—The plaintiff in a foreclosure suit had made parties as defendants certain judgment creditors who had not taken the steps necessary to obtain a charge on the land under 27 & 28 Vict. c. 112. One of these, immediately on being served with a copy of the bill, wrote a letter saying he claimed no interest. The others disclaimed by answer:—Held, that they were not necessary parties. *Mildred v. Austin* (Law Rep. 8 Eq. 220) disapproved of. *Cork v. Russell*, 41 Law J. Rep. (n.s.) Chanc. 226; Law Rep. 13 Eq. 210.

(h) *Administration and partition suits.*

*Executor whether necessary party.* [See PLEADING IN EQUITY, 9; PRACTICE IN EQUITY, 111.]

*Administration suit: suit by one of several executors against some only of his co-executors.* [See ADMINISTRATION, 36.]

*Suit to marshal securities.* [See PRINCIPAL AND SURETY, 6.]

*Absence of parties interested on decree for sale under Partition Act.* [See PARTITION, 17, 18.]

(i) *Dispensing with personal representative.*

9.—One of two joint accounting parties died insolvent after the chief clerk's certificate finding the amount due from them had been settled, but before it was actually signed:—Held, that an order could be made under statute 15 & 16 Vict. c. 86, s. 44, allowing the suit to proceed without a representative of the deceased, and that it was proper it should be made. *Moore v. Morris*, 41 Law J. Rep. (n.s.) Chanc. 161; Law Rep. 13 Eq. 139.

[And see PRACTICE IN EQUITY, 111.]

(k) *Suit by one cestui que trust.*

10.—One of several *cestuis que trusts* cannot, on a mere allegation that the trustees refuse to take proceedings, sue a debtor to the trust estate. *Sharpe v. The San Paulo Railway Company*, Law Rep. 8 Chanc. 597.

(l) *Bill by bankrupt.*

11.—A bankrupt cannot file a bill in reference

to his estate without first applying to the Court of Bankruptcy. A demurrer to such a bill having been allowed without costs and with liberty to amend,—Held, on appeal, that it must be allowed with costs, and without liberty to amend. *Payne v. Dicker*, Law Rep. 6 Chanc. 578.

*Appearance on behalf of party of unsound mind.* [See PRACTICE IN EQUITY, 36.]

*Devolution of interest of parties: suit becoming defective.* [See PRACTICE IN EQUITY, 104–116.]

## PARTITION.

(A) DISPUTED QUESTION OF LAW.

(B) SALE UNDER PARTITION ACT, 1868, 31 & 32 VICT. c. 40.

(a) *Prayer of bill for sale.*

(b) *Particular persons interested.*

(1) *Married women.*

(2) *Infants.*

(3) *Persons of unsound mind.*

(c) *Interests of persons unascertained.*

(d) *Compulsory sale.*

(e) *Powers under 5th section.*

(f) *Absence of parties interested.*

(g) *Sale under decree made before the Act.*

(h) *Decree against persons out of the jurisdiction.*

(i) *Effect of decree in working conversion.*

(C) COSTS.

(a) *Infant plaintiffs.*

(b) *Apportionment.*

(A) DISPUTED QUESTION OF LAW.

1.—*Quere*—whether in a partition suit the Court will decide a disputed question of law except by consent. *Burt v. Hellyar*, 41 Law J. Rep. (n.s.) Chanc. 430; Law Rep. 14 Eq. 160.

(B) SALE UNDER PARTITION ACT, 1868.

(a) *Prayer of bill for sale.*

2.—To get a sale under the Partition Act, 1868, it is not necessary to pray for a partition. *Aston v. Meredith*, 40 Law J. Rep. (n.s.) Chanc. 241; Law Rep. 11 Eq. 601.

3.—The Court will not make a decree for sale of property under the Partition Act, 1868, unless the bill prays for a partition as well as a sale.—*Teall v. Watts* (40 Law J. Rep. (n.s.) Chanc. 176; Law Rep. 11 Eq. 213) followed. *Aston v. Meredith* (last case) dissented from. *Holland v. Holland*, 41 Law J. Rep. (n.s.) Chanc. 220; Law Rep. 13 Eq. 406.

(b) *Particular persons interested.*

(1) *Married women.*

4.—A married woman can, under the Partition Act, obtain a decree for sale, instead of partition, of real estate. *Higgs v. Dorkis*, 41 Law J. Rep. (n.s.) Chanc. 150; Law Rep. 13 Eq. 280.

5.—A married woman is incapable of undertaking, under section 5, to buy the shares of parties who request a sale. *Drinkwater v. Ratcliffe*, 44 Law J. Rep. (N.S.) Chanc. 605; Law Rep. 20 Eq. 528.

6.—A married woman must be separately examined in order to request a sale under the Partition Act, 1868. *Leigh v. Edwards*, 42 Law J. Rep. (N.S.) Chanc. 892.

7.—Where the proceeds of a sale under the above Act had been paid into Court, and some of the parties were married women resident in Australia, the Court nevertheless refused to order payment out to trustees. *Aston v. Meredith*, Law Rep. 13 Eq. 492.

#### (2) *Infants.*

[And see *infra* Nos. 23, 24.]

8.—In a suit for confirmation of a conditional sale of land to which the plaintiff and the defendant were entitled as infant co-heiresses subject to their mother's dower, a decree for sale was prefaced by a recital that a sale appeared more beneficial than a division, and that the infant plaintiff requested a sale. *Grove v. Comyn*, Law Rep. 18 Eq. 387.

#### (3) *Persons of unsound mind.*

9.—A bill for partition or sale cannot be filed on behalf of a person of unsound mind not so found by inquisition. *Halfhyde v. Robinson*, 43 Law J. Rep. (N.S.) Chanc. 398; Law Rep. 9 Chanc. 373.

#### (c) *Interests of persons unascertained.*

10.—After a sale under a decree for partition in a suit under the Partition Act of 1868, it appeared that one-sixth of the estate was vested in J. W. B. (one of the parties to the suit), a bachelor, for life, with remainders to his issue in tail, with ultimate remainders to the right heirs of the plaintiff:—Held, that the power (to make declarations as to the interests of "unborn persons," and that such persons on coming into existence would be trustees) given by section 30 of the Trustee Act, 1850, which is incorporated in the Partition Act, 1868, enabled the Court to make an order to appoint a person to convey the legal estate in the one-sixth limited to the right heirs of the plaintiff. *Basnett v. Moxon*, 44 Law J. Rep. (N.S.) Chanc. 557; Law Rep. 20 Eq. 182.

11.—In a partition suit, when the title, which was complicated, was proved at the hearing, and it appeared that all parties in existence having any interest were before the Court, but that one share had been settled, so that persons might hereafter come into existence who would become entitled to legal estates,—Held, that an immediate decree for sale might be made, with a declaration that the parties to the suit were trustees of the interests, and that the interests of any persons who on coming into existence would be interested were the interests of persons who on coming into existence would be trustees, and decree accordingly. Also, that the appointment of a new

trustee to convey should be made on a separate application. *Lees v. Coulton*; *Lees v. Clutton*, 44 Law J. Rep. (N.S.) Chanc. 556; Law Rep. 20 Eq. 20.

#### (d) *Compulsory sale.*

12.—Where in a partition suit the owners of a moiety of the estate desire a sale, the Court is bound under the 4th section of the Partition Act, 1868, to decree a sale, unless it sees good reason to the contrary, however large the estate may be, and notwithstanding the opposition of the parties entitled to the residue. Decree of one of the Vice-Chancellors reversed. *Pemberton v. Barnes*, 40 Law J. Rep. (N.S.) Chanc. 675; Law Rep. 6 Chanc. 685.

13.—The circumstance that the owner of one undivided moiety of an estate is in possession of the entirety as yearly tenant, and uses it for the business of brick making, is not sufficient to induce the Court to refuse to decree a sale of the entirety. *Wilkinson v. Joberns*, 42 Law J. Rep. (N.S.) Chanc. 663; Law Rep. 16 Eq. 14.

14.—If the majority of the parties entitled to an estate desire a partition, it is for the minority to prove, if they wish a sale, that it will be more to the advantage of all. To succeed in that they should shew that the majority are either perverse in their views, or have mistaken their true interests, otherwise a partition will be decreed. *Allen v. Allen*, 42 Law J. Rep. (N.S.) Chanc. 839.

#### (e) *Powers under 5th section.*

15.—A part owner of an estate, who has in a partition suit asked that the whole estate may be sold, is at liberty to withdraw his request; and if he does so, the Court has no power, under section 5 of the Partition Act of 1868, to compel him to sell his share at a valuation to the other part owners, or any of them. Decision of Jessel, M.R., reversed. *Williams v. Games*, 44 Law J. Rep. (N.S.) Chanc. 245; Law Rep. 10 Chanc. 204.

16.—The 5th section of the Partition Act, 1868, gives the Court a new power of sale distinct from the powers conferred by the 3rd and 4th sections respectively; and the provisions applying to sales under the 5th section do not apply to sales under the 3rd and 4th sections. Lord Hatherley's remarks on this point in *Pemberton v. Barnes* (40 Law J. Rep. (N.S.) Chanc. 675; Law Rep. 6 Chanc. 693) dissented from. *Drinkwater v. Ratcliffe*, 44 Law J. Rep. (N.S.) Chanc. 605; Law Rep. 20 Eq. 528.

A married woman is incapable of undertaking, under section 5, to buy the shares of parties who request a sale. *Ibid.*

#### (f) *Absence of parties interested.*

17.—Section 9 of the Partition Act, 1868, enabling the Court to make a decree in the absence of parties interested, directing enquiries with a view to an order for partition or sale "on further consideration," allows the Court to make an order for sale in the decree contingently on the result of the enquiries; but it is essential that the result of the enquiries should be certified

before the sale takes place. Observations of the Lord Chancellor as to the duties and position of a Chief Clerk. *Powell v. Powell*, 44 Law J. Rep. (n.s.) Chanc. 122; Law Rep. 10 Chanc. 130.

18.—An order for sale under the Partition Act, 1868, cannot be made at the hearing unless all parties interested are parties. *Mildmay v. Quick*, Law Rep. 20 Eq. 537.

(g) *Sale under decree made before the Act.*

19.—Though the Partition Act, 1868, is retrospective, so as to apply to suits pending when it was passed, it does not authorise an order for sale where a decree has been made before the passing of the Act. *Pryor v. Pryor*, 44 Law J. Rep. (n.s.) Chanc. 535; Law Rep. 20 Chanc. 469.

Decision of Bacon, V.C. (Law Rep. 19 Eq. 595) affirmed. *Ibid.*

(h) *Decree against persons out of jurisdiction.*

20.—Decree for sale where persons interested out of jurisdiction. *Teall v. Watts*, 40 Law J. Rep. (n.s.) Chanc. 176; Law Rep. 11 Eq. 213.

(i) *Effect of decree in working conversion.*

21.—When real estate of an infant is ordered to be sold for payment of costs or any other special purpose, and more is sold than is required, the surplus proceeds of sale are converted into personal estate, and on the death of the infant go to his personal representatives. *Steed v. Preece*, 43 Law J. Rep. (n.s.) Chanc. 687; Law Rep. 18 Eq. 192.

*Jermey v. Preston* (13 Sim. 356) and *Cooke v. Dealy* (22 Beav. 196) questioned. *Ibid.*

22.—Decree for sale of realty under the Partition Act, 1868, with consent of all parties. After decree, but before sale, one of the persons entitled died leaving another person entitled as his heir-at-law. The estate having been sold under the decree.—Held, that the estate was sufficiently converted, and that the share of the deceased passed to his personal representative. *Arnold v. Dixon*, Law Rep. 19 Eq. 113.

(C) COSTS.

(a) *Infant plaintiffs.*

23.—On bill filed by infant plaintiffs against an infant defendant for partition or sale of land, an order was made for sale, and the infants' costs were charged on their respective shares. *France v. France*, 41 Law J. Rep. (n.s.) Chanc. 150; Law Rep. 13 Eq. 173; and *Young v. Young*, *Id. n.*

24.—On a bill by three out of four infant tenants in common for partition or sale, the Court made a declaration as to the rights of the parties, and directed a sale, but declined to make any order as to costs till the further consideration. *Davey v. Wietlisbach*, Law Rep. 15 Eq. 269.

(b) *Apportionment.*

25.—In the absence of special circumstances the entire costs of a partition suit ought to be

borne by the parties in proportion to the value of their respective shares. *Cannon v. Johnson*, 40 Law J. Rep. (n.s.) Chanc. 46; Law Rep. 11 Eq. 90.

26.—In suits under the Partition Act, 31 & 32 Vict. c. 40, the Court is not bound by the old rule as to costs where the parties are interested in unequal shares, but has a discretion under section 10, and will in a proper case order the costs of all parties to be paid out of the estate although the costs of the different parties are unequal. *Simpson v. Ritchie*, 42 Law J. Rep. (n.s.) Chanc. 543; Law Rep. 16 Eq. 103.

## PARTNERSHIP.

(A) HOW CONSTITUTED: PARTICIPATION IN PROFITS.

(B) CONSTRUCTION AND EFFECT OF PARTNERSHIP ARTICLES.

(a) *Provisions as to shares of partners on death or retirement.*

(b) *Arbitration clause.*

(C) PROPERTY OF PARTNERSHIP.

(a) *Constructive notice by joint occupation.*

(b) *Distress and seizure on partnership property.*

(c) *Conversion of land into personality.*

(D) WHAT CONSTITUTE PROFITS OF PARTNERSHIP.

(E) LIABILITIES OF PARTNERS FOR ACTS OF CO-PARTNERS.

(a) *Misapplication of client's money by solicitor.*

(b) *Authority to bind co-partner by banking account.*

(c) *Acts of co-partner after dissolution.*

(d) *Powers of manager of partnership.*

(F) DISSOLUTION OF PARTNERSHIP.

(a) *Accounts: right to interest.*

(b) *Return of premium.*

(G) DEATH OF PARTNER.

(a) *Liability of executors and surviving partners continuing deceased partner's assets in business.*

(b) *Liability of executors as partners.*

(c) *Rights of executors of deceased partner.*

(1) *Completion of subsisting contracts.*

(2) *Valuation of assets which cannot be sold.*

(d) *Priority of creditors.*

(H) RIGHTS OF CREDITORS OF BANKRUPT OR INSOLVENT PARTNERSHIP.

(I) PRACTICE IN PARTNERSHIP SUITS.

(a) *Suit by lunatic partner.*

(b) *Costs.*

(A) HOW CONSTITUTED: PARTICIPATION IN PROFITS.

1.—P. and R. agreed in writing, that a certain underwriting account should be continued and subscriptions made in P.'s name alone, policies,

losses and averages to be settled and signed by P., or by R. as his agent; that R. should attend to the business obtaining assistance "subject to the approval" of P.; that R. should be paid a "salary" of 150*l.* a year; that P. should have four-fifths, R. one-fifth of the profits; that if any net loss should "accrue to P.," he alone should bear the same; that unexpected claims in any year should be met by P. and R. proportionably to their shares in the profits, R. paying no more than his share of profits in that year:—Held, that having regard to the whole agreement, R.'s participation in profits was not sufficient to establish a partnership business between P. and R. *inter se*, so as to entitle R. to file a bill for an account. *Ross v. Parkyns*, 44 Law J. Rep. (N.S.) Chanc. 610; Law Rep. 20 Eq. 331.

2.—The question whether a right to participate in the profits of a trade constitutes a partnership, depends on the intention of the parties. An agreement by a firm with a creditor, made with the object of securing the repayment of his debt, and under which the business was to be carried on to some extent under his control, and he was to receive a commission on all profits until the debt and interest was repaid, was held not to constitute such creditor a partner. *Mollwo March & Company v. The Court of Wards*, Law Rep. 4 P. C. 419.

3.—Semble—there is no fiduciary relation between partners and representatives of deceased partner. *Knox v. Gye* (H. L.). See LIMITATIONS, STATUTE OF, 14.

*Advance to trader in business: Partnership Act, 1865, section 5.* [See MORTGAGE, 24.]

## (B) CONSTRUCTION AND EFFECT OF PARTNERSHIP ARTICLES.

### (a) Provisions as to shares of partners on death or retirement.

4.—Partnership agreement between A., B., C. and D., providing that on the death or retirement of any partner his share was to be ascertained and paid by annual instalments with interest "out of the business":—Held, that on the death of a partner and ascertainment of his share, the debt was joint and several, and the agreement was not intended to alter the existing liability. *Willmer v. Currey* (2 De G. & S. 347) considered. *Beresford v. Browning*, Law Rep. 20 Eq. 564.

5.—Business was carried on by W. & T. in partnership under a partnership deed which provided that all the capital in the business should belong to W., and that in case of his death the share of T. in the profits should thenceforth belong to W.'s representatives or nominees, and that T. should continue in it for six months to assist such representatives or nominees. W. died, having appointed T. his executor. The business, which was greatly in debt at W.'s death, was continued by T. for fourteen months. T. then filed a petition for the liquidation of his affairs. The stock in trade at the time of the

liquidation consisted partly of things which had belonged to W. & T. during their partnership, and remained *in specie*, partly of things acquired by T. after W.'s death:—Held, that the partnership deed meant only that the capital, subject to the payment of the debts, should belong to W., and that the proceeds of such part of the stock in trade as had been in existence during the partnership formed joint assets applicable to the payment of the joint debts of the partnership, and that so much of the stock-in-trade as had been acquired by T. since W.'s death, was separate assets of T. applicable to the payment of his separate debts. *Ex parte Morley; In re White*, 43 Law J. Rep. (N.S.) Bankr. 28.

*Tenant for life: accumulation: apportionment: construction of partnership deed.* [See APPORTIONMENT, 11; TENANT FOR LIFE, 10.]

### (b) Arbitration clause.

[See ARBITRATION, 6, 8.]

## (C) PROPERTY OF PARTNERSHIP.

### (a) Constructive notice by joint occupation.

6.—B. & C. carried on business together in partnership under articles by which the real estate upon which their business was carried on, and of which they were seised as tenants in common in fee, was made partnership assets. B., to secure a separate debt, mortgaged his moiety of the estate to bankers, who were aware when they took the mortgage that the premises were in the occupation of the partners, and that they carried on their business thereon. B. absconded, leaving partnership debts which C. was obliged to pay:—Held, that the bankers had constructive notice that the property belonged to the partnership, and that C. was entitled to be paid out of the property what was due to him from the partnership in priority to the bankers' claim under their mortgage. *Cavander v. Bulteel*, 43 Law J. Rep. (N.S.) Chanc. 370; Law Rep. 9 Chanc. 79.

### (b) Distress and seizure on partnership property.

7.—P. & F. were in partnership as brickmakers, and they mortgaged certain lands which they used for their partnership purposes, and of which they were seised as tenants in common, and also each of them separately attorned as tenants to the mortgagees in respect of a moiety of the property which was in their joint occupation and at a separate rent. Subsequently the mortgagees took out separate distresses against the mortgagors for six years' rent due from each for his one equal undivided moiety of the premises, and they seized chattels on the partnership premises. The mortgagors became bankrupt, and the receiver in the bankruptcy claimed the goods as against the mortgagees:—Held (affirming the decision of the County Court Judge), that the mortgagees having in both cases distrained on goods which were the

joint partnership property of the bankrupts had exceeded their rights, and that they could not distrain on goods in which the tenant and another person had an undivided interest. *Ex parte Parke*; *In re Potter*, 43 Law J. Rep. (N.S.) Bankr. 139; Law Rep. 18 Eq. 381.

(c) *Conversion of land into personality.*

8.—Devise of lands occupied by the testator as a nursery garden to his three sons A., B. and C. as tenants in common. A., B. and C. continued the testator's business, and ultimately A. and B. bought C.'s share, and carried on the business till A.'s death:—Held, that A.'s share, both the part devised and the part purchased, was converted into personality. *Waterer v. Waterer*, Law Rep. 15 Eq. 402.

*Adjudication in bankruptcy: joint and separate estates.* [See BANKRUPTCY, C 6-9.]

*Double proof.* [See BANKRUPTCY, E 14-20.]

*Apportionment of dividends on partnership profits.* [See APPORTIONMENT, 3, 11.]

*Pledge of partnership property for private debts where partnership insolvent.* [See BANKRUPTCY, B 36.]

(D) WHAT CONSTITUTE PROFITS OF PARTNERSHIP.

9.—In 1861 A., B. and C. agreed to enter into partnership as cotton spinners on a mill and premises belonging to A. A. was credited with a fixed sum as his share of the capital, being the then estimated value of the mill and premises, which were put down at the same sum in the partnership books as assets. From time to time moneys were expended on the mill and premises out of the profits of the partnership, which were added in the books to their value, and every year a sum was written off for depreciation. B. died in 1872, and A. and C. verbally agreed to carry on the partnership. It was admitted that under this partnership the "profits" were to be divided in equal shares; that there never had been any actual re-valuation of the mill and premises; but that they were put down in the books of the new partnership at an amount which had been arrived at by the gradual additions from time to time since 1861 made of the sums which had been expended on them and the annual deductions of what had been written off each year for depreciation for wear and tear. In 1873 the whole partnership property was sold under an agreement, in which separate prices were fixed for the mill and premises, far exceeding the amounts at which they were set in the books:—Held, that, in the absence of proof of special agreement, the "profits" of a partnership included the rise in value of partnership assets, and that the partners being entitled to share equally in profits were entitled to share equally in the increased value of the mill and

premises. *Ashton v. Robinson*, 44 Law J. Rep. (N.S.) Chanc. 542; Law Rep. 20 Eq. 25.

(E) LIABILITIES OF PARTNERS FOR ACTS OF CO-PARTNERS.

(a) *Misapplication of client's money by solicitor.*

10.—Where a client has entrusted a firm of solicitors with moneys for investment on his behalf, he is at liberty, in the event of their misapplication of the moneys, to sue all or any one or more of the members of the firm, their liability being both joint and several. *Atkinson v. Mackreth* (35 Law J. Rep. (N.S.) Chanc. 624) observed upon. *Plumer v. Gregory*, 43 Law J. Rep. (N.S.) Chanc. 616.

11.—In order to render one partner in a firm of solicitors liable for the misapplication of money entrusted by a client of the firm to the other partner, it must be shewn that the money was received by that other partner in the ordinary course of business for the purpose of being invested on a specific security. A mere general statement to the client by the partner who receives the money that the money is to be lent on security to another client is not sufficient to bind the other partner; the receipt of money for the purpose of laying it out generally not being part of a solicitor's business, or within the scope of a solicitor partnership. *Plumer v. Gregory*, 43 Law J. Rep. (N.S.) Chanc. 803; Law Rep. 18 Eq. 621.

The plaintiff advanced to W., a member of the firm of J. & W., solicitors, a sum of 1,300*l.*, which J. & W., by an agreement signed by them both, agreed to invest on a mortgage of certain specified property. Subsequently the plaintiff advanced to W. a further sum of 1,700*l.*, on the alleged representation that "his firm had a client who wanted to borrow the money on landed security," but it did not appear that J. was aware of the latter advance to his partner. W. himself paid the plaintiff interest on both sums during his lifetime, the plaintiff believing that they had been duly invested on mortgage. W. survived his partner J. some years, and then died insolvent, when the plaintiff found that there was no investment existing of either of the sums, and that they had in fact been applied by W. to his own use. Thereupon the plaintiff filed a bill to establish the liability of J.'s estate to repay to her the whole amount, J.'s assets being sufficient to answer the claim:—Held, that J.'s estate was liable for the 1,300*l.* only, the payment of the 1,700*l.* to W. being out of the ordinary course of business, and was not discharged from such liability by a deed which W. had, shortly after J.'s death, induced the plaintiff by misrepresentation to execute, and which purported to give W. alone complete control over both sums.

(b) *Authority to bind co-partner by banking account.*

12.—In the absence of the evidence of usage, a partner has no implied authority by law to bind his co-partner by a banking account opened by him in his own separate name, instead of in the name

of the firm, although such account be for the purposes of the firm. *The Alliance Bank (Lim.) v. Kearsley*, 40 Law J. Rep. (N.S.) C. P. 249; Law Rep. 6 C. P. 433.

(c) *Acts of co-partner after dissolution.*

13.—After a dissolution of partnership the continuing partner cannot by his act or admission involve his co-partner in any legal liability. Therefore part payment of a debt by the continuing partner cannot be set up against the retiring partner as a bar to the Statutes of Limitation. A debt from solicitors to a client in respect of moneys received is not an express trust within the Statutes of Limitation. *Watson v. Woodman*, Law Rep. 20 Eq. 721.

(d) *Powers of manager of partnership.*

14.—The powers of a manager of a partnership or company considered. *Beveridge v. Beveridge*, Law Rep. 2 Sc. App. 183.

*Acceptance of bills of exchange.* [See BILL OF EXCHANGE, 7, 8.]

(F) DISSOLUTION OF PARTNERSHIP.

(a) *Accounts: right to interest.*

15.—A claim to have partnership accounts subse-quent to the dissolution taken with interest as between the parties must, in the absence of facts raising particular equities, be maintained, if at all, upon the footing of an agreement to that effect. There is no principle upon which after dissolution interest is payable between partners merely on the ground that they have still remaining in the concern unequal shares of capital on which, during the continuance of the partnership, they were entitled to have interest credited. *Pilling v. Pilling* (3 De Gex, J. & S. 162) dissented from. *Barfield v. Loughborough*, 42 Law J. Rep. (N.S.) Chanc. 179; Law Rep. 8 Chanc. 1.

By articles of partnership between two solicitors it was agreed that in case either of the partners should at any time or times, with the consent of the other of them, advance or lend to the co-partnership or leave therein at any annual settlement of accounts any sum or sums of money, the partners respectively should be considered as creditors of the partnership in respect of such capital and advances, and should be allowed interest for the same. Upon the special terms of this contract:—Held, varying the order of one of the Vice-Chancellors, that in taking the accounts after dissolution interest must be allowed to each partner on his share of the capital from time to time remaining in the business, with annual rests up to the time of the dissolution, but without rests from that time. *Ibid.*

(b) *Return of premium.*

16.—In June, 1869, the plaintiff entered into articles of partnership with the defendant for seven years, and paid a premium of 2,500*l.* The articles were strict in their provisions as to the conduct of the partners, and other matters. In

November, 1870, the term of the partnership was varied, and made to cease on 29th of September, 1875. In 1871 the defendant had reason to be dissatisfied with the plaintiff, and, acting under a provision in the articles, called on him to sign (and in November, 1871, he did sign) a notice of dissolution, which was duly gazetted. A correspondence ensued, and ultimately the defendant refusing to return any part of the premium, the plaintiff filed a bill to recover it, and to have the partnership accounts taken in the usual way:—Held, that the plaintiff was entitled to a return of a proportionate part of the premium, but on the footing of the partnership term being one of six years and a quarter, and not seven years. *Wilson v. Johnstone*, 42 Law J. Rep. (N.S.) Chanc. 668; Law Rep. 16 Eq. 606.

(G) DEATH OF PARTNER.

(a) *Liability of executors and surviving partners continuing deceased partner's assets in business.*

17.—Surviving partners, and executors who are not partners, but have continued their testator's assets in the business, are liable to account for profits made in respect of the value of a deceased partner's share only where there is no absolute contract for vesting in the survivors the share of the deceased partner or only an option to take to his share on certain conditions, and the surviving partners neglect to perform such conditions or to liquidate the affairs of the partnership. *Vyse v. Foster* (H.L.), 44 Law J. Rep. (N.S.) Chanc. 37; Law Rep. 7 E. & I. App. 319.

A. was partner in a firm under articles, which provided that the surviving partners should purchase the share of a deceased partner at a valuation. There was nothing to shew that time was of the essence of the contract. A. died, having by will given his real and personal estate to three executors in trust for his children on their attaining the age of twenty-five, and with trusts in the meantime for investing in real or Government securities. One of his executors was partner at the date of the testator's will, and at his death another of his executors became a partner; the third never was a partner. The value of the testator's share in the firm was ascertained in the mode prescribed, but the executors allowed it to remain in the firm until the children arrived at the prescribed age, and the children were credited in the books of the firm with the ascertained value of their father's share with compound interest at five per cent. The arrangement was most beneficial to the firm, and it was very advantageous to the children:—Held, that the contract for sale and purchase of the deceased partner's share was not affected by the delay in actual payment; that the relation of debtor and creditor, purchaser and vendor, subsisted as well between the partners who were executor and their co-executors as between the other partners and the executors, and that the executors, who were or afterwards became partners, were not liable to account for the profits made by them individually or by their firm generally through the use of their testator's capital, nor were the execu-

tors who had assented to such employment under any such liability. *Ibid.*

The articles provided that the price of a deceased partner's share should be secured by promissory notes, and also that the surviving partners should enter into a covenant to indemnify the estate of the deceased partner from all partnership liabilities, and the representatives of the deceased partners were to release their interest in the firm and its effects. The promissory notes were not given, nor were deeds of indemnity or release executed:—Held, that the purchase was not by the articles made conditional upon the execution of the release or indemnity or upon the giving of the promissory notes, and that the non-payment of the sums *ad diem* did not put an end to the contract. Also, that the surviving partners ought to be parties to a bill seeking such relief. *Ibid.*

The executors invested 1,600*l.* in a substantial, but not expressly authorised, improvement of their testator's property:—Held, that this sum should not be wholly disallowed them, but they might, at the option of the *cestuis que trusts*, take to the improved property at its original value, repaying to the estate what they had spent on the improvement. *Ibid.*

18.—B., the surviving partner in a business, being also the executor of the deceased partner, carried on for eight years the business, which was insolvent at the death of the deceased partner, and then sold the business for 1,700*l.* In a suit for the administration of the deceased partner's estate against B., as executor,—Held, that the value of the goodwill ought to be ascertained at the time of the deceased partner's death, and not at the time of sale. *Broughton v. Broughton*, 44 Law J. Rep. (N.S.) Chanc. 526.

(b) *Liability of executors as partners.*

19.—T. and two others carried on business in partnership as auctioneers, under a deed providing that in case any one of them should die during the term, the survivors should carry on the partnership till the end of the term, and should pay to the representatives of the deceased partner the share of the profits to which he would have been entitled if living. T. died during the term, at a time when the firm possessed no capital except office furniture, but had in their hands upwards of 600*l.*, to which T. was entitled, though none of it consisted of his capital in the business. His executors claimed his share of profits, but no settlement was ever made between them and the survivors. The executors however received from the survivors at various times sums amounting in all to about 625*l.* They never interfered with the business in any way. The survivors carried on the business, and in course thereof received the proceeds of the sale of property which the plaintiff had employed the firm to sell for him. In an action against the firm to recover the balance of this purchase-money,—Held, that the executors of T. were not liable as partners in the firm. *Holme v. Hammond* 41 Law J. Rep. (N.S.) Exch. 157; Law Rep. 7 Exch. 218.

(c) *Rights of executors of deceased partner.*

(1) *Completion of existing contracts.*

20.—The executors of a deceased partner are, as a general rule, entitled to have the subsisting contracts of the partnership carried out to completion, in order to ascertain their testator's share of the profits resulting therefrom, his estate being liable also to contribute rateably to the resulting loss, if any. *McClellan v. Kennard*, 43 Law J. Rep. (N.S.) Chanc. 323; Law Rep. 9 Chanc. 336.

Five persons as partners entered into a contract for the construction of some public works. Before the contract was completed one of the partners died. By his will he appointed two executors and three trustees, and authorised his trustees to carry on any business in which any part of his trust property should for the time being be invested. Before the will was proved an agreement was drawn up, expressed to be made between the surviving partners and the executors and trustees of the testator, the names of the executors and trustees being left in blank. The agreement provided (*inter alia*) that the contract should be carried out on the joint account of the co-contractors, who were to contribute in equal shares to the expenses, and that the executors and trustees of the testator should be sleeping partners, the acting partners being the four survivors. The agreement was executed by the four survivors. The next day the executors named in the will proved it. One of the three trustees disclaimed the trusts. The agreement was afterwards executed by the executors and acting trustees:—Held (on appeal), that the object of the agreement was merely to bind the testator's estate, and that it was sufficient that it was executed by the executors and acting trustees. Held, also, that the testator's estate was entitled to his share of the profits of the contract as ascertained on its completion, the estate being also liable to contribute in the same proportion to the losses. *Ibid.*

(2) *Valuation of assets which cannot be sold.*

21.—A. & B. carried on the business of carrying mails under a contract entered into by the Postmaster-General with B. and not assignable. A. died; B. continued to carry on the business under the contract, and refused to account for the value of the contract to the executors of the deceased partner:—Held, that as the contract was not assignable and its value could not be ascertained in the usual way by sale, it must be referred to Chambers to ascertain the value, and the surviving partner must pay the value to the executors of the deceased, with a share of the profits since the death of the deceased, a fair sum being allowed to the surviving partner for his services in carrying on the business. *Ambler v. Bolton*, 41 Law J. Rep. (N.S.) Chanc. 783; Law Rep. 14 Eq. 427.

(d) *Priority of creditors.*

22.—Four brothers were in business together as cotton spinners. By articles of partnership it was agreed that accounts and balance-sheets



should be taken half-yearly, and that in case of the death of either of the partners the capital of the deceased partners should not be withdrawn from the business, but that the amount should be ascertained at the succeeding half-yearly stock-taking, and should remain secured by promissory notes at interest in the business half for three and the other half for five years from his decease. Two of the partners died within a few months of each other, and within a year from the death of the one who last died, the two surviving partners filed a petition for liquidation. Part of the assets consisted of machinery which had belonged to all four partners. On question raised on special case to decide whether the machinery belonged to the creditors of the four in priority to the other creditors:—Held (reversing the decision of the County Court Judge), that the creditors of the four had no priority, but that the assets must be distributed amongst all the creditors rateably. *Ex parte Furniss; In re Simpson*, 43 Law J. Rep. (N.S.) Bankr. 43.

Affirmed, on appeal—*In re Simpson; Ex parte Furniss*, 43 Law J. Rep. (N.S.) Bankr. 147; Law Rep. 9 Chanc. 572.

(H) RIGHTS OF CREDITORS OF BANKRUPT OR INSOLVENT PARTNERSHIP.

[See BANKRUPTCY, E 11—20.]

(I) PRACTICE IN PARTNERSHIP SUITS.

(a) *Suit by lunatic partner.*

23.—A partner who has become incurably insane may obtain a decree for dissolution of the partnership on this ground, and although he has not been found lunatic by inquisition, may institute a suit for dissolution by his next friend, alleging that the lunatic is incurably insane, and that the dissolution is for the benefit of the lunatic, and the Court will entertain the suit, in order to protect the property of the lunatic. *Jones v. Lloyd*, 43 Law J. Rep. (N.S.) Chanc. 826; Law Rep. 18 Eq. 265, and *Fisher v. Melles*, Law Rep. 18 Eq. 268n.

(b) *Costs.*

24.—Bill for account and winding-up of a partnership by executors of a deceased partner against a surviving partner, who was bound to pay them half the annual profits, alleging that no accounts had been rendered, though asked for, for some years, but not alleging that anything was due. The defendant's answer admitted the statements in the bill, and submitted to render an account but did not allege that nothing was due:—Held, that the defendant must pay costs up to the hearing. *Norton v. Russell*, Law Rep. 19 Eq. 343.

*Apportionment of costs in partnership suit.*  
[See COSTS IN EQUITY, 46.]

*Order to tax costs in name of partnership.*  
[See COSTS IN EQUITY, 62.]

PASSENGER.

[See CARRIER; NEGLIGENCE; RAILWAY COMPANY.]

PATENT.

(A) VALIDITY.

- (a) *Application of new material to purpose not new.*
- (b) *Combination of known articles for new purpose.*
- (c) *Right of retiring partner to dispute validity of patent.*

(B) SPECIFICATION: WHETHER TOO LARGE.

(C) DISCLAIMER.

- (a) *Construction.*
- (b) *Taking-off file.*

(D) SEALING.

- (a) *Priority.*
- (b) *Practice.*

(E) LICENSE: NON-REGISTRATION.

(F) COVENANT TO ASSIGN FUTURE RIGHTS.

(G) INFRINGEMENT.

- (a) *What amounts to.*
- (b) *Onus of proof.*
- (c) *Right of action: articles for use of Crown.*
- (d) *Right to publish threats of legal proceedings.*

(H) PROLONGATION OF TERM.

(I) JURISDICTION AND PRACTICE IN EQUITY.

- (a) *Discovery.*
- (b) *Inspection.*
- (c) *Particulars.*
- (d) *Issues.*
- (e) *Evidence of user.*
- (f) *Interlocutory injunction.*

(A) VALIDITY.

- (a) *Application of new material to purpose not new.*

1.—A patent claimed in 1840, a new product, the combination of tin and lead, to be brought about by the process described in the specification, and to be employed in the manufacture of capsules for bottles and for other purposes. Metal capsules for bottles had previously been known and used, and a metal formed by a combination of tin and lead had been patented previously in 1804 by one Dobbs, but the proportions mentioned in his patent as those in which the metals should be combined, differed from those mentioned in the plaintiff's patent; the metal produced was of a different character, and was not so flexible as the metal produced by the plaintiff's patent, the manufacture of which, indeed, was only possible by the application of improved machinery, which in 1804 had not been invented:—Held, that in the absence of evidence that a skilled workman ever had made, or even with the aid of subsequent knowledge and improved machinery could make, from the former patent a metal with the peculiar consistency and character of that specified in the later patent, the latter was not anticipated by the former. Also,

that the material being new, the claim for its application to a purpose that was not new did not affect the validity of the specification. *Neilson v. Betts* (H. L.), 40 Law J. Rep. (N.S.) Chanc. 317; Law Rep. 5 E. & I. App. 1.

The capsules the user of which was complained of were made and purchased abroad, and fixed to the bottles in Scotland. The plaintiff's patent extended only to England and the Channel Islands. It was proved that some of the bottles to which the capsules were fixed had been sent into England, consigned to the respondent's agent, for the purpose of exportation only:—Held, that the user during this time of the capsules was sufficient to support a bill for an injunction. *Ibid.*

Whether the defendants were liable in respect of capped bottles actually sold by them in Scotland, with the knowledge that they would be imported into England?—*quære?* *Ibid.*

Evidence was given by the plaintiff that the capsules manufactured abroad were made of a material substantially identical with and by a process not distinguishable from his:—Held, that the onus lay on the defendants of proving that there was any difference in the material or in the process by which it was produced. *Ibid.*

Although the amount of damages to be recovered was infinitesimal, so that the matter practically in dispute was simply costs, the House of Lords entertained an appeal in the matter. *Ibid.*

The decree appealed from, besides the injunction, awarded an enquiry as to damages sustained by the plaintiff, and also an enquiry of profits made by the defendant. Their Lordships put the plaintiff to his election, and he preferring the direction as to damages, the decree complained of was amended by striking out the direction as to profits. *Ibid.*

(b) *Combination of known articles for new purpose.*

2.—An arrangement of apparatus so constructed as to bring into operation a well-known dynamic agent so as to produce a useful effect for a particular result, constitutes an invention of a combination for which a valid patent may be granted. *Cannington v. Nuttall* (H.L.), 40 Law J. Rep. (N.S.) Chanc. 739; Law Rep. 5 E. & I. App. 205.

3.—To adopt a combination of machinery or arrangement of apparatus originally directed, to one purpose, and to use it for another and additional purpose, is an infringement of the patent which first introduced that combination or arrangement. *Cannington v. Nuttall* (H.L.), 40 Law J. Rep. (N.S.) Chanc. 739; Law Rep. 5 E. & I. App. 205.

4.—A patent for a combination of common elementary mechanical materials so as to produce results which have been previously attained by other mechanical combinations, but more economically, expeditiously and completely, is valid. The validity of such a patent is not affected by the circumstance that a useless and abortive machine, similar in many respects to that patented, was previously exhibited to the public. *Murray v. Clayton*, Law Rep. 7 Chanc. 550.

[And see *infra* No. 19.]

(c) *Right of retiring partner to dispute validity of patent.*

5.—A. and B. entered into partnership for the purpose of working a patent taken out by B., the partnership deed providing that the patent rights should belong solely to B. During the continuance of the partnership the partners issued circulars asserting the validity of the patent, and warning the public against its infringement, although they had been advised that the patent was in fact void. The partnership, having continued for seven years, was dissolved by deed, and A. and B. each proceeded to manufacture the patented articles for himself; but shortly afterwards B. commenced issuing circulars to A.'s customers, asserting that A. was infringing his patent, and threatening them with legal proceedings in case they purchased from A. A. then moved for an injunction to restrain B. from issuing these circulars, contending that, the patent being void, he had an equal right with B. to manufacture the articles intended to be protected by it:—Held, that although A. had, during the continuance of the partnership, precluded himself from disputing the validity of the patent, yet, after the expiration of the partnership, he was as much at liberty as any other person to dispute its validity, and that B.'s proper course for asserting his claim to the patent was, instead of issuing the circulars complained of, to have instituted proceedings against A. to establish its validity. On B. declining to undertake to institute any such proceedings, the Court granted the injunction. *Rollins v. Hinks* (41 Law J. Rep. (N.S.) Chanc. 358) followed. *Asmann v. Lund*, 43 Law J. Rep. (N.S.) Chanc. 655; Law Rep. 18 Eq. 330.

(B) SPECIFICATION: WHETHER TOO LARGE.

6.—A specification which professes to do "by machinery" what has never before been done by machinery, and describes the machinery, is not on the face of it too large. *Arnold v. Bradbury*, Law Rep. 6 Chanc. 706.

(C) DISCLAIMER.

(a) *Construction.*

7.—The plain language of the operative part of a disclaimer is not to be controlled or modified by any introductory sentences with which the patentee may think fit to preface such disclaimer. *Cannington v. Nuttall* (H.L.), 40 Law J. Rep. (N.S.) Chanc. 739; Law Rep. 5 E. & I. App. 205.

(b) *Taking-off file.*

8.—The Master of the Rolls has jurisdiction to take off the file a disclaimer of part of an invention, filed without the authority of the patentee. *In re Sharp's Patent* (3 Beav. 245; s. c. 10 Law J. Rep. (N.S.) Chanc. 86) distinguished. *In re Berdan's Patent*, 44 Law J. Rep. (N.S.) Chanc. 544; Law Rep. 20 Eq. 346.

(D) SEALING.

(a) *Priority.*

9.—An applicant for letters patent has ordi-

narily six months from the filing of his provisional specification within which he may apply to have the great seal affixed to his invention, and if he makes such application earlier than is necessary and then lies by till the six months are nearly expired, the delay will not deprive him of his right to have his patent sealed; but in such a case if a rival inventor, whose provisional specification is of later date than that of the first applicant, has by greater diligence got his patent sealed first, the first applicant's patent will be dated the day of application for sealing, and not, as in ordinary cases, the day of the filing of the provisional specification. *In re Bailey's Application for Letters Patent*, 42 Law J. Rep. (n.s.) Chanc. 264; Law Rep. 8 Chanc. 60.

10.—To an action for infringing letters patent granted to the plaintiff and sealed as of the date of his application for the same, it was held to be no answer that the alleged infringements were done in exercise of certain letters patent for a similar invention granted to the defendant and sealed as of a subsequent date, *i.e.*, the date of his application for the same, although the complete specification of the plaintiff's patent was not filed in the patent office till after the defendant's specification had been filed. *Saxby v. Kennett*, 42 Law J. Rep. (n.s.) Exch. 137; Law Rep. 8 Exch. 210.

11.—The 9th section of the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), giving to an applicant for a patent, who has filed his complete specification in the first instance, protection for six months, with the like powers, rights and privileges, as might have been conferred upon him by letters patent duly sealed, has not the effect of giving him priority over a rival inventor who has made earlier application so as to prevent the latter from having his patent sealed during that period. *Bate's and Redgate's case* (38 Law J. Rep. (n.s.) Chanc. 501; Law Rep. 4 Chanc. 577) distinguished. *In re Henry*, and *In re Farguharson*, 42 Law J. Rep. (n.s.) Chanc. 363; Law Rep. 8 Chanc. 167.

(b) Practice.

12.—Where upon the hearing of several applications for letters patent by rival inventors before the law officer of the Crown the evidence is conflicting, it is the duty of the law officer himself to decide upon it, and not by issuing his warrant for the sealing of both patents, to leave the matter to be contested before the Lord Chancellor. *In re Henry's Application for Letters Patent*; and *In re Farguharson's Application for Letters Patent*, 42 Law J. Rep. (n.s.) Chanc. 363; Law Rep. 8 Chanc. 167.

13.—Upon the hearing of an application to affix the great seal to letters patent which have been unsuccessfully opposed before the Attorney-General, the Lord Chancellor will not allow facts to be gone into which might have been but were not urged on the previous occasion. *In re Sheffield's Application for Letters Patent*, 42 Law J. Rep. (n.s.) Chanc. 356; Law Rep. 8 Chanc. 237.

14.—On allegation that the invention of a first applicant for a patent was similar to that of a

second applicant who had obtained a patent, the Lord Chancellor examined the provisional specification of the first, and the complete specification of the second, and finding no similarity, directed the letters patent of the first to be sealed. *In re Harrison*, Law Rep. 9 Chanc. 631.

Where rival applicants applied on the same day, and mutually agreed to withdraw opposition, two sets of letters patent bearing date on the day of application were granted. Witnesses examined *vidé voce* on application to affix the great seal. *In re Gething*, Law Rep. 9 Chanc. 633.

15.—Where a servant filed a provisional specification for an invention, after which the master filed a provisional specification for a similar invention, and subsequently filed a complete specification and obtained letters patent,—Held, that, under the circumstances, the great seal might be affixed to the letters patent for the servant's invention, and that the letters patent might bear the date of his provisional specification. *Ex parte Scott and Young*, Law Rep. 6 Chanc. 274.

16.—Where the law officer has reported that part of an invention sought to be patented is identical with part of an existing patent, a second patent will not, except under special circumstances, be granted for that part, although the validity of the first patent is disputed. *Ex parte Manceaux*, Law Rep. 6 Chanc. 272.

(E) LICENSE: NON-REGISTRATION.

17.—W., a patentee, agreed with H. that H. should be the sole manufacturer under the patent. This agreement was embodied in a deed, which was prepared by the solicitor of W., H. employing no legal adviser. The deed was not registered in compliance with the Patent Law Amendment Act, 1852, s. 35, until after bill filed. Subsequently W. granted a right of manufacture to M., who had full notice of the previous agreement with H. The grant to M. was also unregistered.—Held, that under the circumstances W. could not avail himself of an objection based upon the non-registration of the agreement with H., and that as the grant to M. was also unregistered, M. also was not entitled to take the objection. *Hassall v. Wright*, 40 Law J. Rep. (n.s.) Chanc. 145.

Semle—that the subsequent registration had relation back to the date of the agreement. *Ibid.*

(F) COVENANT TO ASSIGN FUTURE RIGHTS.

18.—It is not against public policy for the vendor of a patent to agree to assign to the purchaser all future patent rights which he might afterwards acquire with respect to the inventions sold or any of a like nature. *The Printing and Numerical Registering Company v. Sampson*, 44 Law J. Rep. (n.s.) Chanc. 705; Law Rep. 19 Eq. 462.

Specific performance of an agreement to that effect decreed. *Ibid.*

(G) INFRINGEMENT.

(a) What amounts to.

19.—A patent for a mechanical arrangement

whereby a particular operation may be performed for a particular purpose, the parts of the apparatus so arranged not being new in themselves, but thus first combined for that particular purpose, is not infringed by the adoption of the same arrangement or combination of parts for a similar purpose, if the mode of operation is sufficiently distinct, and different in principle from that which was described or claimed in the patent, and the object achieved is also sufficiently distinct or novel and does not form an essential part of the patent. *Saxby v. Charles* (H.L.), 43 Law J. Rep. (n.s.) Exch. 228.

S. obtained in 1856 a patent for "an arrangement of mechanism by which the points and the signals used on railways should be simultaneously actuated by one movement and in such a manner that the points could not be wrong when the signals were right, nor the signals wrong when the points were right." The invention effected this by connecting the rods and pulleys which worked the signals with the lever which moved the points so that when the signalman pushed or pulled the lever to open or shut the points he must of necessity raise or depress the signal and place it so that it should rightly indicate the position of the points. After describing the invention in all its parts, the specification stated that the claim was for the mechanical arrangement thereinbefore described, whereby "the signals and the points of each line are worked by the motion of a signal lever, or any modification thereof," and it was declared that the inventor did not confine himself to the precise arrangement of the mechanical details, as the same might be varied without departing from the invention. In 1866, C. obtained a patent "for machinery for actuating railway-points and signals," the object being "to effect a simultaneous adjustment of points and signals, agreeing together so as to prevent the possibility of accident by collision at railway junctions, and to ensure the efficient working of points and signals in combination." The system employed under C.'s patent was that the normal position of the signals should be at 'danger,' and they could only be changed to 'safety' by the moving of a separate lever; they were not moved by the lever which moved the points. But the lever which moved the signals was connected with the lever which moved the points in such a way that when the line was not open the signal lever was locked, and it could not be moved, consequently the signal could not be changed from danger to safety. But when the point's lever was moved so as to open the line, the signal lever became at the same moment unlocked, and then the signalman might move it and so put the signal to safety. But the line might be opened or closed for shunting, &c., without moving the signal from danger. Thus C.'s invention was in fact one by which any two or more levers might be made to act upon each other and in communication, and not that one lever should act directly at the same moment upon both points and signals. The result, as described in his specification, was that "when one or more sets of levers were moved, such signals (it should have been signal levers) as

might be required to be moved in accordance therewith were set at liberty, and all other signal levers which, if moved, would be antagonistic to the position of the points became locked and rendered incapable of motion." C.'s patent was more useful than that of S., but S.'s patent could have been made to effect C.'s result by a slight modification, and the introduction of another lever. The mechanical contrivances employed in the one patent were of course much the same as those used in the other:—Held, that the working C.'s patent was not an infringement of S.'s patent; that the principle of his invention, namely, of simultaneously moving the points and making it possible to move the signal lever, was not equivalent to S.'s principle of simultaneously moving the signals and the points; and C.'s invention was one of practical importance and distinct from that of S. *Ibid.*

20.—To adopt a combination of machinery or arrangement of apparatus originally directed, to one purpose, and to use it for another and additional purpose, is an infringement of the patent which first introduced that combination or arrangement. *Cannington v. Nuttall* (H.L.), 40 Law J. Rep. (n.s.) Chanc. 739; Law Rep. 5 E. & I. App. 205.

*Infringement of patent for new material applicable to purpose not new.* [See supra No. 1.]

#### (b) *Onus of proof.*

21.—In a suit to restrain the sale of a patented article, it is incumbent on the plaintiff not only to prove the sale, but to prove that the article was not made by himself or his agents, and if he manufactures the article abroad as well as here, he must prove that it was not so made abroad, the sale of the article abroad being held to imply a license to use it here. *James, V.C.*, affirmed. *Betts v. Willmott*, Law Rep. 6 Chanc. 239.

#### (c) *Right of action: articles for use of Crown.*

22.—The defendants, a joint-stock company, under a contract, manufactured and delivered certain rifles, which were accepted for the use of the Crown and the public service, and for which the defendants were paid money. It was admitted that the rifles so manufactured and delivered would, but for the fact that they were manufactured and delivered as above stated, have been infringements of certain patents of which the plaintiff was assignee:—Held, that he was entitled to maintain an action against the defendants in respect of such infringement. *Dixon v. The London Small Arms Company (Lim.)*, 44 Law J. Rep. (n.s.) Q. B. 63; Law Rep. 10 Q. B. 130. [Reversed on appeal, Law Rep. 1 Q.B. Div. 384.]

#### (d) *Right to publish threats of legal proceedings.*

23.—There is no such *prima facie* presumption of the validity of a patent as to entitle a patentee, by publishing threats of proceedings for infringement to injure a rival's trade, without by substantive proceedings establishing the validity of his patent.

*Rollins v. Hinks*, 41 Law J. Rep. (N.S.) Chanc. 358; Law Rep. 13 Eq. 355.

#### (H) PROLONGATION OF TERM.

**24.**—Consideration of the principles regulating the exercise of the discretion of the Privy Council in granting extensions of patents previously patented abroad. *In re Betts' Patent* (1 Moo. P. C. (N.S.) 49) approved. *Poole's Patent* (4 Moo. P. C. (N.S.) 452) observed upon. *In re Johnson's Patent* (*Willcox & Gibbs*), Law Rep. 4 P. C. 75.

**25.**—The petition for prolongation of a patent must state fully and fairly everything relating to the patent. An omission to state that the patent was a communication from a foreigner, who had previously patented the same invention in America, and that such patent (though renewed) had expired:—Held, fatal to the application. *In re Pitman's Patent*, Law Rep. 4 P. C. 84.

**26.**—Prolongation for seven years allowed where the patent was a meritorious one, although no profits had been made by the inventor or his assignees. The statement of accounts being *prima facie* satisfactory, the petitioners were allowed to prove the merits of the invention before going into the accounts. *In re Houghton's Patent*, Law Rep. 3 P. C. 461.

**27.**—15 & 16 Vict. c. 83, sec. 25, does not apply where an English patent for an invention is taken out before a foreign patent for the same invention is obtained, but on the grounds of public policy the Privy Council declined to entertain an application for the extension of such a patent after the expiration of the foreign patent. *In re Winan's Patent*, Law Rep. 4 P. C. 93; and *In re Blake's Patent*, Law Rep. 4 P. C. 535.

**28.**—On considering the question of remuneration on an application for prolongation of a patent, allowance was made in respect of the patentee's loss of time in bringing the invention into public use. Extension granted for six years. *In re Carr's Patent*, Law Rep. 4 P. C. 539.

**29.**—Where the accounts filed by a patentee applying for prolongation were *prima facie* unsatisfactory, the Court directed the question of accounts to be enquired into before considering the merits of the invention. *Bona fide* opponents on an application for a prolongation will be given costs, but where two sets of opponents really represent the same kind of opposition, one set of costs only will be allowed. *In re Wield's Patent*, Law Rep. 4 P. C. 89.

**30.**—Upon an application for the prolongation of the term of letters patent, the petitioner is bound to bring his accounts before the Judicial Committee in such a shape as to leave no doubt what remuneration he has received from the patent. *In re Clark's Patent*, Law Rep. 3 P. C. 421.

**31.**—The Privy Council refused to entertain accounts in a patent case which had not been filed as required by the 9th rule touching letters patent. Two patents of a kindred nature, having different terms unexpired, prolonged so as to expire on the same day. *In re Johnson and Atkinson's Patents*, Law Rep. 5 P. C. 87.

#### (I) JURISDICTION AND PRACTICE IN EQUITY.

##### (a) Discovery.

**32.**—An injunction having been granted to restrain the infringement of a patent, with an enquiry as to damages, an order was made in chambers for an affidavit by the defendants as to the number of the patented machines sold by them, and the names and addresses of the purchasers. They gave the number of the machines sold, but not the names of the purchasers. It appeared that the patentee made his profits by charging a royalty to the manufacturer on each machine sold. On an application by the plaintiff to consider the sufficiency of the affidavit, and another by the defendants to strike out of the order the words they objected to answer, unless the plaintiff would undertake not to take proceedings against the purchasers,—Held, that the plaintiff was entitled to the discovery, and could be put under no restrictions; but the costs of the plaintiff's application were reserved. *Murray v. Clayton; Ex parte the Plaintiff; Ex parte the Defendants*, 42 Law J. Rep. (N.S.) Chanc. 191; Law Rep. 15 Eq. 115.

##### (b) Inspection.

**33.**—The plaintiffs in a suit for the infringement of a patent held by them for the manufacture of certain cartridges applied by motion for an inspection of the machinery and premises of the defendants, who were also large cartridge manufacturers. The defendants alleged by affidavit that the inspection was only asked for to enable the plaintiffs to see their machinery, and that they believed it to be unnecessary for the purposes of the suit:—Held, that as there was no allegation by the plaintiffs that such inspection was necessary, and as there was an allegation by the defendants that it was not necessary, the motion must be refused. *Bailey v. Kynoch*, 44 Law J. Rep. (N.S.) Chanc. 89; Law Rep. 19 Eq. 90.

**34.**—A rule to enter the verdict for the defendants in an action for infringing a patent having been discharged, the defendants gave notice of appeal, and pending the appeal an order was made for an account of profits. This order was not appealed against, but the defendants when before the Master refused to produce their books, whereupon the Court made absolute a rule for inspection of the books, and for administering interrogatories to the defendants. *Sazby v. Easterbrook*, 41 Law J. Rep. (N.S.) Exch. 113; Law Rep. 7 Exch. 207.

[And see PRODUCTION, 8, 18.]

##### (c) Particulars.

**35.**—The practice in equity in regard to patent suits must conform, as far as possible, to the practice at law as established by statute (15 & 16 Vict. c. 83, s. 41). Therefore, the plaintiff in a patent suit ought to deliver to the defendant particulars of the breaches whereon he means to rely, and having done so, is entitled to discovery from a defendant setting up the defence of prior user of particulars of such prior user. *Finnegan v. James*, 44 Law J. Rep. (N.S.) Chanc. 185; Law Rep. 19 Eq. 73.

**36.**—Where a simple article, alleged to be an infringement, was made an exhibit, the Court refused to order further particulars as to what part of the specification was infringed. *Batley v. Kynoch*, 44 Law J. Rep. (N.S.) Chanc. 219; Law Rep. 19 Eq. 229.

(d) *Issues.*

**37.**—The usual issues may be granted in a patent suit before the hearing, although the defendant denies the validity of the plaintiff's patent, on the ground of vagueness of the specification. *Wickens, V.C.*, reversed. *Arnold v. Bradbury*, Law Rep. 6 Chanc. 706.

**38.**—Questions of fact in a patent suit will be tried by the Court itself without a jury, in the absence of special circumstances. *The Patent Marine Inventions Company v. Chadburn*, Law Rep. 16 Eq. 447.

(e) *Evidence of user.*

*Evidence of user in England of product made abroad.* [See *supra* No. 1.]

(f) *Interlocutory injunction.*

**39.**—An injunction to restrain the alleged infringement of a patent will not be granted on an interlocutory application, unless it can be shewn that there has been active user of the invention, even where the patent has been in force for eight years. *Plimpton v. Malcolmson*, 44 Law J. Rep. (N.S.) Chanc. 257; Law Rep. 20 Eq. 37.

PAUPER LUNATIC.

[See *POOR*, 14.]

PAVING.

*Expenses and rates.* [See *METROPOLIS*, 9-15; *PUBLIC HEALTH ACT*, 12-18.]

PAWNBROKER.

[Consolidation and amendment of the Acts relating to pawnbrokers. 35 & 36 Vict. c. 93.]

A person who had pledged goods, having unknowingly given the ticket amongst other matters to a third person, obtained under the (now repealed) statute, 39 & 40 Geo. 3. c. 99, ss. 15, 16, the form of affidavit, &c., therein mentioned, went immediately with it to a magistrate as therein provided, and shewed it afterwards to the pawnbroker:—Held, that under that statute the pawnbroker was not justified in afterwards delivering the goods to the ticket-holder, as the ticket was "lost or mislaid," and it was not necessary to deliver the affidavit and redeem the goods. *Burslem v. Attenborough*, 42 Law J. Rep. (N.S.) C. P. 102; Law Rep. 8 C. P. 122.

PEDLARS.

[33 & 34 Vict. c. 72 repealed, and new provisions made as to the granting of pedlars' certificates, &c. 34 & 35 Vict. c. 96.]

The respondent and other ladies purchased materials, which they made into aprons, handkerchiefs, and other articles of wearing apparel. These they carried from door to door for sale in a basket, called "the missionary basket," and applied the proceeds of the sale to charitable purposes:—Held, that the respondent did not come within the description of "pedlar" in the Pedlars Act, 1871, and did not require a certificate under that Act. *Gregg v. Smith*, 42 Law J. Rep. (N.S.) M. C. 121; Law Rep. 8 Q. B. 302.

PEERAGE.

*Right to vote.*

**1.**—When the right to vote in respect of a peerage has been established, the Act 10 & 11 Vict. c. 52, s. 4, effectually prevents any other vote from being received in respect of that peerage. *The Breadalbane Peerage Claim*, Law Rep. 2 Sc. App. 269.

*Descent of peerage.*

**2.**—The invariable presumption of law is that peerages descend to heirs male, and not to heirs general. *The Herries Peerage Claim*, Law Rep. 2 Sc. App. 258.

*Attainder.*

**3.**—A private Act (1 Mary, sess. 2, c. 1), in the form of a petition to the Queen, by two ladies, daughters of H. P., recited the attainder of H. P., and prayed that the daughters and their heirs might be restored, and enabled *only* in blood, as daughters and heirs of H. P., and enabled to demand and hold all honours, lordships, hereditaments, &c., which were of the said H. P. in possession, reversion, remainder, or otherwise at the time of his attainder:—Held, that this Act had no effect on the attainder of the mother of H. P., who was not mentioned in the Act, but only entitled the ladies to claim inheritances, the succession to which would have been affected by the attainder of H. P. himself. *The Montacute and Monthermer Peerages*, Law Rep. 7 E. & I. App. 305.

Where a son is sitting in Parliament in virtue of a barony of his parent, that circumstance will not save the barony from being affected by the attainder of the parent. *Ibid.*

[And see *PARLIAMENT*, 1, 2, 15, 16.]

PENAL SERVITUDE.

[And see *PREVENTION OF CRIME*.]

**1.**—To render a sentence of penal servitude for seven years obligatory under the Penal Servitude Act, 1864, which enacts (section 2), amongst

other things, that "where any person shall, on indictment, be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, the least sentence of penal servitude that can be awarded in such case shall be a period of seven years;" the indictment must charge the previous conviction. Therefore, where a man was convicted of unlawfully wounding, on an indictment which charged a wounding with intent to do grievous bodily harm, and did not mention a previous conviction for felony, but such a previous conviction was proved against him,—Held, that the Judge was not bound to pass a sentence of penal servitude for seven years, and that a sentence of penal servitude for five years was right. *The Queen v. Willis*, 41 Law J. Rep. (N.S.) M. C. 102; Law Rep. 1 C. C. R. 363.

2.—The 12 & 13 Vict. c. 96, by section 1, gives colonial Courts jurisdiction to try prisoners for offences committed on the high seas, and empowers such Courts to exercise all proceedings "for and auxiliary to and consequent upon the trial." Section 2 provides that persons convicted shall be subject to the same punishment as "by any law now in force," persons convicted of the same offence would be liable to if "tried and convicted in England." At the time of the passing of this statute manslaughter was punishable with transportation, but 16 & 17 Vict. c. 99, and 20 & 21 Vict. c. 3, substituted penal servitude for transportation, and 16 & 17 Vict., by section 6, enacted that persons sentenced to penal servitude in the colonies may be confined in such prison or place as the Crown may direct. The respondents were convicted of manslaughter on the high seas under the above statute, and were sentenced to penal servitude. No place had been appointed by the Crown for carrying out the sentence:—Held, that the Imperial Acts substituting penal servitude for transportation were applicable to persons sentenced under 12 & 13 Vict. c. 96, that the direction referred to in section 6 forms no part of this sentence, and that the sentence of penal servitude was therefore a valid sentence, though no place had been appointed for carrying it out. *The Queen v. Mount*, 44 Law J. Rep. (N.S.) P. C. 58; Law Rep. 6 P. C. 283.

## PENALTY.

### (A) RELIEF IN EQUITY.

### (B) PENAL ENACTMENT: MENS REA.

### (C) APPROPRIATION OF PENALTIES: RECEIVER OF METROPOLITAN POLICE.

### (A) RELIEF IN EQUITY.

1.—A company incorporated by Act of Parliament for making a dock agreed for the purposes of their undertaking to purchase certain land for 4,000*l.*, of which 2,000*l.* was to be paid at once, the balance at a future date. The agreement

contained a proviso empowering the vendors, on default in the payment of the balance or any part of it by a day named, to re-enter and re-possess the land without any obligation to repay any portion of the purchase-money received:—Held, that this was a penalty from which the Court would relieve the purchasers. *In re The Dagenham Thames Dock Company: Hulse's Claim*, 43 Law J. Rep. (N.S.) Chanc. 261; Law Rep. 8 Chanc. 1622.

Semble—that if it was not a penalty, the agreement would be void as *ultra vires* of the company. *Ibid.*

### (B) PENAL ENACTMENT: MENS REA.

2.—As a general rule no penal consequences are incurred where there has been no personal neglect or default, and a *mens rea* is essential to an offence under a penal enactment, unless a contrary intention appears by express language or necessary inference. *Dickinson v. Fletcher*, and *same v. Fletcher the younger*, 43 Law J. Rep. (N.S.) M. C. 25; Law Rep. 9 C. P. 1.

The 23 & 24 Vict. c. 151, s. 10, provides as a general rule to be observed in a coal mine by the owner and agent, that whenever safety lamps are required to be used in a mine they shall be examined and securely locked by a person duly authorised. Section 22 enacts that if any general rule shall be neglected or wilfully violated by any owner, agent or viewer, he shall be liable to a pecuniary penalty. Safety lamps were given out in a mine to which the above Act applied without being duly locked; a competent lampman had been appointed, and there was no personal default in either the owners or the agent of the mine:—Held, that the owners and the agent of the mine were not liable to be convicted under the above statute. *Ibid.*

### (C) APPROPRIATION OF PENALTIES: RECEIVER OF METROPOLITAN POLICE.

3.—By 2 & 3 Vict. c. 71, s. 47, where by any Act penalties or shares of penalties are or shall hereafter be made recoverable in a summary manner before any justices of the peace, and by the Act the same are or shall be limited to the Queen, or some person other than the informer or party aggrieved, in every such case the same, if recovered or adjudged before any of the said (metropolitan police) magistrates, shall be recovered for and adjudged to be paid to the receiver for the time being. By 3 & 4 Vict. c. 84, s. 6, any two justices having jurisdiction within the Metropolitan Police District shall have, while sitting together publicly in the court or room used for holding special or petty sessions in any part of the district within the limits of their commission, except in the divisions to be assigned to the police courts already established, all the powers, privileges and duties which one magistrate at the police courts has while sitting in one of these courts by the Acts 2 & 3 Vict. c. 47 and 2 & 3 Vict. c. 71:—Held, that the receiver was not entitled to a moiety of penalties recovered before two justices sitting in the Metropolitan District under the

powers of the above-mentioned Act. *The Receiver for the Metropolitan Police District v. Bell*, 41 Law J. Rep. (N.S.) M. C. 153; Law Rep. 7 Q. B. 433.

[See CONTAGIOUS DISEASES ACT.]

*Liquidated damages or penalty.* [See DAMAGES, 1, 2.]

## PENSION.

*To public servant: power to vary.* [See CORPORATION, 1.]

## PERJURY.

An indictment for perjury alleged to have been committed on a trial before the Court of Quarter Sessions, averred in substance that a certain indictment for misdemeanour, &c., came on to be tried in due form of law, and was tried by a jury duly sworn, and the prisoner, as a witness on the trial, was duly sworn, and contained the other usual averments and conclusion. It did not state the nature of the misdemeanour, or aver that the Court of Quarter Sessions had authority to try the same, or administer an oath on the trial. The statute 14 & 15 Vict. c. 100, s. 20, enacts, "That in every indictment for perjury it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court, and before whom the oath was taken, &c., without setting forth," &c.:—Held, that the substance of the offence charged against the defendant was sufficiently stated, and under the 14 & 15 Vict. c. 100, s. 20, the indictment was good on motion in arrest of judgment. *The Queen v. Dunning*, 40 Law J. Rep. (N.S.) M. C. 58; Law Rep. 1 C. C. R. 290.

*Conviction for, at hearing of bastardy summons: jurisdiction.* [See **BASTARDY**, 2.]

*At coroner's inquisition before deputy coroner: absence of coroner from lawful and reasonable cause held a question for the Judge.* [See **CORONER**.]

## PERPETUITY.

[See **REMOTENESS**.]

## PETITION OF RIGHT.

*Breach of contract.*

1.—A petition of right, presented by a subject to the Crown, under 23 & 24 Vict. c. 34, is not confined to claims in respect of specific chattels or land, but may be in respect of a breach of con-

tract. *Thomas v. The Queen*, 44 Law J. Rep. (N.S.) Q. B. 9; Law Rep. 10 Q. B. 31.

*Discovery of documents.*

2.—There is nothing in the Petitions of Right Act, 23 & 24 Vict. c. 34, to apply the provisions as to discovery in the Common Law Procedure Act, 1854, section 50, to the procedure under a petition of right, and the suppliant under a petition of right is not therefore entitled to a discovery of documents. *Thomas v. The Queen*, 44 Law J. Rep. (N.S.) Q. B. 17; Law Rep. 10 Q. B. 44.

*When maintainable.*

3.—A petition of right claimed from the Queen payment of debts, which were incurred by the ruler of Oude as part of the public debt of that state before it was annexed by the East India Company:—Held, assuming the liability to pay the debts to have been transferred to the East India Company by the annexation, that such liability was transferred by the 21 & 22 Vict. c. 106, ss. 65–68, from the East India Company to the Secretary of State in Council of India; that the remedy, if any, was by action against him; and that the petition of right therefore could not be maintained. *Frith v. The Queen*, 41 Law J. Rep. (N.S.) Exch. 171; Law Rep. 7 Exch. 365.

[And see **FOREST OF DEAN**, 2, 3.]

## PETROLEUM.

[25 & 26 Vict. c. 66 and 31 & 32 Vict. c. 56, repealed and new provisions substituted. 34 & 35 Vict. c. 105.]

1.—The appellant was charged before justices under the Petroleum Act, 1868, 31 & 32 Vict. c. 56, s. 4, for keeping and exposing for sale petroleum which gave off an inflammable vapour at a temperature of less than 100 degrees of Fahrenheit's thermometer. At the hearing of the complaint the inspector of weights and measures proved that in making the test, as authorised under ss. 6 and 8 and the schedule of the Act, he allowed the thermometer to rest on the bottom of the vessel in which the petroleum was, which vessel was two inches deep, and filled with petroleum as required by the schedule, and the thermometer was therefore inserted to the depth of two inches; and it was objected, on behalf of the appellant, that the test was illegally made, as the schedule says that "the thermometer shall be inserted in the oil so that the bulb (which is to be about half an inch in diameter) shall be immersed about an inch and a half beneath the surface." The inspector also proved that he had used, to ascertain the "flashing point," a spirit lamp with a small wick which had "a very small flame," as required by the schedule; but it was proved on behalf of the appellant, that wax twine was the means used by scientific persons for making the test; which had a still smaller flame. The justices decided that there had been a sufficient com-



pliance with the statute on both points, and that the only way the appellant could displace the test was by having a further test made by a "public analyst," as allowed by section 6. This he refused, and the justices convicted the appellant:—Held, that the conviction would not be quashed, as it was a question of fact for the justices, whether the statutory mode of testing the character of the petroleum had been substantially followed. *Beck v. Stringer*, 40 Law J. Rep. (N.S.) M. C. 174; Law Rep. 6 Q. B. 497.

2.—By the Petroleum Act, 1862, s. 1. "petroleum" for the purposes of that Act shall include any product thereof that gives off an inflammable vapour at a temperature of less than 100 degrees Fahrenheit. By the Petroleum Act, 1868, s. 3, for the purposes of the Petroleum Acts, 1862 and 1868, "petroleum" shall include all such rock oil, Rangoon oil, Burmah oil, any product of them, and any oil made from petroleum, coal, schist, shale, peat, or other bituminous substance, as gives off an inflammable vapour at a temperature of less than 100 degrees Fahrenheit:—Held, that the latter section must be taken to include crude petroleum, although it does not give off inflammable vapour at a temperature of less than 100 degrees, and that a license is therefore required for keeping such petroleum within fifty yards of a dwelling-house, except for private use, in accordance with section 4 of the Act. *Jones v. Cook*, 40 Law J. Rep. (N.S.) M. C. 179; Law Rep. 6 Q. B. 505.

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PIER.

[See *HARBOUR*, 1.]

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PIRATE SHIP.

*Admiralty jurisdiction, as to.* [See *ADMIRALTY*, 12.]

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PLACES OF WORSHIP SITES ACT.

The guardian required by the Places of Worship Sites Act, 1873, to concur on behalf of an infant next entitled in remainder in a grant of a site for a place of worship is not the father of the infant, but a guardian to be appointed by the Court. But the Court has no power of its own, and no power is given to it by the Act, to appoint a guardian of the estate for an infant having no estate in possession. *In re The Marquis of Salisbury*, 44 Law J. Rep. (N.S.) Chanc. 541; Law Rep. 20 Eq. 527: reversed, on appeal, 45 Law J. Rep. (N.S.) Chanc. 250; Law Rep. 2. Chanc. Div. 29

PLEADING AT LAW.

(A) DECLARATION.

(B) PLEA.

(a) *Fraud.*

(b) *Law of Scotland.*

(c) *Non-issuable plea.*

(d) *Defect in plea cured by replication.*

(e) *Plea of release with condition subsequent.*

(f) *In other cases.*

(C) EQUITABLE PLEAS.

(D) ASSIGNMENT OF ERROR IN FACT.

(E) IN PARTICULAR ACTIONS.

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(A) DECLARATION.

1.—Declaration that the defendants maliciously, &c., caused the plaintiff's ship to be arrested for necessities under a warrant from a County Court, and to be detained until the proceedings in the Court were determined and the ship released:—Held (by Blackburn, J., and Archibald, J., Quain, J., dissenting), that it appeared by reasonable intendment that the proceedings were determined in the plaintiff's favour, and that the declaration was good. *Redway v. McAndrew*, Law Rep. 9 Q. B. 74.

*Master and servant: defect in machinery: averment of ignorance of servant.* [See *MASTER AND SERVANT*, 5.]

*Declaration for breach of duty under Contagious Diseases (Animals) Act, 1869.* [See *ACTION*, 3.]

*For fraudulent expulsion of member of insurance society.* [See *ACTION*, 4.]

(B) PLEA.

(a) *Fraud.*

2.—The ordinary plea of fraud in an action on a contract contains an averment by implication that the defendant repudiated the contract, and if the defendant has affirmed the contract, the plea is not proved, and no special replication is needed. *Dawes v. Harness*, 44 Law J. Rep. (N.S.) C. P. 194; Law Rep. 10 C. P. 166.

To an action upon a cheque the defendant pleaded that he was induced to write it by the plaintiff's fraud. The plaintiff merely joined issue. It appeared that the cheque was part of the consideration for the transfer by the plaintiff to the defendant of a business, and that the plaintiff had fraudulently misrepresented the value of the goods at the premises where the business was carried on. The defendant had kept the business and goods:—Held, that the plea of fraud was not proved, and that no special replication alleging affirmance by the defendant was needed. *Ibid.*

*Fraudulent preference: non-averment of bankruptcy.* [See *PRINCIPAL AND SURETY*, 2.]

(b) *Law of Scotland.*

3.—To a declaration in an action for breach of an agreement by the defendant to build a ship

for the plaintiffs, the defendant pleaded that the agreement was made in Scotland by the plaintiffs with a trading partnership or firm domiciled and carrying on business there, and was to be performed wholly in Scotland; that by the law of Scotland the said firm was and is a separate and distinct person from any or the whole of the individual members thereof, of whom the defendant was and is one, and that by the law of Scotland the said firm has the capacity of suing and being sued as such separate firm, by its name of Messrs. Caird & Co., and the alleged agreement was made by the firm as such separate person, and not jointly and severally by the individual members thereof; that the firm consisted of, &c., who at the time of the making of the alleged agreement were and still are domiciled and carrying on business in Scotland; that by the law of Scotland the defendant became and was, as a partner of the said firm, liable to the plaintiffs for the satisfaction of any judgment which might be obtained against the said firm, or the whole of the individual partners thereof jointly, and, save as aforesaid, no liability by the law of Scotland attached to the defendant in respect of the said agreement; that by the law of Scotland it is a condition precedent to any individual liability attaching to the defendant in respect of the said agreement that the firm, as such person as aforesaid or the whole individual partners thereof, jointly, should first have been sued, &c.:—Held, a bad plea, as it merely stated the form of proceeding in Scotland, while the remedy and mode of proceeding were regulated by the law of England. *Bullock v. Caird*, 44 Law J. Rep. (N.S.) Q. B. 124; Law Rep. 10 Q. B. 276.

(c) *Non-issuable plea.*

4.—To a declaration in detinue the defendant, being under terms of pleading issuably, pleaded upon equitable grounds that after the commencement of the action, under the terms of a master's order to stay the action, the goods were returned; that the costs and 1*l.* for damages were paid to the plaintiff; and that afterwards the order to stay proceedings was set aside upon a false affidavit of the plaintiff that the defendant had not returned all the goods:—Held, that the plea was not issuable. *Ellis v. Saxon*, 44 Law J. Rep. (N.S.) C. P. 193.

(d) *Defect in plea cured by replication.*

5.—Declaration against the defendant, as sheriff, for an escape. Pleas, first, not guilty; secondly, that the judgment debtor was discharged from custody on the production of a certificate of the registration of a trust deed under the Bankruptcy Act, 1861. Demurrer to the second plea, joinder of issue, and replication that the plaintiff was not a creditor bound or intended to be bound by the deed. Demurrer to the replication and joinder of issue. Judgment on demurrers that the second plea was bad, and the replication good. At the trial there was a verdict for the plaintiff on the plea of not guilty, and for the defendant on the other issues. The Court of Queen's Bench having decided that on the whole record the defendant

was entitled to judgment:—Held, by the Exchequer Chamber, that the decision was right, by Kelly, C.B., Martin, B., and Brett, J., on the ground that the defect (if any) in the second plea was cured by the replication which tendered the true issue in the cause, and the defendant having succeeded in this issue was entitled to judgment; by Channell, B., Cleasby, B., Keating, J., and Montague Smith, J., that the second plea, though perhaps informal, was sufficient, and the replication to it also sufficient, but the defendant having succeeded on this replication, was entitled to judgment. *Dignam v. Bailey* (Exch. Ch.), 40 Law J. Rep. (N.S.) Q. B. 68; Law Rep. 6 Q. B. 47.

(e) *Plea of release with condition subsequent.*

*Release with condition subsequent: confession of plea an estoppel to fresh action.*  
[See ACTION, 8.]

(f) *In other cases.*

*Pleading written agreement.* [See SHIPPING LAW, E 13.]

*Pleading agreement to refer to arbitration.*  
[See ARBITRATION, 9, 10.]

*Pleading composition deed.* [See COMPOSITION DEED, 7.]

*Plea of resolution for composition.* [See BANKRUPTCY, M 23–25.]

*Plea of bankruptcy of plaintiff in action against attorneys for breach of duty in not selling an equity of redemption advantageously.* [See BANKRUPTCY, G 41.]

*Plea to jurisdiction of Lord Mayor's Court.*  
[See LONDON, 7.]

(C) EQUITABLE PLEAS.

6.—It is a good equitable defence to an action against the maker of a promissory note, that the note was made by the defendant and R. jointly and severally, that the defendant, as the plaintiff knew, was only surety for R., that afterwards, without the defendant's consent, the plaintiff became indebted to R., in an amount equal to that of the note and all moneys due from R., in the following way, namely, that the plaintiff and R. were partners, and the plaintiff sold to R. his interest in the partnership debts, and the note was to secure part of the price, but the plaintiff received a large part of the debts though he knew that the defendant made the note in consideration that R. should receive them. *Bechervaise v. Lewis*, 41 Law J. Rep. (N.S.) C. P. 161; Law Rep. 7 C. P. 372.

7.—To a declaration for money lent, money paid, commission on payment of bills of exchange, interest, and on accounts stated, it is not a good equitable defence, that the defendant assigned goods to the plaintiff under an agreement that he was to accept and pay bills of exchange against them, make advances, and pay charges, and sell the goods, and satisfy his claims in respect thereof out of the proceeds, and pay over the balance; that the goods would have been sufficient to satisfy such claims, but by the defendant's negligence the proceeds became insufficient, and the claim in the

declaration was for the insufficiency caused by that negligence. *Best v. Hill*, 42 Law J. Rep. (n.s.) C. P. 10; Law Rep. 8 C. P. 10.

8.—Action by a mortgagee, who had sold under his power of sale, against the mortgagor for the balance remaining due after the sale. A plea by the defendant, on equitable grounds, that after default in payment made, the plaintiff had entered into possession, and sold the mortgaged property under his power, and had thereby deprived the defendant of his right to have the property reconveyed to him on payment of the amount due on the mortgage:—Held, a bad plea, and rightly struck out by the Judge in chambers. *Rudge v. Richens*, 42 Law J. Rep. (n.s.) C. P. 127; Law Rep. 8 C. P. 358.

[And see JUDGMENT, 10.]

(D) ASSIGNMENT OF ERROR IN FACT.

9.—After judgment for the plaintiffs, who sued, as husband and wife in an action of tort for injuries to the wife, the defendants were held to have no right to assign for error in fact, that the female plaintiff, before her alleged marriage with the male plaintiff, had married one A. B. who was then alive, as this was matter which the defendants might and ought to have pleaded to the action. *The Metropolitan Railway Company v. Wilson*, 40 Law J. Rep. (n.s.) C. P. 208; Law Rep. 6 C. P. 376.

(E) IN PARTICULAR ACTIONS.

*In action on award.* [See ARBITRATION, 18, 19.]

*In action for malicious prosecution and for slander.* [See MALICIOUS PROSECUTION, 1.]

*In action by wife for breach of contract.* [See BARON AND FEME, 25.]

*In action of libel.* [See LIBEL, 13–15.]

*In action on bill of exchange.* [See BILL OF EXCHANGE, 31.]

PLEADING IN EQUITY.

[See PARTIES.]

(A) BILL.

(a) *Scandal.*

(b) *Offer to do equity.*

(B) DEMURRER.

(a) *Want of equity.*

(b) *Want of parties.*

(c) *Multifariousness.*

(C) DEMURRER AND ANSWER.

(D) PLEAS AND DEFENCES.

(a) *Legal personal representative.*

(b) *Settled account.*

(c) *Delay.*

(E) ANSWER: SUFFICIENCY.

(A) BILL.

(a) *Scandal.*

1.—The bill, after alleging that the plaintiff claimed to be entitled to certain company shares

which were under the defendant's control, stated that the "defendant was in league with several persons in order to deal with the shares and contrive operations on the Stock Exchange (popularly called rigging the market) for the purpose of bringing the shares up to a fictitious value in the market." The bill then prayed for an injunction to restrain the defendant, not from improperly dealing with the shares, but merely from disposing of them. The defendant excepted to the bill for scandal:—Held, that the statement, being irrelevant to the relief sought, must be expunged as scandalous. *Rubery v. Grant*, 42 Law J. Rep. (n.s.) Chanc. 19; Law Rep. 13 Eq. 443.

2.—The plaintiffs, C. & C., a long established firm of auctioneers, filed a bill against the defendants, C. & C., to restrain them from carrying on the business as auctioneers in such a manner as to mislead the public into the belief that the defendants' business was the plaintiffs'. The bill charged the defendants with fraudulently issuing a prospectus stating that a company was being formed "for the purpose of acquiring and working the well-known and rapidly increasing auction business of the Messrs. C. & C." The bill then stated that the defendants' business was neither "well-known" nor "rapidly increasing," that they were in fact insolvent, and that the second defendant had been made a bankrupt in 1869, and obtained his discharge only two years before the commencement of the suit. Exceptions by the defendants to the bill for scandal on the ground that it contained certain other statements to the effect that in 1869 the second defendant had been committed for trial on a criminal charge, which was subsequently withdrawn, were overruled. *Christie v. Christie*, 42 Law J. Rep. (n.s.) Chanc. 261; reversed, on appeal, 42 Law J. (n.s.) Chanc. 544; Law Rep. 8 Chanc. 499.

(b) *Offer to do equity.*

3.—The plaintiffs being in negotiation with the vendors, which afterwards resulted in a contract for purchase of an estate, applied to B. for an advance to enable them to pay the deposit, and a verbal agreement was entered into, by which B. was to be substituted as the purchaser of the estate, paying to the plaintiffs 2,000*l.*, and securing to them certain other advantages; and in order to enable B. to have his name substituted for those of the plaintiffs as purchaser, the plaintiffs signed a memorandum simply transferring to him the benefit of the contract entered into with the vendors in consideration of the 2,000*l.* B. having paid a large sum under the agreement afterwards refused to perform any more of the verbal agreement than was comprised in the written memorandum, and the plaintiffs filed a bill to set aside the memorandum and to restrain the dealing with the estate on the footing of it, but did not offer to repay the advances. Demurrer overruled. And held also, that the bill was not demurrable, because it did not contain such offer. The cases considered in which an offer by bill to do equity is necessary. Decision of Malins, V.C., affirmed. *Jervis v. Berridge*, 42 Law J. Rep. (n.s.) Chanc. 518; Law Rep. 8 Chanc. 351.

## (B) DEMURRER.

(a) *Want of equity.*

4.—Tenders for the supply of stone were invited by a corporation. Four neighbouring quarry owners entered into an agreement to supply the stone in certain proportions *inter se*, and that the plaintiffs should make the lowest tender to the corporation. The plaintiffs entered into contracts with the other quarry owners to purchase the proportion of stone agreed upon from each. Notwithstanding the agreement, the defendants, one of the quarry owners, sent in a tender, which was accepted by the corporation. The plaintiffs then filed a bill for an injunction to restrain the defendants from supplying the stone during the year 1875. The defendants demurred:—Held, overruling the demurrer, that the corporation were not necessary parties, and that the agreement was not void either as against public policy, or for want of equity. *Jones v. North*, 44 Law J. Rep. (N.S.) Chanc. 388; Law Rep. 19 Eq. 426.

[And see next case.]

(b) *Want of parties.*

[See PARTIES 6, 7, and *infra* No. 6.]

5.—To a bill filed by a trustee under an assignment for the benefit of creditors to recover from third parties property alleged to be vested in the plaintiff by virtue of the deed, a demurrer will not lie, either on the ground that the creditors are not alleged to have executed the deed, or on the ground that they are not made parties to the suit. Observations on *Garrard v. Lord Lauderdale*, 3 Sim. 1; on appeal, 2 Russ. & M. 451. *Glegg v. Rees*, 41 Law J. Rep. (N.S.) Chanc. 243; Law Rep. 7 Chanc. 71.

(c) *Multifariousness.*

6.—Three only out of four residuary legatees filed a bill to administer their testator's private estate, and for an account of his assets used in partnership with one of the executors, and to enforce a lien in respect of a purchase of a moiety of the partnership premises made by one of the executors under a power in the will, charging wilful default, and praying an injunction and receiver against the partner:—Held, that the bill was not demurrable for either, first, want of parties, or, secondly, multifariousness. *Pointon v. Pointon*, 40 Law J. Rep. (N.S.) Chanc. 609; Law Rep. 12 Eq. 547.

7.—Where alternatively to the principal relief, a bill prays relief for which some of the parties are not necessary, it is not multifarious. *Wilson v. Lloyd*, 42 Law J. Rep. (N.S.) Chanc. 559; Law Rep. 16 Eq. 60.

8.—Bill by an intended lessee under an agreement against the intended lessor and a tenant of his claiming under a prior lease, for specific performance by the lessor and an injunction against the tenant from exercising his rights contrary to the agreement:—Held, multifarious. An objection for multifariousness not raised till the

hearing is too late. *Cousens v. Rose*, Law Rep. 12 Eq. 366.

*Execution of trusts of two settlements prayed for by same bill.* [See ADMINISTRATION, 38.]

## (C) DEMURRER AND ANSWER.

9.—A testator bequeathed to his executors his business premises, fixtures, plant, &c., on trust to permit his son J. H. to carry on the business and occupy the premises, and use the plant for that purpose, "upon the terms and conditions" (amongst others) of his paying the testator's daughter, S. E. R., an annuity, payable weekly. The testator's executor instituted a suit against J. H. and other beneficiaries under the will for the administration of the testator's estate. Pending this suit S. E. R. filed her bill against the defendant, J. H., alleging that her annuity had not been paid, and praying, first, a declaration of her being entitled to the annuity; second, an account of the amount due in respect thereof; third, payment; fourth, an account of the profits of the business; fifth, a declaration that the annuity was a charge on the business premises and effects; sixth, a receiver; seventh, sale or mortgage; eighth, general accounts and enquiries; ninth, payment of costs; and tenth, general relief. The defendant demurred as to so much of the bill "as seeks that an account may be taken as prayed by the first paragraph," and to the relief prayed by the third and following paragraphs of the bill on the grounds of the pendency of the executor's suit, want of equity, and want of parties, and as to the remainder of the bill he answered. By his answer he claimed to be entitled, under the will, to the sole beneficial interest in the premises:—Held, that the Court would look at the answer filed with the demurrer to see whether the defendant had confessed an equity, that whether the demurrer was to be taken to apply to the first or second paragraph of the prayer of the bill relief must follow, that since the plaintiff's was a personal demand against J. H., the testator's executor was not a necessary party to her suit, and that since, in the executor's suit, full justice could not be done to the plaintiff, she could sustain this bill. The demurrer was accordingly overruled. *Rees v. Engelback*, 40 Law J. Rep. (N.S.) Chanc. 382; Law Rep. 12 Eq. 225.

## (D) PLEAS AND DEFENCES.

(a) *Legal personal representative.*

10.—A bill for administration alleged that the defendant was the legal personal representative of the testator, and had entered into possession of all his property. Plea—that the defendant was not the legal personal representative of the testator:—Held, that the plea should stand for an answer. *Cooke v. Gittings* (21 Beav. 497) observed upon. *Rayner v. Koehler*, 41 Law J. Rep. (N.S.) Chanc. 697; Law Rep. 14 Eq. 262.

(b) *Settled account.*

11.—The plaintiff and the defendant, being partners, executed articles of partnership by which

it was stated that the capital of the partnership then consisted of the sum of 6,000*l.* brought in by the defendant. The plaintiff subsequently filed a bill for a dissolution of the partnership, and for the usual accounts. The bill alleged that it was not the fact that the 6,000*l.* had been brought into the partnership by the defendant, and the interrogatory founded on that allegation asked how that sum was made up. The defendant declined to answer the interrogatory, pleading by his answer a settled account. The plaintiff having excepted to the answer for insufficiency,—Held, that as the bill did not allege fraud, the defendant was entitled to rely on the settled account. The exception was, therefore, overruled with costs. *Lockett v. Lockett* (38 Law J. Rep. (N.S.) Chanc. 290; Law Rep. 4 Chanc. 366) followed. *Weir v. Tucker*, 41 Law J. Rep. (N.S.) Chanc. 471; Law Rep. 14 Eq. 25.

(c) *Delay.*

*Delay as defence to suit grounded on fraud.*  
[See FRAUD, 4.]

## (E) ANSWER: SUFFICIENCY.

12.—A mortgagee in possession, the defendant to a bill for redemption, admitting himself by his answer to be redeemable, cannot decline to answer interrogatories requiring him to set forth an account of the rents and profits of the mortgaged hereditaments, the rule being that when a party answers he is bound to answer fully. *Elmer v. Creasy*, 43 Law J. Rep. (N.S.) Chanc. 166; Law Rep. 9 Chanc. 69.

13.—The executors of a wine merchant were authorised by his will to carry on his business. His executrix entered into partnership with B. and G., and carried on the business in partnership with them for fourteen years. At the end of that term the partnership was dissolved. Shortly afterwards the executrix having discovered that B. and F. were carrying on together the business of wine merchants in the neighbourhood of the old firm, filed her bill against B., F., G. and others, alleging that under a scheme concocted by B. and G. the good will and stock-in-trade and assets belonging to the old firm had been appropriated to and used in the business of B. & F., and claiming that the testator's estate was entitled to share in the profits made by B. & F. F. declined to answer an interrogatory asking what sums had been drawn out of the business of B. & F. by the several partners therein:—Held, on exceptions, that F. must answer this interrogatory. *Saull v. Browne*, 43 Law J. Rep. (N.S.) Chanc. 568; Law Rep. 9 Chanc. 364.

14.—Where real estate was limited on trust for I. B. H. for life, with remainder to his children, with a proviso for the forfeiture of I. B. H.'s estate upon his charging or incumbering the same, it was held, in a suit instituted by the trustees for the execution of the trusts, to be obligatory upon persons claiming an interest in the estate through I. B. H. to answer an interrogatory as to the nature of their interest, although the discovery might subject them to a forfeiture of the estate. *Hurst*

*v. Hurst*, 44 Law J. Rep. (N.S.) Chanc. 111; Law Rep. 9 Chanc. 762.

15.—When a sufficient answer has been put into interrogatories founded on the averments in the original bill, amended interrogatories, which are substantially founded on those averments, need not be answered, though the bill has been amended, and some new charges introduced as foundation for the amended interrogatories. *Hill v. The Northern Railway of Buenos Ayres*, 41 Law J. Rep. (N.S.) Chanc. 69.

## PLEDGE.

[See BAILMENT.]

## POACHING.

[See GAME, 3, 4.]

## POISONS.

[14 & 15 Vict. c. 90, 14 & 15 Vict. c. 93, and 23 & 24 Vict. c. 84, extended and applied to Ireland. 33 & 34 Vict. c. 26.]

## POLICE.

[See HACKNEY CARRIAGE.]

*Receiver of Metropolitan Police: appropriation of penalties.* [See PENALTY, 8.]

## POLLUTION OF STREAM.

[See NUISANCE, 1; INJUNCTION, 18, 19.]

## POOR LAW.

(A) GUARDIAN: LIABILITY FOR SELLING GOODS TO PARISH.

(B) OVERSEERS' ACCOUNTS.

(a) *Certificate of treasurer.*

(b) *Passing of jury lists.*

(C) COMPENSATION TO OFFICERS FOR DEPRIVATION OF OFFICE.

(D) RELIEF.

(a) *Non-liability of grandchildren.*

(b) *"Valuable security" belonging to pauper.*

(c) *In Scotland.*

(E) REMOVAL.

(a) *Jurisdiction of borough sessions.*

(b) *Irremovability.*

(1) *Break of residence.*

(2) *Unemancipated child.*

(3) *Division of parish.*

(F) PAUPER LUNATIC.

(a) *Order for maintenance of criminal lunatic.*

(b) *Administration to guardians.*

[Further provisions for the boards of guardians after the dissolution of their unions. 33 Vict. c. 2.]

[Powers to boards of guardians and management as to extending time for payment of loans, &c. 34 & 35 Vict. c. 11.]

[Section 5 of 32 & 33 Vict. c. 45 explained. Section 14 of 30 & 31 Vict. c. 106 declared to apply to the metropolis. The limit of expenditure for building and furnishing schools in the metropolis extended. 35 Vict. c. 2.]

[Poor Law Board to define cases in which guardians may pay expense of conveying paupers. 33 & 34 Vict. c. 48.]

[Provisions as to the discharge of paupers from workhouses or wards provided for the casual poor. 34 & 35 Vict. c. 108.]

[Provisions for the better management of lands allotted under Local Inclosure Acts for the benefit of the poor. 36 & 37 Vict. c. 19.]

#### (A) GUARDIAN: LIABILITY FOR SELLING GOODS TO PARISH.

1.—By 4 & 5 Will. 4, c. 76, s. 77, it shall not be lawful for any person hereafter to be appointed, in any parish or union, to any office concerned in the administration of the laws for the relief of the poor, or for any person who, after the 25th of March, 1835, shall fill any such office, to furnish or supply for his own profit or on his own account, any goods, materials, or provisions ordered to be given in parochial relief to any person in such parish or union. The appellant was a guardian of the poor for the N. union. He carried on business as a cabinet maker and upholsterer in partnership with his son. The relieving officer purchased at the appellant's shop, from the son and partner of the appellant, an iron bedstead, which was, by the direction of the relieving officer, delivered at the house of an outdoor pauper in the union. The appellant was not present when the bedstead was ordered, nor when it was paid for, nor when it was delivered, and the price was paid to his son alone. The bedstead was only lent to the pauper, and remained the property of the guardians:—Held, first, that the appellant was liable to the penalty imposed by the section, without proof of any guilty knowledge on his part, the bedstead having been supplied by his partner with knowledge of the circumstances, in the ordinary course of the partnership business. Secondly, that the case was within the words "ordered to be given" in the section, for the word "given" must be taken to include a gratuitous delivery of goods, whether by way of loan or gift. Thirdly, that a guardian of the poor is a person appointed to an office within the meaning of the above section. *Davies v. Harvey*, 43 Law J. Rep. (N.S.) M. C. 121; Law Rep. 9 Q. B. 433.

#### (B) OVERSEERS' ACCOUNTS.

##### (a) Certificate of treasurer.

2.—By 11 & 12 Vict. c. 91, s. 9, in any proceedings to be taken by an auditor before justices

to recover sums certified by him to be due, it shall be sufficient for him to produce a certificate of his appointment, and to state and prove that the audit was held, that the certificate was made in the book of account of the union, and that the sum certified to be due had not been paid to the treasurer within seven days after the same had been so certified, nor within three clear days of the laying of the information, of which non-payment a certificate in writing, purporting to be signed by the treasurer, shall be sufficient proof on the part of the auditor. Upon an application to justices under this section to issue their warrant to levy the amount due from the assistant overseer of a parish, the evidence prescribed by the above section was adduced, but the justices refused to treat the certificate of the treasurer as conclusive, but allowed the overseer to prove payments made by him between the date of the certificate of the auditor and that of the treasurer:—Held, that the justices were right as the section made the treasurer's certificate *prima facie*, but not conclusive evidence. *The Queen v. Fordham*, 42 Law J. Rep. (N.S.) M. C. 153; Law Rep. 8 Q. B. 501.

##### (b) Passing jury lists.

3.—By 6 Geo. 4, c. 50, ss. 8 and 9, the churchwardens and overseers of every parish are to make out a true list of every man liable to serve on juries within their parishes, and to cause copies of the same to be fixed on church doors, &c., with notices of the time and place when objections to the list will be heard by the justices of the peace.

By section 10 the justices in every division are to hold a special session "on some day and at some place at which notice shall be given by their clerk . . . to the churchwardens and overseers, who shall then and there produce the list of men liable to serve, by them prepared and made out, and shall answer on oath" all questions put to them by the justices concerning the same. By 7 & 8 Vict. c. 101, s. 60, "the costs and expenses properly incurred by the officers of the parish in making out, preparing, printing, and collecting (*sic*) the lists . . . according to the provisions of 6 Geo. 4, c. 50, and relating thereto, shall be paid and allowed to them out of the poor-rates of the parish." By 11 & 12 Vict. c. 43, s. 30, the fees of justices' clerks are payable according to a table to be made out by justices at quarter sessions, and laid before a Secretary of State, who may certify that such fees are proper to be demanded and received by them:—Held, that the payment of fees to justices' clerks "for notice to parish officers to return and verify jury lists, and for allowance of list and return thereof," were not expenses properly incurred within the meaning of 7 & 8 Vict. c. 101, s. 60; and a rule to quash the disallowance of the same in the overseers' accounts by the Poor Law Auditor was discharged. *The Queen v. The Overseers of Haslingfield*, 43 Law J. Rep. (N.S.) Q. B. 38; Law Rep. 9 Q. B. 203.

Semle—that if the fees had been payable by the overseers, the amount ought to have been allowed to them out of the poor-rate. *Ibid.*

## (C) COMPENSATION TO OFFICERS FOR DEPRIVATION OF OFFICE.

4.—Upon the dissolution of a Poor Law Union, 30 & 31 Vict. c. 106, s. 20, enacts that, “if any person shall by means of such dissolution be deprived of any office or employment, the Poor Law Board may, according to their judgment, award a compensation to be paid to such person,” &c. The Board on awarding to a clerk of a dissolved union, who was a solicitor, compensation for the loss of his office, took into consideration, in addition to the amount of his salary as clerk, a sum paid him for professional charges connected with proceedings under the Lands Clauses Consolidation Act, to obtain compensation to the guardians for property belonging to them taken by a railway company:—Held, that the Board were acting within their jurisdiction in exercising their judgment upon such a basis; and that it was competent for them to take into consideration advantages collateral to, though arising out of, the employment as clerk, in addition to the salary attached to the office. *The Queen v. The Poor Law Board*, 41 Law J. Rep. (n.s.) M. C. 16.

5.—Certain trustees having the management of the relief of the poor of a metropolitan parish, appointed S. to be solicitor for the arrangement of legal matters, with an annual salary. After the passing of the Metropolitan Poor Act, 1867, the Poor Law Board refused to allow the board of guardians elected under that Act to continue S. in the appointment which he had received from the trustees:—Held, that he was entitled to an award of compensation from the Poor Law Board, under section 76. *The Queen v. The Local Government Board*, 43 Law J. Rep. (n.s.) Q. B. 49; Law Rep. 9 Q. B. 148.

## (D) RELIEF.

## (a) Non-liability of grandchildren.

6.—By 43 Eliz. c. 2, s. 7, the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person, &c.:—Held, that the word “children” does not include grandchildren, and therefore that a grandchild cannot be compelled to support his grandfather. *Maund v. Mason*, 43 Law J. Rep. (n.s.) M. C. 62; Law Rep. 9 Q. B. 254.

## (b) “Valuable security” belonging to pauper.

7.—A pauper, while in the receipt of relief, brought an action in the Court of Exchequer, and signed judgment for a sum of money. After he had ceased to receive relief, the judgment debtor paid him the judgment debt:—Held, that the judgment was a “valuable security for money belonging to” the pauper, within 12 & 13 Vict. c. 103, s. 16, so as to enable the guardians of the relieving union to recover from the pauper the relief given during the twelve months prior to the proceeding for the recovery. *The Guardians of the West Ham Union v. Owens*, 42 Law J. Rep. (n.s.) M. C. 29; Law Rep. 8 Exch. 37.

Digest, 1870-1875.

## (c) In Scotland.

8.—Able-bodied persons are absolutely excluded from relief out of funds raised under 8 & 9 Vict. c. 83. The Poor Law Board of Scotland have no discretionary power to relieve such persons though in destitution through want of work and willing to work. *Jack v. Isdale*, Law Rep. 1 Sc. App. 1.

## (E) REMOVAL.

## (a) Jurisdiction of borough sessions.

9.—Where a pauper becomes chargeable in a union which includes a borough having a separate Court of Quarter Sessions, the guardians may obtain an order for the removal of such pauper to his place of settlement from the justices of the borough, although the particular parish from which he is to be removed is not within the borough, and, in such case, the proper tribunal to hear an appeal against the order is the quarter sessions for the borough and not the quarter sessions for the county. *The Queen v. The Justices of Staffordshire*, 41 Law J. Rep. (n.s.) M. C. 78; Law Rep. 7 Q. B. 283.

## (b) Irremovability.

## (1) Break of residence.

10.—P., a widow, had lived with her husband in the parish of M. continuously for many years up to December, 1868. At that time they were both in the workhouse of the parish. He was removed to a lunatic asylum, where he died; she remained in the workhouse till October, 1870, when she went into service in the parish. She remained in her place for six weeks, when being too old for service she left, saying that she wished at any rate first to have a holiday. She went to visit her son, who lived out of the parish, and stayed with him for three days, but only on a visit, and with no intention of staying. She then went on a visit to E. Clarke, and stayed with her out of the parish for three days. She endeavoured to get work, and if she could have got any, she would not have returned to the parish. She told E. Clarke that she was going back to the workhouse, but asked E. Clarke to let her know if she, E. Clarke, heard of any work that would suit her. Having left the house of E. Clarke, she stayed for one day with a friend in the parish, and then went into the workhouse:—Held, that there was no break of the residence in the parish of M. so as to render her removable. *The Queen v. The Guardians of St. Ives Union*, 41 Law J. Rep. (n.s.) M. C. 94; Law Rep. 7 Q. B. 467.

11.—H. lived in the parish of B. for many years up to the 30th of May, 1872, when he went into the workhouse. After remaining there till November, he agreed with R. to go to S., and there work for R. at his trade, on the understanding that if he and R. agreed, he might stay as long as he thought proper. He boarded and lodged with R. in S. for ten weeks, and then returned to Birmingham, because he and R. could not agree:—Held, that there was no actual or constructive residence in B. after H. had gone to S., and there-

fore that H. had lost his status of irremovability, and was liable to be removed to the place of his last legal settlement. *The Queen v. The Worcester Law Union*, 43 Law J. Rep. (N.S.) M. C. 102; Law Rep. 9 Q. B. 340.

(2) *Unemancipated child.*

12.—II., a spinster of the age of nineteen, had resided as a domestic servant for two years in the respondent union previously to becoming chargeable through illness. Her mother was settled in the appellante union, and was an inmate of a work-house therein. H. never gained a settlement in her own right, and had no other settlement than that of her mother:—Held, that she was removable to the appellante union. *The Queen v. The Guardians of St. Olave's Union*, 43 Law J. Rep. (N.S.) M. C. 15; Law Rep. 9 Q. B. 38.

(3) *Division of parish.*

13.—Subsequently to the passing of the Union Chargeability Act, 1865, 28 & 29 Vict. c. 79, an order of justices was made for the removal of M. A. S. and her children to the union of S., and adjudging the place of her last legal settlement to be in the parish of O. in the said union. The alleged settlement was derived from the father of the pauper's husband, who was born in 1804 in the parish of O. The parish of O. was an ecclesiastical parish not maintaining its own poor, nor were there ever overseers appointed for it. It was originally made up of a number of townships and hamlets, and the alleged birth settlement was in the township of U. in the said parish. From time immemorial separate overseers of the poor and separate poor-rates have been appointed and made for two of such townships respectively, and since the year 1842, separate overseers of the poor and separate poor-rates have been duly and legally appointed and made for the other townships respectively. The township of U. became lawfully separated for the maintenance of its own poor from the parish of O. and the other townships comprised therein, and maintained its own poor separately:—Held, that under these circumstances the pauper S. had no settlement in the parish of O., and that the order of removal was invalid. *The Guardians of the Stourbridge Union v. The Guardians of the Droitwich Union*, 40 Law J. Rep. (N.S.) M. C. 186; Law Rep. 6 Q. B. 769.

(F) PAUPER LUNATIC.

(a) *Order for maintenance of criminal lunatic.*

14.—An order of justices adjudging the settlement of a criminal lunatic and ordering maintenance may be made under 3 & 4 Vict. c. 54, s. 7, notwithstanding the repeal of 9 Geo. 4. c. 49, s. 54, by 8 & 9 Vict. c. 126, s. 1. *The Queen v. The Guardians of Stepney Union*, 43 Law J. Rep. (N.S.) M. C. 145; Law Rep. 9 Q. B. 383.

Service of the grounds of appeal with the order is not necessary. *Ibid.*

The claim for maintenance is barred if not paid within three months after the half-year at which

it is incurred, under 22 & 23 Vict. c. 24, s. 1. *Ibid.*

(b) *Administration to guardians.*

[See PROBATE, 25, 26.]

PORT.

[See HARBOUR.]

By a special Act dues were granted to certain commissioners on all coals "exported" from the port of N.:—Held, that coals taken away by a foreign steamer for the purpose of being wholly consumed on board beyond the limits of the port, were coals "exported" within the meaning of the Act, and therefore that the commissioners might insist upon payment of the dues in respect of such coals. *Muller v. Baldwin*, 43 Law J. Rep. (N.S.) Q. B. 164; Law Rep. 9 Q. B. 457.

PORCTIONS.

[See POWER, 27, 28; ADVANCEMENT, 3.]

POST-OFFICE.

[Partial repeal of previous Acts, 38 & 39 Vict. c. 22.]

*Covenant to use premises as a post-office.*  
[See LEASE, 18.]

*Posting letter: contract.* [See COMPANY,  
G 14-16; CONTRACT, 14.]

POSTAL DUTIES.

[33 & 34 Vict. c. 79 amended and extended. 34 & 35 Vict. c. 30.]

POWER.

[See ELECTION; TRUST; SCOTCH LAW, 23-25.]

(A) CONSTRUCTION: GIFT BY IMPLICATION.

(B) EXECUTION OF POWER OF APPOINTMENT.

(a) *Execution by will.*

(1) *General absolute bequest.*

(2) *General bequest with subsequent special words.*

(3) *Construction reddendo singula singulis.*

(4) *Execution by deed and will.*

(5) *Formalities: instrument delivered.*

(b) *Defective execution when aided.*

(c) *Excessive execution.*

(1) *Cy-près.*

(2) *Appointment to trustee for objects of power.*

(d) *Appointment of life interest with power to appoint by will.*



- (e) *Invalid appointment of life interest to husband.*
- (f) *Power of appointment to appointee with consent of stranger.*
- (g) *Non-exclusive power: gift of legacies to excluded objects of power.*
- (h) *Perpetuity and remoteness.*
- (i) *Construction and effect of appointment.*
  - (1) *Appointment of "residue" where fund diminished.*
  - (2) *French law of community: reference back to instrument of donation.*
  - (3) *Where property converted.*
  - (4) *In general.*
- (k) *Power of revocation.*
- (l) *Appointment to donee of absolute power.*
- (m) *Insolvency of donee.*

## (C) POWER OF SALE.

## (D) POWERS TO RAISE AND CHARGE PORTIONS.

## (E) POWER OF ADVANCEMENT.

[Appointment under a non-exclusive power of appointment to be valid, notwithstanding one or more objects of the power are excluded. 37 & 38 Vict. c. 37.]

## (A) CONSTRUCTION: GIFT BY IMPLICATION.

1.—Testator gave residuary personalty to trustees in trust for his daughter for life, and after her death in trust for her children as she should by deed or will appoint, and in default of such appointment in trust for such persons generally as she should appoint, and in default in trust for her next-of-kin according to the Statute of Distributions. The daughter by her will, after reciting that, as the fact then was, there were no children of the marriage, exercised her general power of appointment in favour of her husband. After the date of the will she had several children, but died without having altered it, or otherwise exercised the power. Upon petition by the husband for payment out to him of the fund,—Held, first, that in default of exercise of the limited power the children took by implication; secondly, that if not, the motive for the exercise of the general power being the failure of children, the appointment based upon such motive could not take effect, and the children took in default of appointment as next-of-kin under the Statute of Distributions to the exclusion of the husband. *In re Jeffery's Trusts*, 42 Law J. Rep. (N.S.) Chanc. 17; Law Rep. 14 Eq. 136.

*Construction of gift over in default of appointment until appointee should become bankrupt.* [See *infra* No. 20.]

## (B) EXECUTION OF POWER OF APPOINTMENTS.

(a) *Execution by will.*(1) *General absolute bequest.*

2.—The testator, having a power to appoint the income of a fund to his wife for life, and no other power of appointment, by his will directed payment of his debts, and then, by a separate clause, devised all property, of whatever description, belonging to him, "or over which he might at his decease have

any power, disposition or control," to his wife, her heirs and legal representatives, in full property for ever absolutely:—Held, that the will operated as an exercise of the power. *Clogstoun v. Walcott* (13 Sim. 523) not followed. *In re Teape's Trusts* 43 Law J. Rep. (N.S.) Chanc. 87; Law Rep. 16 Eq. 442.

(2) *General bequest with subsequent special words.*

3.—Under his marriage settlement, a testator had a power of appointment by deed or will among the issue of the marriage, of so much of an estate, A., as should not exceed the annual income of 300*l.* after the death of his wife. He had the fee of the residue of the estate. By his will he devised and bequeathed the whole of his property, "consisting of a farm, A," "and whatever may devolve to me by virtue of my marriage settlement," to a trustee for the benefit of his wife for life, and for his children in unequal shares in remainder:—Held, that the will did not operate as an appointment under the power. *Wildbore v. Gregory*, 41 Law J. Rep. (N.S.) Chanc. 129; Law Rep. 12 Eq. 482.

(3) *Construction, Reddendo singula singulis.*

4.—Gift by will of "all my property over which I have any disposing power" on trusts for testator's wife for life for her separate use with remainder for his children who should attain twenty-one equally, with remainder for his wife's brothers and sisters,—Held, an appointment (1) under a special power to appoint among children subject to the wife's life interest during widowhood, (2) under a power to appoint a life interest to the wife in a fund held subject thereto on trusts for the children at twenty-one equally. *Thornton v. Thornton*, Law Rep. 20 Eq. 599.

(4) *Execution by deed and will.*

5.—By a marriage settlement, power was reserved to A., the wife, to appoint by deed, revocable or irrevocable, or by will, the property comprised in the settlement. In exercise of this power A. executed a will, by which she appointed a life interest in the settled property to her husband, with remainder to her niece. Subsequently, also in exercise of the power, she executed a deed, by which she "irrevocably appointed" the settled property absolutely to her husband, reserving to herself a life interest in the same:—The Court held that the case fell within the principle of *Barnes v. Vincent* (5 Moore P. C. 201) and granted probate of the will. *Parkinson v. Townsend*, 44 Law J. Rep. (N.S.) P. & M. 32.

6.—R., who had promised his deceased brother to make some provision for that brother's illegitimate children, made his will containing a residuary bequest in favour of other persons. Five weeks afterwards he executed a settlement of certain stock, the trusts of which, subject to a general power of appointment reserved to himself, were for the benefit of the brother's illegitimate children. He then died:—Held, that under the circumstances, the residuary bequest did not operate as

an execution of the general power of appointment, so as to carry the settled fund away from the brother's illegitimate children. *In re Ruding's Settlement*, 41 Law J. Rep. (N.S.) Chanc. 666; Law Rep. 14 Eq. 266.

(5) *Formalities: instrument delivered.*

7.—A power to appoint by an instrument in writing with formalities may be exercised by a will with those formalities. *Smith v. Adkins*, 41 Law J. Rep. (N.S.) Chanc. 628; Law Rep. 14 Eq. 402.

A will with an attestation clause containing the words, "published, acknowledged and declared," satisfies the requirement of an instrument delivered, for a deed with such an attestation clause would be a deed delivered. *Ibid.*

(b) *Defective execution when aided.*

8.—A will made by the donee of a special power to appoint by deed, though it shews that the donee supposed the power to have been extinguished, and purports to be an execution of an invalid power, and of all other powers enabling in that behalf, and though it appoints to persons, some of whom are strangers to the power, is a defective execution which Equity will aid in favour of a child otherwise provided for, and to the prejudice of other children entitled in default of appointment. *Bruce v. Bruce*, 40 Law J. Rep. (N.S.) Chanc. 141; Law Rep. 11 Eq. 371.

The donee of a power to appoint by deed among the children of her first marriage, who were entitled to the estate in equal shares in default of appointment, executed deeds which she erroneously supposed to have extinguished that power and conferred upon her an unlimited testamentary power. By her will made during her second coverture, expressly in pursuance of the testamentary power and of every other power enabling her in that behalf, she appointed the estate to her eldest son, charged with a sum for the benefit, in equal shares, of all her other children of both marriages:—Held, that the will operated as an exercise of the power to appoint by deed among the children of the first marriage. *Ibid.*

9.—A lady, having power to appoint a fund by deed to be sealed and delivered and attested by one witness, in January, 1870, signed an unattested memorandum, stating her wish that if she died suddenly her eldest son should have the fund, and that her intention was to make it over to him legally if her life was spared. She died in March, 1870, after two days' illness:—Held, that her intention to appoint the property by this memorandum was sufficiently clear, and that the Court would give effect to the memorandum as an execution of the power. *Kennard v. Kennard*, 42 Law J. Rep. (N.S.) Chanc. 280; Law Rep. 8 Chanc. 227.

(c) *Excessive execution.*

(1) *Cy-près.*

10.—A testator having power to appoint an estate to any one or more of his children by will,

gave it with other property of which he was owner in fee, to trustees for a term of 1,000 years, to raise portions for grandchildren (not objects of the power), with the usual proviso for cesser in case the term should be incapable of taking effect, with remainder after the expiration of the term, and in the meantime subject thereto, to G. K. Hall, one of his sons (an object of the power), for life, remainder to his issue in tail. The objects of the term were not satisfied:—Held, that the will operated as an execution of the power, and that G. K. Hall took under the *cy-près* doctrine an estate tail. *Line v. Hall*, 43 Law J. Rep. (N.S.) Chanc. 107.

(2) *Appointment to trustee for objects of power.*

11.—A. by his will bequeathed a fund to trustees in trust for the children of his daughter B., in such shares and in such manner as B. should by will appoint, and gave his trustees usual powers of maintenance and advancement. B. by will appointed the fund to her children in certain proportions, and further appointed that the share of any minor should be paid to the trustees of her will, with powers of maintenance and advancement. B.'s children being infants, the question arose whether the appointed fund should be retained by A.'s trustees or handed over to B.'s trustees:—Held, that A.'s trustees were the proper parties to hold the fund and to administer the trusts of B.'s testamentary appointment. *Busk v. Aldam*, 44 Law J. Rep. (N.S.) Chanc. 119; Law Rep. 19 Eq. 16.

(d) *Appointment of life interest with power to appoint by will.*

12.—A power of appointment in favour of children of the donee is well exercised by an appointment to a child, born before the power was created, of a life interest, with a power to appoint the corpus by will. *Phipson v. Turner* (9 Sim. 227) approved. *Stark v. Dakyns*, 44 Law J. Rep. (N.S.) Chanc. 205; Law Rep. 10 Chanc. 35. Decision of Lord Romilly (M.R.) (42 Law J. Rep. (N.S.) Chanc. 524; Law Rep. 15 Eq. 307) affirmed.

W. B. by his will gave certain real and personal estate to trustees upon trust for his granddaughter A. M. S. for her life, and after her death for all her children or some of them as she should appoint. A. M. S. by her will appointed one-fifth of the trust property to each of her five children (all of whom were living at the time of the death of the original testator), for their respective lives, and after the death of each such child directed that the share of which the annual produce was therein before given to him or her should go as such child should by will appoint, with limitations over in default of appointment in favour of the five children:—Held, that the power of appointment was well executed by A. M. S. *Ibid.*

(e) *Invalid appointment of life interest to husband.*

13.—The donee of a power to appoint amongst issue affected to appoint to a daughter for life,

and after her death to any husband who might survive her for life or any shorter period as she might appoint, and, subject thereto, to the daughter's children:—Held, that the power to appoint to a husband not being validly exerciseable might be omitted from consideration, and that the whole amounted to a valid appointment to the daughter for life, and after her death to her children. *Carr v. Atkinson*, 41 Law J. Rep. (N.S.) Chanc. 785; Law Rep. 14 Eq. 397.

(f) *Power of appointment to appointee with consent of stranger.*

14.—Parents having under their marriage settlement a power of appointment over a trust fund in favour of their children, appointed a portion of the fund upon such trusts as H. R. S., one of the children, should, with the consent of the trustees of the father's will, appoint, and in default of appointment upon trust for H. R. S. for life, or until he should become bankrupt within the joint lives of the parents or twenty-one years from the death of the survivor of them; and after his decease, if his interest should not have determined, upon trust for his executors or administrators, as part of his personal estate:—Held, varying the decision of one of the Vice-Chancellors, 42 Law J. Rep. (N.S.) Chanc. 103; Law Rep. 14 Eq. 533, first, that the words requiring the consent of the trustees of the father's will to the exercise of the power by H. R. S., being inseparably connected with the power, rendered the whole power void; secondly, that the gift over in default of appointment amounted to an absolute appointment in favour of H. R. S., subject to the contingency of his becoming bankrupt, &c., within twenty-one years after the death of the surviving parent. *Webb v. Sadler*, 42 Law J. Rep. (N.S.) Chanc. 489; Law Rep. 8 Chanc. 419.

(g) *Non-exclusive power: gift of legacies to excluded objects of power.*

15.—A testatrix, being entitled to exercise a non-exclusive testamentary power of appointment amongst her brother and four sisters, made a will giving her brother and two sisters 5*l.* a-piece, and giving to her other two sisters all the residue of her property of whatever kind and wheresoever situate, and over which she had any power of appointment:—Held, that the effect of giving the residue of the appointable fund with the testatrix's own property, was to make the legacies payable out of both rateably, and so make the power well exercised. *Gainsford v. Dunn*, 43 Law J. Rep. (N.S.) Chanc. 403; Law Rep. 17 Eq. 405.

(h) *Perpetuity and remoteness.*

16.—By a settlement upon marriage, certain funds were vested in trustees upon trust, after the decease of the husband and wife, for the children of the marriage, as the husband and wife or the survivor of them should appoint. After the death of the wife, the husband made an appointment, subject to his own life interest, in favour of one of the children of the marriage, who was a married

woman, and he directed that the same should be held for her separate use without power of anticipation:—Held, that the restraint upon anticipation was void, but that the rest of the appointment was good. *In re Cunynghame's Trusts*, 40 Law J. Rep. (N.S.) Chanc. 247; Law Rep. 11 Eq. 324.

17.—Under a common power in a marriage settlement to appoint amongst children an appointment may be made to such uses as a child may appoint; but such power to appoint must be given so as necessarily to become effectually exerciseable within the time allowed by the law of perpetuities. Under these circumstances, therefore, a power for a child to appoint by will is void for remoteness, and a power for an unmarried child to make an appointment to take effect on marriage is also void for remoteness. But where the donee of a power to appoint among children had given an unmarried child a power to make appointments to take effect only in case of the child's marriage, and after the child's marriage he executed a further deed, in the operative part of which he was expressed to confirm the prior appointment,—Held, that this second deed operated as a new appointment, and gave the child a valid general power of appointing exerciseable immediately. *Morgan v. Gronow*, 42 Law J. Rep. (N.S.) Chanc. 410; Law Rep. 16 Eq. 1.

[And see No. 13 supra.]

(i) *Construction and effect of appointment.*

(1) *Appointment of "residue" where fund diminished.*

18.—A settlement made in 1822 contained a power for R. H. by deed or will to appoint a sum of 37,914*l.* 13*s.* 9*d.* consols, among his nephews and nieces, the children of his brothers and sisters named in the settlement. A sum of 800*l.* consols was afterwards added to the settled funds. In 1853, when the plaintiffs were appointed trustees of the fund, and from that time to 1870, it consisted of 27,170*l.* 15*s.* 4*d.* consols, and 8,000*l.* on mortgage. Between 1850 and 1870, R. H. made various appointments of the fund, specifying it by its original description, all of which he revoked. In 1870 R. H. by deed appointed "the 37,914*l.* 13*s.* 9*d.* consols, and the 800*l.* consols," in trust after his death, as to five specified sums of consols, parts of the 37,914*l.* 13*s.* 9*d.* and 800*l.* consols, or other the securities of which the same might for the time being consist, for five of his said nephews and nieces (naming them). He appointed "the residue of the said two sums of 37,914*l.* 13*s.* 9*d.* and 800*l.* consols, or other the stocks, funds or securities of which the same might for the time being consist, or upon which the same might for the time being be invested," in trust for C. H., a daughter of one of his said brothers. The sums so appointed, less the residue, amounted to 37,000*l.* The appointor died in 1872. At that time the trust funds consisted only of the sum of 27,170*l.* 15*s.* 4*d.* consols, and the 8,000*l.* mortgage; and they were now represented by a fund in Court of 36,901*l.* 1*s.* 6*d.*, together with the January dividend thereon, viz., 546*l.* 11*s.* 11*d.* cash. On the

question whether the appointees, prior to C. H., should abate so as to allow her to take a proportionate share of the diminished funds.—Held, that the funds must be distributed rateably between the appointees, exclusive of C. H. *De Lisle v. Hodges*, 43 Law J. Rep. (N.S.) Chanc. 385; Law Rep. 17 Eq. 440.

(2) *French law of community: reference back to instrument of donation.*

19.—The testator bequeathed his residuary estate to trustees, in trust for A. for life, and after her decease to pay the capital to such of the children of A. as might be living at her decease, in such shares as she should appoint, and, in default of appointment, to such children equally. A. had four children, all of whom survived her, and one of whom, a daughter, C., became domiciled in France, and married a Frenchman, by whom she had one child. After his death A., in the exercise of her power, appointed one-fourth of the trust funds to C., "for her separate use," absolutely, and then died. Section 1401 of the Code Napoléon provides that all property belonging to the husband and wife at the time of their marriage, or coming to them by succession or donation during the marriage, shall fall into the "community of goods," and vest in them in equal moieties, "if the donor have not expressed himself to the contrary." C.'s daughter, therefore, according to the law of France, claimed to be entitled to a moiety of the appointed fund, contending that her mother had an interest or property in the fund at the time of her marriage. Upon bill filed by C. to compel the trustees to pay the whole of the appointed fund to herself,—Held, that C. was entitled to the whole fund, on the ground, first, that her right to it accrued at, and not before the date of the appointment, when, in consequence of her husband's death, there was no "community of goods;" and, secondly, that even assuming she had a property in the fund at the date of her marriage, the donor had, by appointing the fund to her "for her separate use," expressed an intention that the law of community should not attach to it. *De Serre v. Clarke*, 43 Law J. Rep. (N.S.) Chanc. 821; Law Rep. 18 Eq. 587.

*In re Vizard's Trusts* (35 Law J. Rep. (N.S.) Chanc. 804) reluctantly followed. *Ibid*.

As the trustees ought to have paid the plaintiff at least the one moiety of the appointed fund to which she was in any case entitled, and might have paid the other moiety into Court, under the Trustee Relief Acts they were only allowed their costs of the suit as between party and party. *Ibid*.

(3) *Where property converted.*

20.—Parents having under a settlement of real estate (which contained powers of sale and exchange with a trust for reinvestment of purchases-moneys in land) a power of appointment amongst their children, appointed a share to H. R. S., one of the children, and declared that the shares and interests of the persons beneficially interested in the monies arising from any sale of the premises,

should be of the quality of personal estate:—Held, that the share of H. R. S. was converted in equity into personalty by the terms of the appointment. *Webb v. Sadler*, 42 Law J. Rep. (N.S.) Chanc. 498; Law Rep. 8 Chanc. 419.

(4) *In general.*

*Appointment: death of appointee in life of appointor: next-of-kin.* [See WILL, CONSTRUCTION, C 2.]

*Duty of appointees to elect between appointed property and other property.* [See ELECTION.]

*Appointment specifying special motive.* [See supra No. 1.]

(k) *Power of revocation.*

21.—The donee of a power executed a deed whereby he was expressed to confirm a prior appointment, and also to appoint certain further funds, and the deed contained a power to revoke the appointment thereby made. The confirmation was in law an appointment:—Held, that the power of revocation applied only to that part of the deed which was expressed in terms of appointment, and not to that part which was expressed in terms of confirmation. *Morgan v. Gronow*, 42 Law J. Rep. (N.S.) Chanc. 410; Law Rep. 16 Eq. 1.

(l) *Appointment to donee of absolute power.*

22.—Shares were settled on trust for such persons as A. might by deed or will appoint. A. took a transfer of the shares into her own name in the ordinary way, executing the transfer under hand and seal:—Held, that this amounted to an appointment by A. in her own favour. *Fletcher v. Green* (33 Beav. 426 (1864) explained. *Marler v. Tommas*, 43 Law J. Rep. (N.S.) Chanc. 73; Law Rep. 17 Eq. 8.

(m) *Insolvency of donee.*

23.—A power given to an insolvent to appoint among his children held to be capable of being exercised after the insolvency. *Aylwin's Trusts*, 42 Law J. Rep. (N.S.) Chanc. 745; Law Rep. 16 Eq. 585.

(C) POWER OF SALE.

24.—The trustees of a settlement of real estate having power to sell the fee at the request of the tenant for life can, by an exercise of the power upon his request, after he has alienated his particular estate and with the consent of his alienee, make a good title in fee to a purchaser. *Alexander v. Mills*, 40 Law J. Rep. (N.S.) Chanc. 73; Law Rep. 6 Chanc. 124.

*Sugden on Powers*, 8th edit. p. 70, commented on and disapproved. *Ibid*.

25.—A testator by his will devised his real estates to trustees for 1,000 years, and subject thereto in strict settlement. The trusts of the term were to pay the testator's wife a life annuity of 200*l.*, and, subject thereto, for the persons entitled under the prior limitations. He also gave the trustees a power to sell the property, the power to

be exercised during the life of any tenant for life, who should be for the time being entitled to the possession, or to the receipt of the rents of the estates, with his consent. The sale monies were to be reinvested in land. By a codicil the testator directed his trustees to stand possessed of the term, and of the like term to arise in the real estates which might be purchased under the trusts of the will, on trust to pay the surplus of the rents of all the said estates (after paying the interest on his mortgage and other debts) to his wife, during her widowhood, in lieu of the annuity. \* In case she should marry again, the trust for payment of the annuity was to take the place of the trust for payment of the surplus rents. The testator's debts having been all paid,—Held, that the trustees could exercise the power of sale with the consent of the tenant for life, the widow also consenting. *Robertson v. Walker*, 44 Law J. Rep. (N.S.) Chanc. 220.

**26.**—An administrator *durante minoritate* can exercise a power of sale given by a testator to his executor or administrator for the time being. *Monsell v. Armstrong*, 41 Law J. Rep. (N.S.) Chanc. 715; Law Rep. 14 Eq. 423.

*Power of sale of minerals and surface separately.* [See CONFIRMATION OF SALES ACT.]

#### (D) POWERS TO RAISE AND CHARGE PORTIONS.

**27.**—A tenant for life under a power charged the estate with portions for younger children varying according to the number, being, if there were four or more, 5,000*l.* There were four younger children, two of whom died before the portions were raisable. The tenant for life having subsequently appointed by will the full sum of 5,000*l.*,—Held, that the appointment was effectual, notwithstanding the death of the children. *Knapp v. Knapp*, Law Rep. 13 Eq. 238.

**28.**—Power to raise a sum of money by mortgage includes power to raise also by mortgage the costs of effecting the security. *Armstrong v. Armstrong*, 43 Law J. Rep. (N.S.) Chanc. 719; Law Rep. 18 Eq. 541.

#### (E) POWERS OF ADVANCEMENT.

[See ADVANCEMENT.]

**29.**—A testator bequeathed a legacy to trustees upon trust to pay the income to A. B. for his life, and after his death for such trusts as he should by his will appoint, and in default of appointment in trust for his children. And he declared that his trustees might, at any time during the life of A. B., apply any part of the trust fund not exceeding a moiety, for the preferment or advancement of A. B., or otherwise for his benefit. A. B. was thirty years of age at the date of the will. After the testator's death he borrowed considerable sums of money on the security of his life interest in the fund, and being unable to pay off these debts, requested the trustees to pay them off under the power above mentioned. On a bill being filed to restrain the trustees from so doing,—Held, that the words of the power authorised the trustees to

pay off the debts. *Lowther v. Bentinck*, 44 Law J. Rep. (N.S.) Chanc. 197; Law Rep. 19 Eq. 167.

**30.**—By deed of settlement a sum of money was settled upon trust for A. for life, and after his death for B. for life, or until alienation, and afterwards in trust for B.'s children, and it was declared that the trustees might in their absolute discretion, but with the consent of the first tenant for life, if living, advance any sum not exceeding 2,000*l.* for the promotion in the army of B. The purchase of commissions in the army having been abolished,—Held, that the power of applying the fund for the promotion in the army of B. could not now be exercised. *Palmer v. Flower* (41 Law J. Rep. (N.S.) Chanc. 193; Law Rep. 13 Eq. 250) distinguished. *In re Ward's Trusts*, 42 Law J. Rep. (N.S.) Chanc. 4; Law Rep. 7 Chanc. 727.

### PRACTICE AT LAW.

[See COSTS AT LAW; INTERPLEADER; JURISDICTION AT LAW; MANDAMUS; QUO WARRANTO; VENUE.]

#### (A) SERVICE OF PROCESS.

- (a) *Service on company.*
- (b) *Service out of jurisdiction.*
- (c) *Service out of jurisdiction of Palatine Court.*

#### (B) AMENDMENT.

#### (C) INTERROGATORIES.

- (a) *By plaintiff.*
  - (1) *As to defendant's title.*
  - (2) *As to payment by defendant where discovery would be granted in equity.*
  - (3) *In action for negligence.*
  - (4) *In action for seduction.*
  - (5) *In libel: tendency to criminate.*
  - (6) *Cross interrogatories discrediting witness.*
- (b) *By defendant.*
  - (1) *Before plea.*
  - (2) *Privileged communication.*
  - (3) *When money paid into Court.*
  - (4) *In ejectment.*
- (c) *Answer.*
  - (1) *Insufficiency.*
  - (2) *Abandonment of right to answer.*

#### (D) WITNESSES: ORDER FOR EXAMINATION BEFORE TRIAL.

#### (E) AFFIDAVIT.

#### (F) PAYMENT INTO COURT.

#### (G) CONTEMPT OF COURT.

#### (H) NOTICE OF TRIAL.

#### (I) SIGNING JUDGMENT AT MASTER'S OFFICE.

#### (K) JUDGE'S NOTES: STAMP.

#### (L) TRIAL OF ISSUE OF NUL TIEL RECORD.

#### (M) TRIAL AT BAR.

#### (N) TRIAL OF UNDEFENDED CAUSE.

#### (O) NEW TRIAL.

#### (P) ABATEMENT: JUDGMENT NUNC PRO TUNC.

#### (Q) TAKING DOCUMENTS OFF FILE.

#### (R) STAYING PROCEEDINGS.

- (a) *On injunction by Court of Admiralty.*
- (b) *Action brought without authority.*

(c) *On ground of non-payment of costs of previous trial.*

(d) *Until security for costs is given.*

(S) ERROR.

(T) APPEAL.

#### (A) SERVICE OF PROCESS.

##### (a) *Service on company.*

1.—The defendants, a Scotch railway company, having their line of railway and their principal office in Scotland, employed an ordinary booking clerk to issue tickets at the Carlisle station of the Caledonian railway, over the southernmost portion of whose line the defendants had running powers:—Held, that such clerk, although the only officer of the defendants resident in England, was not a “head officer” or “clerk,” within the 16th section of the Common Law Procedure Act, 1852, so as to render service on him of an ordinary writ of summons a good service on the company. *Mackreth v. The Glasgow and South-Western Railway Company*, 42 Law J. Rep. (N.S.) Exch. 82; Law Rep. 8 Exch. 149.

2.—An American Company, incorporated by American law in the United States, had a place of business in England, where it, *de facto*, carried on business, although its manufactory, and also its principal place of business, where the meetings of its directors and shareholders were held, were in America. The plaintiff claimed a sum of money as being due from the corporation to him as the balance of commission on the sale of goods. He commenced an action against the corporation and their agent in England, including both in the same writ, and served two copies upon the agent, one for himself and the other for the corporation. One of the Masters of this Court made an order that the writ and subsequent proceedings should be amended by striking out the name of the corporation:—Held, rescinding the said order, that this Court would not, upon the ground that a foreign corporation cannot be sued in England, prevent the plaintiff from proceeding in the action; and secondly, that, inasmuch as the corporation had a place of business in this country and traded here, it must be treated as resident here, and that the service upon its agent was sufficient. *Newby v. Von Oppen and the Colt's Patent Fire Arms Manufacturing Company*, 41 Law J. Rep. (N.S.) Q. B. 148; Law Rep. 7 Q. B. 293.

##### (b) *Service out of jurisdiction.*

3.—The defendant while abroad was served with a writ of summons in an action for breach of promise of marriage, under the provisions of the 18th section of the Common Law Procedure Act, 1852. The promise of marriage was made abroad, and broken in this country:—Held, per Martin, B., Pigott, B., and Cleasby, B., that the case was within the section, and the service of the writ good (*dissentiente Kelly, C.B.*). Per Pigott, B., and Cleasby, B.—In actions of contract the “breach” is the “cause of action” within the meaning of the 18th section. Per Kelly, C.B.—The “cause of

action” in that section includes both contract and breach. *Durham v. Spence*, 40 Law J. Rep. (N.S.) Exch. 3; Law Rep. 6 Exch. 46.

4.—In the Common Law Procedure Act, 1852, ss. 18, 19, the words “cause of action” mean the act on the part of the defendant which gives the plaintiff his cause of complaint; and, therefore, a plaintiff who has issued a writ under either of these sections is not bound to prove that every circumstance necessary to sustain his case occurred within the jurisdiction. The rule laid down in *Jackson v. Spittal* (39 Law J. Rep. (N.S.) C. P. 321; Law Rep. 5 C. P. 542) will henceforward be observed in all the Superior Courts of Law. *Vaughan v. Weldon*, 44 Law J. Rep. (N.S.) C. P. 64; Law Rep. 10 C. P. 47.

##### (c) *Service out of jurisdiction of Palatine Court.*

5.—The Court of the County Palatine of Lancaster being a superior Court of record, has jurisdiction in an action where the cause of action arises outside the county, and if the defendant voluntarily enters an appearance to such action he comes within the jurisdiction of the Court, and cannot then object that he does not reside within the county, and that the writ was served beyond the jurisdiction of the Court. *Oulton v. Radcliffe*, 43 Law J. Rep. (N.S.) C. P. 87; Law Rep. 9 C. P. 189.

*Service of summons for assault.* [See SERVICE OF SUMMONS.]

#### (B) AMENDMENT.

6.—The plaintiff having sued a local board in their clerk's name instead of their own, the writ of summons was held to be amendable by substituting the name of the clerk for that of the board. *Bolingbroke v. Townsend*, 42 Law J. Rep. (N.S.) C. P. 255; Law Rep. 8 C. P. 645.

7.—In an action against a tenant for dilapidations to furniture, the first count was for damages for breach of the agreement under which the furniture had been let, and the second count was for the amount of dilapidations as awarded by valuers. It appearing that though the plaintiff was the party to the submission under which the award was made, the agreement for letting had been made only between one C. (who was the plaintiff's trustee) and the defendant, the plaintiff applied for and obtained a Master's order, under section 34 of the Common Law Procedure Act, 1852, to add C. as plaintiff to the action:—Held, that the Master had power to make such order, and that he rightly exercised his discretion in making it, since, if refused, the plaintiff could bring a fresh action in the joint names of the plaintiff and C., and according to section 19 of the Common Law Procedure Act, 1860, succeed as to the one who was entitled to recover, subject only to the right of the defendant to the costs occasioned by such joinder. *De Gendre v. Bogardus*, 41 Law J. Rep. (N.S.) C. P. 107; Law Rep. 7 C. P. 409.

8.—A declaration, which claimed only 600*l.* for two years' instalments, was allowed to be amended before verdict by increasing the claim to 750*l.*,

this being an amendable "defect" within the Common Law Procedure Act, 1852, s. 222. *Knowlman v. Bluett*, 43 Law J. Rep. (n.s.) Exch. 29; Law Rep. 9 Exch. 1.

9.—Where there is a variance between the declaration and the proof, the proper time to amend is at the conclusion of the plaintiff's case; but a Judge in a civil action, sitting without a jury, may allow an amendment after he has begun to deliver his decision. *Rainy v. Bravo*, Law Rep. 4 P. C. 287.

*Amendment of declaration at Nisi Prius by stating that plaintiff sued as administratrix de bonis non, not as administratrix.* [See EXECUTOR, 16.]

*Amendment of declaration: turning action of trover or trespass into action for account.* [See TENANTS IN COMMON, 3.]

### (C) INTERROGATORIES.

#### (a) By plaintiff.

##### (1) As to defendant's title.

10.—Although interrogatories as to the means by which a defendant proposes to establish an adverse title to an hereditament are not admissible, yet interrogatories seeking only to ascertain the character of his title and the quality of his possession may be allowed. *Towne v. Cocks*, 43 Law J. Rep. (n.s.) Exch. 41; Law Rep. 9 Exch. 45.

##### (2) As to payment by defendant where discovery would be granted in equity.

11.—Where in an action against the maker of a promissory note by the executors of a deceased payee, the defendant pleaded payment to the payee in his lifetime, the Court, on the authority of *Hawkins v. Carr* (35 Law J. Rep. (n.s.) Q. B. 81; Law Rep. 1 Q. B. 89), and because the person to whom the payment was stated to have been made was dead, allowed the plaintiffs to interrogate the defendant by interrogatories under the Common Law Procedure Act, 1854, as to the mode, time and circumstances of such payment. *Hills v. Wates*, 43 Law J. Rep. (n.s.) C. P. 380; Law Rep. 9 C. P. 688.

##### (3) In action for negligence.

12.—In an action against a railway company for damages sustained by a passenger from a collision on the line, through the alleged negligence of the company's servants, the plaintiff was not allowed, without an affidavit disclosing special circumstances, to administer interrogatories to the company as to what was the cause of the accident, or as to whether they possessed or had the care of that with which the train came into collision. *Beckervaise v. The Great Western Railway Company*, 40 Law J. Rep. (n.s.) C. P. 8; Law Rep. 6 C. P. 36.

##### (4) In action for seduction.

13.—In an action for seduction it is not allowable to interrogate the defendant as to his present means or what property he is possessed of. But *Draest*, 1870-1875.

it is allowable to interrogate him with a view of obtaining admissions from him as to his having had sexual intercourse with the plaintiff's daughter. *Hodsoll v. Taylor*, 43 Law J. Rep. (n.s.) Q. B. 14; Law Rep. 9 Q. B. 79.

##### (5) In libel: tendency to criminate.

14.—An alleged libel was contained in a printed notice or handbill, on which the name of the printer did not appear. The defendant had been seen with the person who distributed the notices, and had himself posted up one of them. On an application to administer interrogatories to him directed to ascertain if and to what extent he gave instructions for the printing and circulation of the handbills,—Held, that the special circumstances took the case out of the ordinary rule that interrogatories which tend to criminate will not usually be allowed in an action of libel. *Greenfield v. Reay*, 44 Law J. Rep. (n.s.) Q. B. 81; Law Rep. 10 Q. B. 217.

##### (6) Cross interrogatories discrediting witness.

15.—An action having been brought against the defendant for the unskillful spinning of yarn, the defendant obtained an order for the examination by interrogatories of a person whom he had employed as manager of his works, and who had gone to America. The plaintiff proposed to examine him upon cross interrogatories, several of which were directed to the question whether or not he had left his wife and children in England, and whether or not he had taken another woman with him to America:—Held, that as these questions were not relevant to the issue, and had a tendency to deter the witness from coming to England to give evidence, they could not be allowed. *Stocks v. Ellis*, 42 Law J. Rep. (n.s.) Q. B. 241; Law Rep. 8 Q. B. 454.

#### (b) By defendant.

##### (1) Before plea.

16.—Though there is no rule to preclude a defendant from being allowed to deliver interrogatories to the plaintiff before he has pleaded, yet if he seeks to be allowed to deliver them before plea, he must first disclose the nature of his defence, in order to shew that the interrogatories are for the purpose of supporting such defence. *Gourley v. Plimsoll*, 42 Law J. Rep. (n.s.) C. P. 244; Law Rep. 8 C. P. 362.

Where, therefore, in an action for libel the defendant pleaded a justification in a general form, he was not allowed to deliver interrogatories to the plaintiff until, either by affidavit or by particulars, he had first disclosed the matters on which his justification was founded. *Ibid*.

##### (2) Privileged communication.

17.—Where a plaintiff ordered goods, to be shipped by the defendant to London from New York, at which place the defendant carried on business in partnership with R., who conducted the transaction, and, in answer to interrogatories enquiring into the particulars thereof, the defend-

ant swore that before action he had no information as to them, but had since by letters and telegrams, sent with respect to his defence to the action, obtained it and refused to communicate it as it was privileged:—Held, that such information was privileged. *Phillips v. Routh*, 41 Law J. Rep. (N.S.) C. P. 111; Law Rep. 7 C. P. 287.

(3) *When money paid into Court.*

18.—Where in an action for breach of contract the defendant admits himself to be liable to compensate the plaintiff, and intends to pay into Court a sum sufficient to cover the damage sustained, the defendant will be allowed to administer interrogatories in order to ascertain the extent of the loss which the plaintiff has incurred. *Horne v. Hough*, 43 Law J. Rep. (N.S.) C. P. 70; Law Rep. 9 C. P. 735.

(4) *In ejectment.*

19.—A defendant in ejectment, who has, by the plaintiff, been let into possession of the premises, the subject of the action, for a term, and holds over at the expiration of the term without attorning or paying rent to any other claiming title, will not be allowed to interrogate the plaintiff with a view to shew that, at the time of possession being given, the plaintiff's interest was a term of years which had expired before the action. *Wallen v. Forrest*, 41 Law J. Rep. (N.S.) Q. B. 96; Law Rep. 7 Q. B. 239.

*Interrogatory as to documents.* [See PRODUCTION AT LAW.]

(c) *Answer.*

(1) *Insufficiency.*

20.—When the answers to interrogatories administered pursuant to the Common Law Procedure Act, 1854, contain statements irrelevant to the questions asked, the interrogatories are insufficiently answered within the meaning of the 53rd section of that statute, and an oral examination may be ordered in the discretion of a Judge at chambers. *Peyton v. Harting*, 43 Law J. Rep. (N.S.) C. P. 10; Law Rep. 9 C. P. 9.

An order directing that a person interrogated pursuant to the Common Law Procedure Act, 1854, shall be orally examined as to the matters concerning which he has refused or omitted to make an affidavit, is sufficient within the 53rd section. *Ibid.*

(2) *Abandonment of right to answer.*

21.—In an action of detinue judgment was signed by consent for certain damages, subject to a stay of further proceedings on the defendant delivering up, within a specified time, the articles which had been detained. The defendant neglected to deliver such articles, and the plaintiff caused a writ of execution to issue for the return of them, but the sheriff was unable to find the articles, and therefore could not execute the writ. In order to assist the sheriff, the plaintiff applied to the Court to enforce by attachment

answers to interrogatories which had been delivered to the defendant under the Common Law Procedure Act, 1854, previously to the signing of the judgment, but which had never been answered. The Court refused the application, as the judgment by consent had been a virtual abandonment of the right to have the interrogatories answered, and as also interrogatories could not be used in aid of execution. *Hayne v. Pratt*, 40 Law J. Rep. (N.S.) C. P. 119; Law Rep. 6 C. P. 105.

(D) WITNESSES: ORDER FOR EXAMINATION BEFORE TRIAL.

22.—The application by one party to an action for a rule *nisi* for an attachment against the other is a motion, upon the hearing of which the Court has power to order the examination of witnesses under the Common Law Procedure Act, 1854, section 46, and the order for examination may be made absolute in the first instance. So held by Lord Coleridge, C.J.; Keating, J.; and Denman, J.; *dubitante* Grove, J. *Morgan v. Alexander*, 44 Law J. Rep. (N.S.) C. P. 167; Law Rep. 10 C. P. 184.

The plaintiff was the assured upon a policy of marine insurance purporting to be underwritten by the defendant through the intervention of a certain co-partnership acting as agents. A loss having accrued to the plaintiff upon the policy, the present action was brought, and interrogatories pursuant to the Common Law Procedure Act, 1854, section 51, were administered to the defendant through the attorneys appearing for him; these interrogatories remained unanswered. Enquiry was then made for the defendant on behalf of the plaintiff. No underwriter bearing the defendant's name could be found, but information was obtained raising a suspicion that the defendant was either a fictitious personage or one of the members of the co-partnership above mentioned acting under an assumed name. The plaintiff thereupon applied to the Court for a rule *nisi* for an attachment against the defendant for a contempt in not answering the interrogatories, and also applied at the same time for an order to examine two of the members of the co-partnership *viva voce* before a Master:—Held (per Lord Coleridge, C.J.; Keating, J. and Denman, J.; *dubitante* Grove, J.), that the Court had jurisdiction upon the hearing of the motion for the attachment to order by a rule, absolute in the first instance, the examination of the two members of the co-partnership to take place forthwith before the Master. *Ibid.*

(E) AFFIDAVIT.

23.—The rule that a party shewing cause against a rule must take office copies of the affidavits in support is imperative. *In re Chaffers*, Law Rep. 8 C. P. 376.

24.—Where a rule *nisi* had been obtained against two persons, and one of them succeeded in getting the rule quashed, on the ground of the want of the deponent's addition in the affidavit on which the rule was granted, the Court allowed



the other to waive the objection, and have the rule discussed, as far as he was concerned. *Ex parte King*, 41 Law J. Rep. (n.s.) C. P. 59; Law Rep. 7 C. P. 74.

#### (F) PAYMENT INTO COURT.

**25.**—The defendants in an action upon a bill of exchange paid a sum of money into Court to abide the event. The matters in dispute were subsequently referred to arbitration, and before any award had been made by the arbitrator, the defendants went into liquidation of their affairs by arrangement. The trustee in the liquidation claimed the money in Court:—Held, that the plaintiff in the action was entitled to be paid thereout the amount of his debt and costs, and there must be an enquiry to ascertain this amount. *Ex parte Tate; In re Keyworth*, 43 Law J. Rep. (n.s.) Bankr. 102; Law Rep. 9 Chanc. 379.

**26.**—The plaintiff sued for the penalty in a bond conditioned for avoidance if half the penalty with interest were paid by instalments on several fixed days, and alleged as a breach the non-payment of one of the instalments, the time for the payment of the subsequent instalments not having yet arrived. The defendant paid into Court the sum due in respect of the one instalment with interest:—Held, a bad plea, such a bond not being within section 25 of the Common Law Procedure Act, 1860. *Preston v. Dania*, 42 Law J. Rep. (n.s.) Exch. 33; Law Rep. 8 Exch. 19.

*Ejectment: forfeiture for breach of covenant: waiver of, by payment into Court of rent due after forfeiture.* [See EJECTMENT.]

#### (G) CONTEMPT OF COURT.

**27.**—It is contempt of Court to state at public meetings that a defendant who is on his trial is the victim of a conspiracy, and will not have a fair trial. When a true bill has been found and the indictment removed into the Queen's Bench, and the day fixed for the trial, the case is pending. Parties committing contempt will be ruled to appear in Court, and on appearance fined or imprisoned. *Lechmere Charlton's case* (2 Myl. & Cr. 316) considered. *The Queen v. Castro*, Law Rep. 9 Q. B. 219.

**28.**—Where a party has been guilty of contempt in not answering interrogatories under an order in a cause in the Court of Common Pleas at Lancaster, proceedings for an attachment against him may be taken by rule in any one of the superior Courts at Westminster. *Coston v. Blackburn*, Law Rep. 8 Q. B. 54.

#### (H) NOTICE OF TRIAL.

**29.**—A defendant under terms to take "short notice of trial if necessary," is not entitled to full notice if the plaintiff, using reasonable diligence, is unable to give it. *Pretty v. Nauscawen*, 43 Law J. Rep. (n.s.) Exch. 3; Law Rep. 9 Exch. 42.

#### (I) SIGNING JUDGMENT AT MASTER'S OFFICE.

**30.**—All the proceedings in an action at law

in one of the superior Courts are deemed to be taken before the Court itself; and although the Master's office of the Queen's Bench is situate in the city of London, yet a judgment signed thereat is in contemplation of law a step in a suit taken before the Court itself sitting at Westminster; therefore a judgment of that Court does not create a cause of action within the city of London, upon which a suit in the Mayor's Court can be founded. *Tapp v. Jones*, 43 Law J. Rep. (n.s.) C. P. 250; Law Rep. 9 C. P. 418.

#### (K) JUDGE'S NOTES: STAMP.

**31.**—The stamp of 5s. on bespeaking Judge's notes is not sufficient where the cause is tried before the Judge of a Court other than that in which the rule *nisi* is granted. In such case a further fee of 6d. per folio is payable. *Evans v. Roe*, Law Rep. 7 C. P. 138.

#### (L) TRIAL OF ISSUE OF NUL TIEL RECORD.

**32.**—The issue of *nul tiel record* is tried by the Court and not by a jury. *Richardson v. Willis*, 42 Law J. Rep. (n.s.) Exch. 15; Law Rep. 8 Exch. 69.

#### (M) TRIAL AT BAR.

[See TRIAL AT BAR.]

#### (N) TRIAL OF UNDEFENDED CAUSE.

**33.**—When a cause has been entered for trial as undefended, it is the duty of the plaintiff's attorney, upon notice from the defendant of his intention to defend, to inform the Court that the cause will be defended; and if it afterwards be tried as undefended out of its proper turn, a new trial will be granted without an affidavit of merits. *Wolff v. Goldring*, 44 Law J. Rep. (n.s.) C. P. 214.

#### (O) NEW TRIAL.

**34.**—The rule that a new trial will not be granted for either party when the sum given or recoverable is under 20*l.*, does not apply to replevin. *Edgson v. Cardwell*, Law Rep. 8 C. P. 647.

**35.**—In moving in the Court of Exchequer for rules for a new trial or to enter a nonsuit in cases tried in the Liverpool Court of Passage, a rule to shew cause will not be granted unless either the counsel moving was present at the trial, or the assessor's notes are produced with an affidavit verifying the assessor's signature. When cause is shewn the assessor's notes must be produced with a similar affidavit. *Welsh v. Mercer*, 42 Law J. Rep. (n.s.) Exch. 52; Law Rep. 8 Exch. 71.

**36.**—In an action for slander imputing that the plaintiff had committed perjury, the jury found a verdict for the plaintiff; damages, one farthing. The verdict was not satisfactory to the Judge who tried the cause:—Held, that there ought to be a new trial, inasmuch as the amount of damages seemed to have been arrived at by a compromise, without duly weighing the circumstances of the case. *Falvey v. Stanford*, 44 Law J. Rep. (n.s.) Q. B. 7; Law Rep. 10 Q. B. 54.

**37.**—Where at a trial the Judge, on being asked to direct the jury to find a verdict for the defendants, refused to do so, but an objection which, if substantiated, would have justified his so doing, was not then raised,—Held, that such objection could not be afterwards received, and that the mere refusal of the Judge was not a misdirection. *Greene and King v. Bateman*, Law Rep. 5 E. & I. App. 591.

(P) ABATEMENT: JUDGMENT NUNC PRO TUNC.

**38.**—An action for negligence causing personal injury was tried in the sittings out of term. The Judge directed a nonsuit upon the ground that there was no evidence of negligence, but stayed execution until the fifth day of the following term, that the plaintiff might move to set aside the nonsuit. The plaintiff died before the next term. In that term a rule was obtained by the defendant to enter judgment of nonsuit *nunc pro tunc*, so that he might tax costs thereon; but the Court taking into consideration the fact that the nonsuit was only provisional and subject to their approval, and that the action abated before any final judgment could be pronounced, discharged the rule. *Hemming v. Batchelor*, 44 Law J. Rep. (N.S.) Exch. 54; Law Rep. 10 Exch. 54.

(Q) TAKING DOCUMENTS OFF FILE.

**39.**—Where documents sent from Bombay were in the custody of the Court of Common Pleas awaiting the decision of the Court of error, and the same documents were required to be sent out to Bombay on a mandamus for the examination of witnesses issued in an action in the Court of Exchequer, an application for leave to take the documents from the office of the Common Pleas was refused, as they might still be required; but it was suggested that the Court of Exchequer should be applied to for leave to annex office or photographic copies to the mandamus. *In re Stephens*, Law Rep. 9 C. P. 187.

(R) STATING PROCEEDINGS.

(a) *On injunction by Court of Admiralty.*

**40.**—An order made by the High Court of Admiralty under 24 Vict. c. 10, s. 13 (which confers on that Court the same powers of stopping proceedings as were conferred on the Court of Chancery by the 514th section of the Merchant Shipping Act, 1854), is not a "writ of injunction, rule, or order of either of the Superior Courts of Common Law or Equity at Westminster," within the meaning of section 226 of the Common Law Procedure Act, 1852; and therefore proceedings in an action in the Court of Exchequer will not be stayed upon the production of such an order made by the Court of Admiralty. *Milburn v. The London and South-Western Railway Company*, 40 Law J. Rep. (N.S.) Exch. 1; Law Rep. 6 Exch. 4.

(b) *Action brought without authority.*

**41.**—If an attorney brings an action in the name of a person who has not given him any

authority to do so, such person is entitled to have the proceedings stayed. *Reynolds v. Howell*, 42 Law J. Rep. (N.S.) Q. B. 181; Law Rep. 8 Q. B. 398.

(c) *On ground of non-payment of costs of previous trial.*

**42.**—Where the plaintiff brought two actions for ejectment, each of which depended on the same title and question, and in each the defendants were substantially the same, being trustees for an infant heir, who was the real defendant in each, and the plaintiff elected to be nonsuited at the trial of the first of such actions, the Court, on the application of the defendants in the second action, stayed proceedings in it until the plaintiff paid the costs of the first action, notwithstanding the defendants had given the plaintiff twenty days' notice under section 202 of the Common Law Procedure Act, 1852, to proceed with the trial of this second action; but the amount of such costs being large, the Court extended the time of such notice beyond the twenty days. *Tichborne v. Mostyn*, 41 Law J. Rep. (N.S.) C. P. 113; Law Rep. 8 C. P. 29.

(d) *Until security for costs is given.*

[See COSTS AT LAW, 19.]

(S) ERROR.

[And see JURISDICTION AT LAW, 1, 2.]

**43.**—The decision of one of the Superior Courts pronounced on motion is not the subject of a proceeding in error. A Court has power by consent to discharge a jury from giving a verdict upon any of the issues in a case, and where the record does not shew the contrary, the discharge will be taken to be with consent. So where a Court has power to give costs upon a certificate or order, and it is not shewn that there was no such certificate or order, the taxation is not the subject of a proceeding in error. *Banks v. Newton* (11 Q. B. 340) overruled. *Scott v. Bennett* (H.L.), Law Rep. 5 E. & I. App. 234.

(T) APPEAL.

**44.**—On an appeal from chambers all material affidavits used at chambers must be referred to in the rule. *Holmes v. Mountstephen*, Law Rep. 10 C. P. 474.

*Appeal from County Court.* [See COUNTY COURT, 23-27.]

*County Court appeal: time for giving security.* [See COUNTY COURT, 26.]

*Leave to appeal from Lord Mayor's Court.* [See LONDON, 4.]

*Practice as to setting aside award.* [See ARBITRATION, 24, 25.]

*As to enlarging time for award.* [See ARBITRATION, 27.]

*As to garnishee order and summons.* [See ATTACHMENT, 4, 5.]

## PRACTICE IN EQUITY.

[N.B.—See also COSTS IN EQUITY; JURISDICTION IN EQUITY; PLEADING IN EQUITY, and for cases relating to the practice in winding up joint-stock companies, see COMPANY.]

- (A) ABATEMENT.
- (B) ADMINISTRATION SUMMONS.
- (C) AFFIDAVIT.
  - (a) *Form of jurat: lunatic witness.*
  - (b) *Affidavit sworn abroad.*
  - (c) *Taking off file.*
  - (d) *Unfiled affidavits.*
  - (e) *Affidavit after evidence closed.*
  - (f) *Cross-examination on affidavit.*
- (D) AMENDMENT.
  - (a) *Of bill or information.*
  - (b) *Of interrogatories.*
  - (c) *Of petition.*
- (E) ANSWER.
  - (a) *Form of.*
  - (b) *Admissibility in evidence.*
  - (c) *Plea coupled with answer: irregularity.*
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- (F) APPEAL AND RE-HEARING.
  - (a) *Right to appeal.*
  - (b) *Effect of enrolment of order.*
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- (G) APPEARANCE.
- (H) BILL.
  - (a) *Delivery of copy to person not party.*
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- (I) CERTIORARI.
- (K) CHIEF CLERK'S CERTIFICATE.
- (L) CONCURRENT SUITS.
- (M) CONTEMPT.
- (N) DAMAGES.
- (O) DEMURRER: SETTING DOWN.
- (P) DEPOSITION: TAKING OFF FILE.
- (Q) DISMISSAL.
  - (a) *For want of prosecution.*
  - (b) *Charges of fraud not proved.*
- (R) ENROLMENT OF DECREE OR ORDER.
- (S) EVIDENCE.
  - (a) *Notice to read.*
  - (b) *Vivâ voce at hearing.*
  - (c) *Cross cause.*
  - (d) *Burden of proof.*
  - (e) *Oral examination on oath.*
- (T) HEARING IN PRIVATE.
- (U) INTEREST ON MONEY REPAID.
- (V) INTERROGATORIES.
- (W) INVESTMENT.
- (X) ISSUE.
- (Y) LIS PENDENS.
- (Z) LONG VACATION.
- (AA) MOTION.
- (BB) NE EXEAT REGNO.
- (CC) NEXT FRIEND.
- (DD) NEW TRIAL.
- (EE) ORDERS AND DECREES.

- (a) *Service: effect of.*
- (b) *Correction of error.*
- (c) *Form of.*
- (FF) PARTITION SUITS.
- (GG) PARTIES.
- (HH) PAYMENT AND TRANSFER.
  - (a) *Into Court.*
  - (b) *Out of Court.*
    - (1) *To tenant in tail.*
    - (2) *To married woman.*
    - (3) *In other cases.*
- (II) PETITIONS.
- (KK) PRO CONFESSO.
- (LL) PRODUCTION OF DOCUMENTS.
- (MM) RECEIVER.
- (NN) REVIVOR AND SUPPLEMENT.
  - (a) *Order of revivor.*
    - (1) *Death of sole plaintiff.*
    - (2) *Transfer of plaintiff's interest.*
    - (3) *Death of petitioner.*
    - (4) *Devolution of defendant's interest on co-plaintiff.*
    - (5) *Absence of personal representative.*
    - (6) *Defective suit: leave to take proceedings off file.*
    - (7) *Special circumstances.*
  - (b) *Revivor for costs.*
  - (c) *Supplemental bill.*
    - (1) *Change of interest after decree.*
    - (2) *Facts discovered since decree.*
- (OO) SALES AND PURCHASES UNDER DIRECTION OF THE COURT.
  - (a) *Mode of conducting.*
  - (b) *Opening biddings.*
  - (c) *Sale of infant's property.*
- (PP) SEQUESTRATION.
- (QQ) SERVICE.
  - (a) *Of petition.*
  - (b) *Of decree.*
  - (c) *Out of jurisdiction.*
- (RR) SHORT CAUSE.
- (SS) SPECIAL CASE.
- (TT) SPECIAL EXAMINER.
- (UU) STAYING PROCEEDINGS.
  - (a) *Pending appeal.*
  - (b) *In other cases.*
- (VV) STOP ORDER.
- (WW) SUBJECT-MATTER.
- (XX) SUIT IN FORMÂ PAUPERIS.
- (YY) TRANSFER OF CAUSE.
- (ZZ) WITNESS.

[Rules under Chancery (Funds) Act, 1872, 21st December, 1872, and 23rd December, 1872, 42 Law J. Rep. (N.S.) Chanc. 1.]

## (A) ABATEMENT.

[See *infra* REVIVOR.]

## (B) ADMINISTRATION SUMMONS.

1.—Land was devised to trustees, who were also executors, on trust to sell, with a declaration postponing the sale of part for five years unless a certain price could be obtained, the first trust of the proceeds being to pay funeral and testamen

tary expenses and legacies at the expiration of five years:—Held, that an order for the administration of the estate was properly made on summons. *Moorat v. Moorat, and De la Salle v. Moorat*, 40 Law J. Rep. (N.S.) Chanc. 44; Law Rep. 11 Eq. 8.

### (C) AFFIDAVIT.

#### (a) Form of jurat.

2.—The jurat of an affidavit sworn by a person suffering from monomania, and confined in a lunatic asylum, should state the fact that it was sworn in an asylum, otherwise the affidavit is irregular, and will be taken off the file. *Spittle v. Walton*, 40 Law J. Rep. (N.S.) Chanc. 368; Law Rep. 11 Eq. 420.

Before the evidence of a lunatic, subject to insane hallucinations, can be received, there must be an enquiry as to his mental condition.

#### (b) Affidavit sworn abroad.

3.—Statutory declaration made in New South Wales by husband and wife allowed to be annexed as an exhibit to an affidavit filed in the cause. *Whiting v. Bassett*, 41 Law J. Rep. (N.S.) Chanc. 551; Law Rep. 14 Eq. 70.

4.—Affidavits sworn irregularly in a foreign country allowed to be filed on the consent of all parties. *Lyle v. Elwood*, 42 Law J. Rep. (N.S.) Chanc. 80; Law Rep. 15 Eq. 67.

5.—An affidavit by the defendants sworn in Germany before a burgermeister instead of a British consul or vice-consul, allowed to be filed with the consent of the only adult plaintiff, the mother of the infant plaintiffs. *Bell v. Turner*, Law Rep. 17 Eq. 439.

#### (c) Taking off file.

6.—A plaintiff filed an affidavit made by a dying witness, and offered an opportunity for cross-examination, and afterwards filed replication, and, having omitted to give notice of reading the affidavit within the prescribed time, took out a summons for leave to read the affidavit which summons was adjourned to the hearing of the cause. The plaintiff printed the affidavit, with the others proposed to be read at the hearing, and thereupon the defendant moved to take it off the file and expunge it from the printed affidavits:—Held, that this motion was irregular. *Lautour v. The Attorney-General*, 43 Law J. Rep. (N.S.) Chanc. 313.

#### (d) Unfiled affidavits.

7.—Although unfiled affidavits may be read on an *ex parte* application, they cannot be read when the respondent has been served but does not appear, and the application is made on affidavit of service on him of the notice of motion. *Farrer v. Sykes*, 43 Law J. Rep. (N.S.) Chanc. 392.

#### (e) Affidavit after evidence closed.

8.—Where a plaintiff's evidence after replication raised new issues of fact, the defendant was allowed to file affidavits after the time for closing

evidence, such evidence to be confined to the new issues and the plaintiff to be at liberty to cross-examine. *Leech v. Bolland*, Law Rep. 10 Chanc. 362.

#### (f) Cross-examination on affidavit.

9.—A party who swears an affidavit, which is used at the hearing of a motion, on which an order is made for the motion to stand on terms till the hearing of the cause, cannot be cross-examined on that affidavit, even although the one party may have given notice to the other that he means to use the affidavit at the hearing of the cause. *Singer v. Audsley*, 41 Law J. Rep. (N.S.) Chanc. 229; Law Rep. 13 Eq. 401.

10.—As a general rule a party should file his affidavits before cross-examining a party on the other side. Consequently an affidavit filed in a creditor's administration suit by defendant executors subsequently to their cross-examination of the plaintiff upon his affidavit in support of his claim is not generally admissible in proceedings in chambers for adjudication of the plaintiff's claim, but it was allowed to be used upon leave given to the deponent to reply. *Lancefield v. Ig-gulden*, 41 Law J. Rep. (N.S.) Chanc. 473.

11.—The fourteen days from the filing of an affidavit in support of a petition having been allowed to expire without notice having been given to cross-examine on the affidavit as provided by rule 19 of Order of the 5th of February, 1861,—Held, that the Court was not thereby precluded from exercising its discretionary power under section 40 of the Chancery Improvement Act, 1852 (15 & 16 Vict. c. 86), and leave to cross-examine was granted accordingly. *In re Sadler's Wells Theatre*, 42 Law J. Rep. (N.S.) Chanc. 737.

12.—An accounting defendant who has carried in an account and verified it by affidavit, may be cross-examined on his affidavit as well before he has vouched his account as afterwards. *Meacham v. Cooper*, 42 Law J. Rep. (N.S.) Chanc. 876; Law Rep. 16 Eq. 102.

13.—Where only one day's notice was given that a witness, as to whom notice of cross-examination had been given, was about to leave the country, his affidavit was not allowed to be read. Where it appears by a defendant's affidavit filed on an enquiry, that he has money in his hands, he may be ordered to pay it in after decree and before further consideration. *Dunne v. English*, Law Rep. 18 Eq. 524.

*Cross-examination of solicitor on affidavit on taxation.* [See ATTORNEY, 36.]

[And see *infra* EVIDENCE, WITNESS.]

### (D) AMENDMENT.

#### (a) Of bill or information.

14.—An injunction, granted upon the merits, is not dissolved by the amendment of the bill. *Harvey v. Hall*, Law Rep. 11 Eq. 31.

15.—Upon application for special leave to amend an information and bill, the affidavits mentioned in Consolidated Order IX. rr. 14, 15, 16, may be made by the solicitor to the relator

and the plaintiff alone. *The Attorney-General v. The Castleford Local Board of Health*, 40 Law J. Rep. (N.S.) Chanc. 636; Law Rep. 6 Chanc. 853.

(b) *Of interrogatories.*

16.—After exceptions to an answer for insufficiency had been allowed, and before a sufficient answer had been filed, the plaintiff, on an order of course, amended his bill and interrogatories. The interrogatories as amended comprised much of the matter contained in the original interrogatories. On motion by the defendant to take the amended interrogatories off the file as irregular,—Held, that since the insufficient answer was technically no answer, and the plaintiff at the time of obtaining his order to amend had a clear right to an answer, the amended interrogatories were not irregular. *Newry v. Kilmorey*, 40 Law J. Rep. (N.S.) Chanc. 371; Law Rep. 11 Eq. 425.

(c) *Of petition.*

17.—When upon the hearing of a petition, leave is given to amend the petition, any facts, whether occurring before or after the leave given, may be inserted by amendment. *In re Westbrook's Trusts*, 40 Law J. Rep. (N.S.) Chanc. 224; Law Rep. 11 Eq. 252.

(E) ANSWER.

(a) *Form of.*

18.—An answer not containing the words "In answer to the said bill, we say as follows," was directed to be filed. *Bowes v. Farrar*, Law Rep. 14 Eq. 71.

19.—The paper on which Chancery pleadings are printed must be of the quality prescribed by Consolidated Order IX. r. 3, but need not be weighed in the Record and Writ Clerks' Office in order to ascertain the quality. An answer a little under the prescribed weight, and with a margin less than the prescribed size, was ordered to be filed. *Calthrop v. Rummens*, Law Rep. 6 Chanc. 151.

(b) *Admissibility in evidence.*

20.—The answer of a defendant who was unable to be cross-examined on account of illness was not allowed to be read as evidence on his behalf. *Parker v. McKenna*, 43 Law J. Rep. (N.S.) Chanc. 802.

21.—An admission in an answer of one defendant of a certain fact, is not evidence of that fact against another defendant upon motion for decree, though notice to read the answer has been given. Where, however, a defendant objected to such evidence, the Court allowed the case to stand over, with leave for the plaintiff to file affidavits, deposing to the fact in question. *Saltmarsh v. Hardy*, 42 Law J. Rep. (N.S.) Chanc. 422.

(c) *Plea coupled with answer: irregularity.*

22.—The defendant, having put in a plea which was overruled with costs, obtained the common order in chambers to "plead answer or demur," and then put in a second plea in the same terms, coupled with his answer. Upon motion by the

plaintiff to take the second plea off the file for irregularity, it was ordered that the plea and answer should stand for the answer only, the defendant paying the costs of the motion; the plaintiff to have a fortnight to except. *McKewan v. Sanderson*, 42 Law J. Rep. (N.S.) Chanc. 788; Law Rep. 16 Eq. 317.

(d) *Sufficiency.*

[See PLEADING IN EQUITY, 12-15.]

(F) APPEAL AND RE-HEARING.

(a) *Right to appeal.*

23.—An appeal will not be allowed where the amount in dispute is only 1*l.* 15*s.* *In re the National Assurance and Investment Society*, 41 Law J. Rep. (N.S.) Chanc. 341; Law Rep. 7 Chanc. 221.

24.—The making of an order to dismiss a bill for want of prosecution is a matter within the discretion of the Judge to whose Court the cause is attached, and his refusal to make such an order ought not to be made the subject of an appeal. *Sheffield v. Sheffield*, 44 Law J. Rep. (N.S.) Chanc. 304; Law Rep. 10 Chanc. 206.

25.—The Court will not entertain an appeal from an order directing an issue, if it appears that there was any real question on which, in the exercise of his discretion, the Judge could order an issue to be tried. *Williams v. Guest*, 44 Law J. Rep. (N.S.) Chanc. 559; Law Rep. 10 Chanc. 467.

26.—The appointment of an official liquidator is within the discretion of a Judge, and no appeal can be had from his decision unless under very special circumstances. *In re the Albert Average Assurance Association*, 40 Law J. Rep. (N.S.) Chanc. 34.

The fact that a Judge has laid down as a rule for his own guidance that *ceteris paribus* he will appoint the nominee of the petitioner, is not a ground for an appeal. *Ibid.*

27.—On a summons that in taking accounts in chambers, the Chief Clerk might treat a certain statement as conclusive evidence, the Judge, after deciding the question, thought fit only to give a direction to his Chief Clerk without making any formal order:—Held, that no appeal could be brought from his decision, but that the party aggrieved must wait for the certificate. *Vyse v. Foster*, 44 Law J. Rep. (N.S.) Chanc. 344; Law Rep. 10 Chanc. 236.

Decision as to the extent of the decree in *Vyse v. Foster*, 42 Law J. Rep. (N.S.) Chanc. 245; Law Rep. 8 Chanc. 309, on appeal to the House of Lords, 44 Law J. Rep. (N.S.) Chanc. 37; Law Rep. 7 E. & L. App. 318. *Ibid.*

*Appeal from decision of Judge as arbitrator.*  
[See ARBITRATION, 3.]

(b) *Effect of enrolment of order.*

28.—A petition which has been dismissed on the merits will not be heard after enrolment of the order. *Ollerenshaw v. Harrop*, 43 Law J. Rep. (N.S.) Chanc. 584.

**29.**—Notice of an appeal motion which was served upon the respondent's solicitors was irregular by reason of it being neither dated nor signed by the appellants' solicitors, although their names appeared on the back of it. The irregularity having been discovered, the appellants' solicitors applied to the respondent to waive it, but he refused to do so and stated that he would avail himself of every technical objection. The appeal was afterwards set down for hearing, but no proper notice of its having been set down was served on the respondent's solicitors. Before the appeal came on to be heard, the respondent's solicitors enrolled the order appealed from. The appellant moved to have the enrolment vacated:—Held, that the respondent was under the circumstances entitled to avail himself of the irregularity in the notice of motion of appeal and to retain his enrolment. *In re the Limehouse Works Company (Lim.)*, 43 Law J. Rep. (n.s.) Chanc. 483; Law Rep. 9 Chanc. 266.

(c) *Mode of appealing.*

**30.**—Where a Judge of a Court of first instance declines to decide a question on a petition, and expresses his wish that it should be brought before the Appeal Court, the proper course is for the petitioner to present a short petition of appeal *pro forma*. *In re Earl Berkeley's Will*, 44 Law J. Rep. (n.s.) Chanc. 3.

(d) *Advancing appeal.*

**31.**—An appeal from a decree granting an injunction against the use of a trade-mark will be advanced, where the injury done by the continuance of the injunction would be irreparable. *Lazenby v. White*, Law Rep. 6 Chanc. 89.

(e) *Hearing of.*

**32.**—In ordinary cases of appeal only two counsel will be heard on the same side. *Hoare v. Brenridge*, 42 Law J. Rep. (n.s.) Chanc. 1.

**33.**—The rule that upon an appeal the whole case is open to the respondent applies where a motion has been ordered to stand over to the hearing of the cause and the order on the motion and the decree have been drawn up together. Therefore where an appeal was in such a case brought from the decree only, it was held that the respondents were entitled to have the order on the motion also disposed of by the Court of Appeal. *Middlemas v. Wilson*, 44 Law J. Rep. (n.s.) Chanc. 476; Law Rep. 10 Chanc. 232.

(f) *From County Court.*

**34.**—Parties who consented to the signing of a case for appeal from a County Court after the expiration of the thirty days limited by the above section,—Held, to have waived the objection as to time. *Ward v. Raw*, Law Rep. 15 Eq. 83.

**35.**—On a County Court appeal, no question will be entertained which is not submitted by the case as signed by the County Court Judge. *Williams v. Evans*, 44 Law J. Rep. (n.s.) Chanc. 319; Law Rep. 19 Eq. 547.

(G) *APPEARANCE.*

**36.**—It is irregular for a plaintiff to instruct a solicitor to take steps on behalf of a defendant of unsound mind. Where a plaintiff in a redemption suit, a co-mortgagor and brother of the defendant, adopted this course, and had appearance entered for the defendant, and obtained an order appointing her a guardian, the appearance and order were set aside. *Camps v. Marshall*, Law Rep. 8 Chanc. 462.

(H) *BILL.*

[See PLEADING IN EQUITY, 1-3.]

(a) *Delivery of copy.*

**37.**—The practice of the Record and Writ Clerks' Office is to produce the bill in a suit, or furnish a copy of it, after decree, to any person who desires it, but not before—except in a representative suit to members of the class represented—unless with the plaintiff's consent, or under special circumstances. *Coates v. Brown*, 42 Law J. Rep. (n.s.) Chanc. 378.

Where, in a suit for specific performance of a contract to sell, it was discovered that some other specific performance suit had been commenced against the defendants, but compromised,—Held, that the plaintiffs were entitled to a copy of the bill in the compromised suit, notwithstanding the opposition of the plaintiffs in that suit to any copy being furnished. *Ibid*.

(b) *Taking pro confesso.*

**38.**—A decree was taken *pro confesso* under 3 & 4 Will. 4. c. 36, against an absconding defendant. Service of the decree on the defendant under G. O. 22, rule 11, was dispensed with. *Manser v. Manser*, 42 Law J. Rep. (n.s.) Chanc. 390; Law Rep. 15 Eq. 259.

**39.**—Where a suit has been duly set down to take the bill *pro confesso*, the Court has, under the General Orders, discretion to require evidence of the truth of the statements in the bill. And in a case where it did not appear that the defendant had personal knowledge of the suit, such evidence was required. *Borrell v. Barr*, 42 Law J. Rep. (n.s.) Chanc. 879.

**40.**—Where a bill for foreclosure had been taken *pro confesso* against the defendants out of the jurisdiction, advertisements were allowed to be substituted for service of decree and the summons to proceed under the same and the plaintiff was allowed to proceed under the decree at the end of three months from the date of the advertisements. *Hyde v. Large*, Law Rep. 19 Eq. 48.

(c) *Schedule to.*

**41.**—Leave given to file a bill of complaint, with a schedule containing copies of pleadings in former suits which it was necessary to set out. *The Credit Foncier and Mobilier of England v. Lord Sondes*, Law Rep. 6 Chanc. 477.

(I) *CERTIORARI.*

**42.**—A writ of *certiorari* had been granted to bring up a suit in the Lord Mayor's Court into

the Court of Chancery. It then appeared upon the face of the bill in the Lord Mayor's Court that some of the parties were out of the jurisdiction of that Court. An order was made *ex parte* that the suit be retained in the Court of Chancery, without any enquiry or other preliminary proceedings in chambers. *Tracy v. The Open Stock Exchange Company*, 40 Law J. Rep. (n.s.) Chanc. 159; Law Rep. 11 Eq. 556.

#### (K) CHIEF CLERK'S CERTIFICATE.

43.—On a summons to vary the chief clerk's certificate no evidence can be used which is not mentioned in the certificate as having been before the chief clerk. *Budge v. Gummow*, 42 Law J. Rep. (n.s.) Chanc. 22.

44.—Upon the hearing of a summons to vary a chief clerk's certificate, evidence not mentioned in the certificate was not admitted. *Budge v. Gummow*, 41 Law J. Rep. (n.s.) Chanc. 520; Law Rep. 7 Chanc. 719.

#### (L) CONCURRENT SUITS.

45.—The hearing of a summons taken out by a creditor for administration of a testator's real and personal estate was directed to stand over upon an application on behalf of the defendants, the testator's personal representatives. The next day a second suit for administration of the same estate was instituted by another creditor against the same defendants, and (by the bill as amended) against the testator's heir-at-law. All the parties in that suit appeared by the same solicitors, who represented the defendants in the first suit. A decree was obtained in the second suit before the summons could be heard. Upon the application of the plaintiff in the first suit,—Held, that he was entitled to the conduct of the second suit by reason of the unfair advantage taken over him in the manner in which the decree in the first suit was obtained. *Rhodes v. Barrett*; *Singleton v. Barrett*, 41 Law J. Rep. (n.s.) Chanc. 103; Law Rep. 12 Eq. 470.

46.—After a suit had been instituted by trustees for executing the trusts of a settlement, two of the *cestuis que trust*, who were the defendants to the suit, filed their bill in another branch of the Court for a declaration that the settlement was void, or for its rectification, and so far as necessary, for the execution of the trusts thereof:—Held, that there was such common ground between the two suits as to bring them within the rule requiring a second bill relating to the same subject-matter as an existing suit to be instituted in that branch of the Court to which the first suit is attached, and that the second suit must be transferred accordingly, and the plaintiffs in that suit must pay the costs of the application for such transfer. *Sayers v. Corrie*; *Corrie v. Sayers*, 43 Law J. Rep. (n.s.) Chanc. 337; Law Rep. 9 Chanc. 52.

47.—Where a person knowing that a suit has been instituted in one branch of the Court for the administration of a testator's estate, files a bill in another branch of the Court for the same purpose,

the second cause will be ordered to be transferred to the Court to which the first cause is attached even after a decree has been made in the second cause, while no decree has been made in the first; and the plaintiff in the second cause will be ordered to pay the costs of the motion for transfer. *Lucas v. Siggers*; *Gray v. Siggers*, 41 Law J. Rep. (n.s.) Chanc. 364; Law Rep. 7 Chanc. 517.

48.—Where two suits as to the same matter are instituted in different branches of the Court, the plaintiff in the first suit ought, before moving to transfer the second suit to the branch of the Court in which the first is, to ask the plaintiff in the second suit for his consent to the application, and if he neglects to do so he may have to pay the costs of the application. *Lyall v. Weldhen*, Law Rep. 9 Chanc. 287.

49.—A plaintiff in an administration suit, who charges trustees with breach of trust, may bring his suit to a hearing, although the ordinary administration decree has already been obtained in a subsequent suit to which the plaintiff is not a party. If a second decree is made, both decrees ought to be prosecuted in the same branch of the Court. Where a first suit is stayed by reason of a decree in a second suit, the plaintiff in the first suit will ordinarily have the conduct of the decree. *Zambaco v. Cassavetti*, Law Rep. 11 Eq. 439.

#### (M) CONTEMPT.

50.—A plaintiff on whom a defendant, in contempt for not answering in time, leaves an office copy of his answer, but without any tender of costs, must be taken to have waived such tender if he silently retains the answer. *Roberts v. The Albert Bridge Company*, 42 Law J. Rep. (n.s.) Chanc. 767; Law Rep. 8 Chanc. 753.

51.—Although a publication by a newspaper proprietor in his paper of comments on a suit, before it comes to a hearing, is clearly a contempt of Court, yet where such comments are not malevolent or libellous, and the party coming to complain of them himself furnished the materials upon which they are founded, he will not be permitted, especially after a public apology in the offending newspaper, to take advantage of the technical contempt, and will not have his costs of proceedings instituted by him for a committal for the contempt. *Vernon v. Vernon*, 40 Law J. Rep. (n.s.) Chanc. 118.

*Order for payment of money: committal for contempt.* [See DEBTORS ACT, 2, 3.]

#### (N) DAMAGES.

[See INJUNCTION, 37-40].

#### (O) DEMURRER.

52.—When an order is made for the transfer of a cause during the time for setting down a demurrer and the order is not drawn up until the time has expired, the Court will allow the demurrer to be set down within four days after the order is drawn up. *Woodbridge v. Hoare*, 41 Law J. Rep. (n.s.) Chanc. 563.

## (P) DEPOSITION.

**53.**—*Semble*—the Court will not take the deposition of a witness off the file for irregularity in taking it. *De Britto v. Hillel*, 42 Law J. Rep. (n.s.) Chanc. 307; Law Rep. 15 Eq. 213.

Notice was given by the party that had obtained a commission to examine witnesses at Lisbon that their agent was proceeding there, and notice of the time and place of examination could be obtained of him at the Hotel D. at Lisbon. The Court refused to take the deposition of a witness examined at Lisbon off the file. *Ibid.*

The Court has power to dispense with notice under rule 22 of the Orders of the 5th of February, 1861, *ex post facto*. *Ibid.*

## (Q) DISMISSAL.

(a) *For want of prosecution.*

**54.**—A plaintiff, on being served with a notice of motion to dismiss for want of prosecution to which he was open, at once proceeded with the suit, and tendered to the defendants twenty shillings for their costs of the motion. The defendants had, however, already delivered their counsel's briefs, and incurred costs to a greater extent than the tender.—Held, that the plaintiff was liable to pay the defendants their costs actually incurred. *Wakefield v. Cruikshank*, 41 Law J. Rep. (n.s.) Chanc. 277.

**55.**—Upon a motion to dismiss a bill for want of prosecution, on the plaintiff's undertaking to speed the cause, the usual order was made, whereby the plaintiff was to file replication within fourteen days or the bill was to stand dismissed. The plaintiff, who was desirous to amend his bill, and had already prepared the amendments, omitted to state that fact to the Court, and being under a mistake as to the form in which the order had been drawn failed to file replication within the fourteen days, but filed one within the time within which he might have amended. The plaintiff moved to have the bill restored, but the motion was refused with costs. *Burkinshaw v. Wilson*, 40 Law J. Rep. (n.s.) Chanc. 512; Law Rep. 12 Eq. 103.

**56.**—The making of an order to dismiss a bill for want of prosecution is a matter within the discretion of a Judge to whose Court the cause is attached, and his refusal to make such an order ought not to be made the subject of an appeal. *Sheffield v. Sheffield*, 44 Law J. Rep. (n.s.) Chanc. 304; Law Rep. 10 Chanc. 206.

(b) *Charges of fraud not proved.*

**57.**—Where a bill to set aside a deed contains charges of fraud which are not proved, the bill, though dismissed as to those charges, need not be altogether dismissed if there are other charges which would be a ground for relief. When notice of intention to give in evidence the probate of a will must be given under 20 & 21 Vict. c. 79, s. 68. *Hilliard v. Eiffe*, Law Rep. 7 E. & L. App. 39.

## (R) ENROLMENT.

**58.**—A plaintiff, after having allowed all but a

few weeks of five years from the date of a decree dismissing his bill to elapse, obtained an order to enrol the decree. He was unable to complete the enrolment within the five years by reason of the necessity of reviving the suit in consequence of the death of a defendant of which he had not known when he obtained the order for enrolment. He then applied for liberty to enrol the decree notwithstanding the expiration of the five years. The application was refused. *Patch v. Ward*, 43 Law J. Rep. (n.s.) Chanc. 486; Law Rep. 7 Chanc. 269.

**59.**—Under the rule that an order is not to be enrolled after six months without special leave the Court has a discretion whether enrolment should be allowed, and where after an order as to the mode in which a case was to be tried an official liquidator had allowed much expense to be incurred under the order the discretion was exercised against him. *In re Charles Laffitte & Company*, Law Rep. 10 Chanc. 316.

**60.**—The plaintiff was a day too late in proceeding on a *caveat* against the enrolment of an adverse decree in consequence of a petition of appeal presented by him on the last day not being then answered, owing to the absence from office of the Lord Chancellor's principal secretary, and the defendant enrolled the decree. On the plaintiff's application the enrolment was vacated, but he was required to pay all the costs. *Blackman v. Cornish*, 42 Law J. Rep. (n.s.) Chanc. 576.

The twenty-eight days, within which by Consolidated Order xxiii., rule 27, the party who has entered a *caveat* must proceed after a docket for enrolment has been left, is not to be extended, because, according to the practice of the office, he only receives notice of the docket being left next day. *Ibid.*

**61.**—A fund was held in trust for a class of persons. B., who claimed to be a member of the class, obtained a decree against the trustees for the distribution of the fund. In this decree was inserted a declaration to the effect that B. was entitled to participate in the fund, and enquiries were directed as to what other persons were entitled. A., who was not a party to the suit, put in a claim to be a member of the class, and therefore entitled to participate in the fund; he also claimed the whole of the fund in case no other person should establish his membership of the class. Being desirous of disputing the title of the plaintiff, he presented a petition of rehearing, in order to strike out of the decree the declaration as to the plaintiff's title. This petition could not be heard in consequence of the decree having been enrolled. He therefore moved to vacate the enrolment:—Held, under such circumstances, that he was entitled to have the enrolment vacated, the costs of the application being ordered to be dealt with by the Judge on the rehearing. *Bruff v. Cobbold*; *Ex parte Ayres*, 41 Law J. Rep. (n.s.) Chanc. 402; Law Rep. 7 Chanc. 217.

**62.**—Sharp practice is no ground for vacating the enrolment of an order. *Ollerenshaw v. Harrop*, 43 Law J. Rep. (n.s.) Chanc. 584; Law Rep. 9 Chanc. 480.



A petition which has been dismissed upon the merits in the Court below will not be reheard in the Appeal Court when the order dismissing it has been enrolled. *Ibid.*

*Enrolment of order after irregular notice of appeal.* [See supra No. 29.]

(S) EVIDENCE.

(a) Notice to read.

**63.**—When notice of intention to give in evidence the probate of a will must be given under 20 & 21 Vict. c. 79, s. 68, considered. *Hilliard v. Eiffe*, Law Rep. 7 E. & I. App. 39.

**64.**—Where on an appeal notice is given to a party of the intention of his adversary to read a mass of affidavits to the admission of which such party objects, he will not, if the Court allows the objection, be entitled to the cost of taking copies. His proper course is to wait until the Court has considered the question of admissibility. *In re the Brompton and Longtown Railway Company, Shaw's Claim*, Law Rep. 10 Chanc. 186.

(b) *Vivâ voce* at hearing.

**65.**—A party will not be allowed to prove *vivâ voce*, at the hearing of a cause, documents affecting a material issue, of which no notice has been previously given to his opponent. The common order to prove documents *vivâ voce* at the hearing applies only to making good a merely technical defect or to curing an accidental slip. *Wilson v. Thornbury*, 44 Law J. Rep. (N.S.) Chanc. 242; Law Rep. 10 Chanc. 239.

**66.**—The making of an order, under rule 3 of the General Order of the 5th of February, 1861, to take evidence *vivâ voce* at the hearing of a cause, is a matter within the discretion of the Judge who has the conduct of the cause, and his decision upon an application to have the evidence so taken cannot be appealed from. *Ohlsen v. Terrero*, 44 Law J. Rep. (N.S.) Chanc. 155; Law Rep. 10 Chanc. 127.

Semble—an examiner has a discretion to allow a witness to be treated by the person who calls him as a hostile witness. *Ibid.*

(c) *Cross-cause.*

**67.**—The defendants to an original cause, in which replication had been filed, having instituted another suit which was in fact held to be a cross cause, filed only a small amount of evidence in the original cause; but two days before the evidence was closed in that cause, they filed a large bulk of evidence in the cross-cause, and on the day of publication in the original cause gave notice of motion for a decree in the cross-cause. They then obtained an order to use in the original cause all the evidence filed in the cross-cause. Both parties gave notice to cross-examine the other witnesses, and the plaintiffs in the cross-cause filed affidavits in reply in that cause. A motion by the plaintiff in the original cause, to have the last-mentioned affidavits suppressed, or to obtain leave to file further affidavits in reply to them, on the ground that they were in reply to his evidence

in the original cause, was refused, but the Court ordered the witnesses in both causes to be cross-examined in Court, at the hearing. *Hargreaves v. Hall; Hall v. Hargreaves*, 40 Law J. Rep. (N.S.) Chanc. 255; Law Rep. 11 Eq. 415.

(d) Burden of proof.

*Evidence on summons to vary chief clerk's certificate.* [See supra Nos. 43, 44.]

(e) Oral examination on oath.

**68.**—A decision having been partly founded on answers given by one of the parties in Court to questions from the Judge, it was ordered that the evidence should be mentioned in the decree. *Bousquet v. Bent*, 42 Law J. Rep. (N.S.) Chanc. 575.

(T) HEARING IN PRIVATE.

**69.**—Except where lunatics or wards of Court are affected, causes will not be heard in private unless with consent of both parties. *Quære*—whether it would not be otherwise if the whole object of the suit would be defeated by a public hearing. *Andrew v. Raeburn*, Law Rep. 9 Chanc. 522.

(U) INTEREST.

**70.**—Interest at 4l. per cent. was allowed on money which had been paid on an order which was reversed on appeal. *The Merchant Banking Company of London v. Maud*, 43 Law J. Rep. (N.S.) Chanc. 861; Law Rep. 18 Eq. 659.

(V) INTERROGATORIES.

*Amendment of Interrogatories.* [See supra No. 16.]

**71.**—The plaintiff being shortly about to go to India, effected with the defendant company a policy of assurance which contained conditions for the payment of extra premiums if the assured went beyond European limits, and for the policy being reinstated within six months after the expiration of the days of grace, upon payment of the premium, with a fine. A special premium was required from the plaintiff, but, as the defendants alleged, on account of his bad health, and not as the extra rate for residence in India. The plaintiff went to India and paid the premiums regularly for some years, but upon default having been then made in payment of one of the premiums within the days of grace, the defendants refused to reinstate the policy, except on the terms of the plaintiff paying the extra Indian rate for the whole period from the date when he went to India. The plaintiff filed his bill to enforce his claim to have a policy granted him at the rate of premium originally charged, with liberty to reside in India; and he interrogated the defendants as to their habit in similar cases, and called upon them to state, as examples of their practice, the particulars of the ten insurances effected by them on lives of persons about to start for India immediately preceding, and of the ten of such insurances immediately subsequent to the plaintiff's

insurance. The defendants having declined to answer this interrogatory:—Held, on exception, that the plaintiff was entitled to this discovery as evidence of the defendants' conduct. *Girdlestone v. The North British Mercantile Insurance Company*, 40 Law J. Rep. (N.S.) Chanc. 230; Law Rep. 11 Eq. 197.

**72.**—A bill was filed by a company to make the defendants (a solicitor and a mining agent) account for a secret profit made on the sale to the company of a colliery which the defendants were alleged to have purchased on their own account in the name of the ostensible vendor, and resold to the company at an advanced price while they were engaged in getting up the company, and acting in a fiduciary relation towards it. The defendants were interrogated as to the cheques drawn on a banking account opened for the purposes of the purchase:—Held, that the required discovery was immaterial to the real question in the suit (whether an agency had existed at the time of the purchase), and that the Court would not compel the defendants to answer the interrogatory. *The Great Western Colliery Company v. Tucker*, 43 Law J. Rep. (N.S.) Chanc. 518; Law Rep. 9 Chanc. 376.

**73.**—A defendant cannot compel a plaintiff to answer an interrogatory, which in effect asks him what evidence he has in favour of his case. Each party may obtain discovery of all matters relating to his own case, and is entitled to know what the opponent's case is, but not what is his evidence of it. *The Commissioners of Sewers of the City of London v. Glasse*; *Epping Forest case* (No. 2), 42 Law J. Rep. (N.S.) Chanc. 345; Law Rep. 15 Eq. 302.

Bill on behalf of the occupiers of land within a forest, whether residing within or without a certain manor, to establish rights of common over waste lands within that manor. Interrogatory by the defendant asking for instances in which rights of common over lands within the manor had been exercised by persons residing without it. Answer, declining to set out instances. Exception overruled, with costs. *Ibid.*

[And see PLEADING IN EQUITY, 12–15.]

#### (W) INVESTMENT.

**74.**—An order was made for the payment of 1,200*l.* (proceeds of a sale under the Settled Estates Act) into Court, and for re-investment thereof in land, and for interim investment in Consols:—Held, that the Accountant General was not bound to invest the money in Consols without a written request of the solicitor who paid it in. *In re Woodcock's Settled Estates*, 41 Law J. Rep. (N.S.) Chanc. 22; Law Rep. 13 Eq. 183.

"Cash under the control of the Court."  
[See SETTLED ESTATES ACT, 13–15, 17.]

#### (X) ISSUE.

**75.**—In a suit charging a defendant with fraud in the purchase of land, issues are not bad because they throw the burden of proving the affirmative, and shewing that the sale was *bonâ fide*, on the

defendant. The Court of Equity have a wide discretion in reviewing the decisions of juries, with which the Court of Appeal will be slow to interfere. The delay which will constitute a defence to a suit for relief founded on fraud must be delay commencing after the party had knowledge of the circumstances concerning the fraud. *Browne v. McClintock*, Law Rep. 6 E. & I. App. 456.

**76.**—Suit to set aside certain sales on the ground of collusion to procure a sale at an undervalue, alleging that, although the purchases were ostensibly made by U., B. was the real purchaser. Issues having been directed, it was found that as to one of the sales U. was the real purchaser. On further directions the Vice-Chancellor reviewed the evidence, and came to the conclusion that though this purchase had been really made by U., there was a secret understanding that B. should have the benefit of it, and he made an order declaring the purchase void:—Held, that this order could not be sustained, as it proceeded on a ground not raised by the pleadings. *Browne v. McClintock*, Law Rep. 6 E. & I. App. 434.

*Appeal from order directing issue.* [See supra No. 25.]

*In patent suit.* [See PATENT, 37, 38.]

(Y) LIS PENDENS.

[See that title.]

#### (Z) LONG VACATION.

**77.**—An application for payment out of a Parliamentary deposit not previously payable is long vacation business. *In re the Wigan Junction Railway Act*, 44 Law J. Rep. (N.S.) Chanc. 774; Law Rep. 10 Chanc. 541.

**78.**—Where a person, entitled to a vested interest in trust funds in Court, to be paid at twenty-one, would attain that age in the long vacation, a prospective order was made for the payment out of the fund to her at such date. *In re Pern's Trust Estate*, 42 Law J. Rep. (N.S.) Chanc. 880.

#### (AA) MOTION.

**79.**—When the Court orders a motion to stand till the hearing of the cause, it in effect reserves to itself the right of dealing differently with the costs of the motion, and those of the cause. *Singer v. Audsley*, 41 Law J. Rep. (N.S.) Chanc. 229; Law Rep. 13 Eq. 401.

*Costs of motion.* [See COSTS IN EQUITY, 38, 39.]

#### (BB) NE EXEAT REGNO.

**80.**—Where a sum admitted to be due is ordered to be paid on or before a certain day, a writ *ne exeat regno* may be issued against the debtor before the day has arrived; the order amounting to an immediate judgment, though payment is deferred. *Sobey v. Sobey*, 42 Law J. Rep. (N.S.) Chanc. 271; Law Rep. 15 Eq. 200.

In a suit for an account the writ *ne exeat regno* can be obtained against a co-defendant. *Ibid.*

## (CC) NEXT FRIEND.

**81.**—A bill was filed in the name of an infant having a very small interest:—Held, that the Court could not look into the motives of the next friend. *Dance v. Goldingham*, 42 Law J. Rep. (n.s.) Chanc. 777; Law Rep. 8 Chanc. 902.

Such a suit can be maintained by one *cestui que trust* without making the others parties. *Ibid.*

**82.**—On the death of the next friend of an infant plaintiff whose father and mother were dead, the infant's paternal uncle, by his solicitors (who were not the solicitors of the plaintiff on the record), obtained an order of course appointing them solicitors of the plaintiff in the suit, and another appointing the uncle next friend. On motion by the former solicitors of the plaintiff to discharge these orders,—Held, that they were properly obtained, and motion dismissed with costs. *Talbot v. Talbot*, 43 Law J. Rep. (n.s.) Chanc. 352; Law Rep. 17 Eq. 347.

**83.**—A suit instituted by a next friend on behalf of a person of unsound mind, not so found by inquisition, becomes absolutely paralysed by a change in the status of the plaintiff. If he becomes of sound mind there is no pretext for the continued intervention of the next friend; if he is found a lunatic by inquisition, and is thus placed under the protection of the Crown, the suit should be continued only with the sanction of the Court in Lunacy. *Beall v. Smith*, 43 Law J. Rep. (n.s.) Chanc. 245; Law Rep. 9 Chanc. 85.

Every proceeding taken in the suit after the inquisition, whether or not a committee has been appointed, is irregular and void and a contempt of the Court in Lunacy. A suit on behalf of a trader who had become deranged, for an account against his agent and manager, and the appointment of a receiver of his stock-in-trade, &c., was instituted by solicitors who had occasionally acted for the plaintiff, but were not his ordinary family solicitors. A receiver was appointed in the suit with the concurrence of the family solicitor, who consented upon the understanding that no further steps should be taken without notice to him. The suit was proceeded with without such notice. A decree directing accounts and enquiries was obtained, the accounts were taken, the chief clerk made his certificate, and an order on further consideration was obtained directing taxation and payment of the costs of suit, which were paid out of the plaintiff's estate. Meanwhile, previously to the last-mentioned order, the plaintiff was found a lunatic by inquisition; but no committee was appointed until after the said order. The committee with the sanction of the Master in Lunacy presented a petition for the purpose of setting aside as invalid the proceedings in the suit subsequent to the finding in lunacy:—Held, that all proceedings after the appointment of the receiver were unauthorized and improper, and all after the finding on the inquisition were irregular and void, and that the solicitors of the next friend were liable to refund the costs so paid out of the lunatic's estate under the orders so irregularly obtained and to pay the costs of the petition. *Ibid.*

## (DD) NEW TRIAL.

**84.**—The Courts of Equity have a wide jurisdiction in reviewing the decisions of juries with which the Court of Appeal will be slow to interfere. *Browne v. McClintock*, Law Rep. 6 E. & I. App. 456.

## (EE) ORDERS AND DECREES.

## (a) Service: effect of, &amp;c.

[See *infra* Nos. 122–129.]

**85.**—A testator invested certain moneys in the name of his sister, and made a will giving her an annuity and appointing the plaintiffs his residuary legatees. The plaintiffs then obtained the ordinary administration decree against the executors, served it on the testator's sister, and moved for an injunction to restrain her from dealing with the fund invested in her name by the testator which she claimed as her own:—Held, that the question between the testator's estate and his sister could not be tried in this way, but required the institution of a distinct suit. *Walker v. Seligmann*, 40 Law J. Rep. (n.s.) Chanc. 601; Law Rep. 12 Eq. 152.

**86.**—An expectant heir not properly made a party to a suit, who puts in an answer disputing the plaintiff's title, and allows a decree to be made against him, instead of getting himself dismissed from the suit, will be bound by the decree so made. *Collier v. Walters*, 43 Law J. Rep. (n.s.) Chanc. 216; Law Rep. 17 Eq. 252.

## (b) Correction of error.

**87.**—An order which had been drawn up for payment of a share of a fund to a married woman described under her previous name and as discovered corrected on her *ex parte* application. *In re Robinson's Trusts*, 42 Law J. Rep. (n.s.) Chanc. 354.

## (c) Form of.

*Entering evidence taken orally.* [See *supra* No. 68.]

*Form of order on payment in of miscellaneous security.* [See *infra* No. 88.]

## (FF) PARTITION SUITS.

[See PARTITION.]

## (GG) PARTIES.

[See that title.]

## (HH) PAYMENT AND TRANSFER.

## (a) Into Court.

**88.**—Form of order where miscellaneous securities are brought into Court under the Court of Chancery (Funds) Act, 1872, ss. 3, 6, 10. *Povak v. Walker*, Law Rep. 15 Eq. 316.

**89.**—Stocks and shares to be paid into Court under the Court of Chancery (Funds) Act, 1872, should be transferred to "the account of the Paymaster-General for the time being on behalf

of the Court of Chancery." *In re Stephens*, Law Rep. 8 Chanc. 465.

**90.**—In urgent cases, and especially in injunction suits, parties should now proceed under the Chancery Funds Act and Rules, 1872, rule 12, and thereby obviate all unnecessary delay in obtaining their orders. *Brand v. Blow*, 43 Law J. Rep. (N.S.) Chanc. 528.

**91.**—A *curator bonis* and *factor loco tutoris* of Scotch infants,—Held, not bound to pay into Court assets belonging to the infants, receivable under an English will, of which the curator was administrator, and which was in course of administration by the Court. *Mackie v. Darling*, Law Rep. 12 Eq. 319.

**92.**—Where it appears by a defendant's affidavit, filed on an enquiry, that he has money in his hands, he may be ordered to pay it in after decree and before further consideration. *Dunne v. English*, Law Rep. 18 Eq. 524.

*Order against person not a party to suit.*  
[See SEQUESTRATION.]

(b) *Out of Court.*

(1) *To tenant in tail.*

**93.**—Fund in Court exceeding 400*l.* paid to tenant in tail without a disentailing deed having been executed. *In re Row's Estate*, 43 Law J. Rep. (N.S.) Chanc. 347; Law Rep. 17 Eq. 300.

**94.**—Per Malins, V.C., on payment out under the Leases and Sales of Settled Estates Act to a tenant in tail a disentailing deed is unnecessary. *In re Wood's Settled Estates*, Law Rep. 20 Eq. 372.

[And see LANDS CLAUSES ACT, 39.]

(2) *To married woman.*

**95.**—Where a woman, aged forty-nine years and nine months, had been married to her husband twenty-six years without issue, the Court presumed that she would never have a child by him. *In re Millner's Estate*, 42 Law J. Rep. (N.S.) Chanc. 44; Law Rep. 14 Eq. 245.

**96.**—Where a married woman entitled to a fund in Court was resident abroad, the Court accepted as evidence of no settlement, the affidavit of a solicitor, stating that he had been distinctly informed by her and her husband that there was no settlement, and also facts which rendered the existence of any settlement improbable. *Woodward v. Pratt*, 42 Law J. Rep. (N.S.) Chanc. 891; Law Rep. 16 Eq. 127.

**97.**—Payment out to married woman resident abroad under power of attorney. *Allen v. Forbes*, 40 Law J. Rep. (N.S.) Chanc. 530.

(3) *In other cases.*

**98.**—In the absence abroad of one of several trustees the Court ordered a sum of money to be paid to the other trustees without requiring the absent trustee to join in giving the receipt by power of attorney. *Clark v. Penwick*, 42 Law J. Rep. (N.S.) Chanc. 320.

**99.**—Purchase-money paid into Court by a railway company for charity lands taken by them was

ordered to be paid out to the trustees of the charity as persons absolutely entitled under section 78 of the Lands Clauses Act. *In re Spurstowe's Charity*, 43 Law J. Rep. (N.S.) Chanc. 512; Law Rep. 18 Eq. 279.

**100.**—A., entitled for life to the dividends of a fund in Court, charged them by way of mortgage with the payment of an annuity to B. during the life of A. In 1827 an order was made for payment to B. during the life of A. of a sufficient part of the dividends to answer the annuity. The annuitant died in 1873, in the lifetime of the grantor:—Held, that the case was within Rule 22 of the Chancery Funds Rules of 1872, and that the executor of the annuitant was entitled to have the payment continued to him without any fresh order. *Chapman v. Chapman*, 43 Law J. Rep. (N.S.) Chanc. 600; Law Rep. 17 Eq. 350.

**101.**—When it is required to transfer a fund in Court from the credit of a cause or matter in the Court of Chancery in England to the credit of a cause or matter in the Court of Chancery in Ireland, the order should direct the fund to be transferred into the name of the Accountant-General of the Court of Chancery in Ireland, to be by him forthwith transferred, with his name as Accountant-General of the Court of Chancery in Ireland, to the credit of the cause or matter in question. *Vaughan v. The Marquis of Headfort*; *Cockburn v. The Marquis of Headfort*, 42 Law J. Rep. (N.S.) Chanc. 456; Law Rep. 15 Eq. 173.

[And see LANDS CLAUSES ACT; SETTLED ESTATES ACT; TRUSTEE, D.]

(II) PETITIONS.

**102.**—A testator bequeathed a legacy to Mrs. C. "for her absolute use and benefit, except as hereinafter limited," and directed the same with other legacies to females, to be invested and the interest therefrom to be for the legatees' separate use; and in case any of the legatees should become bankrupt, or assign the interest bequeathed to her, the same was to fall into the testator's residuary estate, "except in respect of Mrs. C., whose legacy is to go to her children, according to her appointment, and in default, to them absolutely." By Mrs. C.'s marriage settlement her husband had covenanted to settle all after-acquired property of his wife. Mrs. C. died without having become bankrupt or assigned her interest in the legacy, and having by will appointed the same to her children equally. The Commissioners of Inland Revenue thereupon insisted that Mrs. C.'s share did not go to her children directly under the will, but that her husband must take out administration to her estate, in order to obtain possession of it. By consent the question was raised upon a petition for the opinion of the Court under Lord St. Leonards' Act (22 & 23 Vict. c. 35, s. 30):—Held (not without doubt), that by consent the question, although between the Crown and the subject, might be decided on this petition. Also, that under the will the legacy upon Mrs. C.'s death went directly to her children. *In re Ware's Trusts*, 41 Law J. Rep. (N.S.) Chanc. 121.

*Rehearing petition.* [See supra Nos. 28, 29.]  
*Costs of petition.* [See COSTS IN EQUITY, 29-37.]

*Revivor on death of petitioner.* [See infra No. 109.]

*Amendment of petition.* [See supra No. 17.]

*Service of petition.* [See infra Nos. 123, 124.]

(KK) PRO CONFESSO.

[See supra Nos. 38-40.]

(LL) PRODUCTION OF DOCUMENTS.

[See that title.]

(MM) RECEIVER.

[See that title.]

(NN) REVIVOR AND SUPPLEMENT.

(a) Order of revivor.

(1) Death of sole plaintiff.

**103.**—On death of sole plaintiff before decree, leaving a defendant his executor the common order to revive cannot be made. *Bates v. Bates*, 41 Law J. Rep. (N.S.) Chanc. 280; Law Rep. 13 Eq. 138.

**104.**—On the 14th of July, 1868, the plaintiff's bill was dismissed. On the 10th of July, 1871, the plaintiff presented a petition of appeal, but he died before it was heard. In May, 1872, his devisee and executor obtained an order of course to revive the suit, but this order was discharged by Wickens, V.C., as irregular. Application was then made to the Court of Appeal by an original motion. An order was made that the cause and the petition of appeal which had become abated by the death of the plaintiff should stand revived at the suit of the devisee and executor, and that he should be at liberty to carry on and prosecute the cause and the proceedings therein, including the petition of appeal, and liberty was given to amend the petition of appeal. *Chadwick v. Chadwick*, 42 Law J. Rep. (N.S.) Chanc. 805; Law Rep. 8 Chanc. 926.

**105.**—The death of a sole plaintiff, after argument and before judgment, does not prevent the delivery thereof, and it will be entered "nunc pro tunc," as of the date when the arguments were concluded. *Turner v. The London and South-Western Railway Company and Ringwood, &c., Railway Company*, 43 Law J. Rep. (N.S.) Chanc. 430; Law Rep. 17 Eq. 561.

**106.**—An administration suit by a trustee against the residuary devisees and legatees, one of whom was co-trustee, was allowed to be revived by the common order upon the death of the plaintiff. *Edmonson v. Sharp*; *Dean v. Sharp*, Law Rep. 12 Eq. 198.

(2) Transfer of plaintiff's interest.

**107.**—Order of revivor on supplement upon transfer of interest of co-plaintiff after decree in foreclosure suit. *Ingham v. Waskett*, 40 Law J. Rep. (N.S.) Chanc., 339; Law Rep. 11 Eq. 283.

**108.**—When a decree has been made in a foreclosure suit, and the plaintiff has subsequently transferred his interest, the transferee may obtain an order of revivor under 15 & 16 Vict. c. 86, s. 52, whether the transfer took place before or after the chief clerk had made his certificate. *Bibby v. Naylor*, 43 Law J. Rep. (N.S.) Chanc. 405; Law Rep. 17 Eq. 14.

(3) Death of petitioner.

**109.**—On a petition under the Lands Clauses Act to sanction an investment in land, an order was made approving the investment and directing a reference as to title. Before the order was fully worked out, the petitioner died. On the application of his executors, it was ordered that the proceedings should be revived for their benefit. *In re Youl*, 42 Law J. Rep. (N.S.) Chanc. 900; Law Rep. 16 Eq. 106.

(4) Devolution of defendant's interest on co-plaintiff.

**110.**—An order of revivor may be obtained on application of a plaintiff against a co-plaintiff on whom the interest of a defendant has devolved after an order on further consideration. *Battison v. Hobson*, 40 Law J. Rep. (N.S.) Chanc. 378.

(5) Absence of personal representative.

**111.**—The plaintiff in an administration suit, tenant for life of the estate, died after decree and before further consideration. There being no legal personal representative of the plaintiff constituted, one defendant obtained an order to revive without a representative of the deceased plaintiff, but without prejudice to such representative, when constituted, intervening. *Hayward v. Pile*, 41 Law J. Rep. (N.S.) Chanc. 778; Law Rep. 7 Chanc. 634.

(6) Defective suit: leave to take proceedings off file.

**112.**—When a suit has become defective, and further proceedings have unwittingly been taken in it, the Court will give leave to take such further proceedings off the file, in order to save the necessity of filing a supplemental bill. *Cuthbert v. Wharmby*, 41 Law J. Rep. (N.S.) Chanc. 216; Law Rep. 13 Eq. 202.

(7) Special circumstances.

**113.**—Order of revivor made under special circumstances. *Scott v. Maxwell*, 41 Law J. Rep. (N.S.) Chanc. 600.

(b) Revivor for costs.

**114.**—The provision, abolishing the rule that there shall be no revivor for costs, contained in 33 & 34 Vict. c. 28, s. 19, does not apply where the abatement took place before the passing of the Act. *Doggett v. The Eastern Counties Railway Company*, 40 Law J. Rep. (N.S.) Chanc. 262; Law Rep. 6 Chanc. 474.

A decree was made in 1842, in the usual form, for specific performance of a purchase and for payment by the defendants of the purchase-money and costs of the suit, certain enquiries and accounts

being directed. By arrangement the purchase-money was paid and the conveyance completed, the solicitors for the defendants undertaking to pay the costs. In the year 1857 the suit became abated by the deaths of the plaintiffs:—Held, that no revivor could be had under the recent Act for the purpose of obtaining payment of the costs. *Ibid.*

The application was made by the representative of the plaintiff, who pre-deceased his co-plaintiff:—Held, that he was not the proper person to make the application. *Ibid.*

(c) *Supplemental bill.*

(1) *Change of interest after decree.*

**115.**—After the decree was made in an administration suit the number of a class interested in the residue of the estate of the testatrix was increased by the birth of a child of one of the tenants for life. Some proceedings were taken in the suit after his birth:—Held, that the infant could not be bound by the proceedings by means of the common order to revive, but that a supplemental bill must be filed. *Askew v. Rooth*, 44 Law J. Rep. (N.S.) Chanc. 200.

(2) *Facts discovered since decree.*

**116.**—A common administration decree having been made, an infant interested in the estate some years afterwards presented a petition by her next friend for leave to file a supplemental bill, with the object of charging a trustee of the estate with a breach of trust, which she alleged had been discovered since the date of the decree. The Court granted leave accordingly, without requiring an affidavit by the next friend that the alleged breach of trust could not with reasonable diligence have been discovered at the date of the decree. *In re Hoghton's Estate; Hoghton v. Fiddley*, 43 Law J. Rep. (N.S.) Chanc. 758; Law Rep. 18 Eq. 573.

Semble—in such a case, the object being to obtain an addition to a decree already made, the proper mode of applying for leave is by petition. *Ibid.*

(OO) SALES AND PURCHASES UNDER DIRECTION OF THE COURT.

(a) *Mode of conducting sale.*

**117.**—The Court has jurisdiction to direct an estate to be sold by auction by the Chief Clerk, without the employment of an auctioneer. And, semble—this jurisdiction will be exercised, if all parties interested are before the Court, and concur in desiring the sale so to be made. *Pemberton v. Barnes* (No. 2), 41 Law J. Rep. (N.S.) Chanc. 209; Law Rep. 13 Eq. 349.

**118.**—When the Court has made an order for the sale of property by public auction, and the sale has proved abortive, the parties cannot make a valid contract for sale of the property under the order by private tender without the personal sanction of the Judge who made the order; it is not sufficient for them to have obtained the sanction of the chief clerk. *Berry v. Gibbons*, 42

Law J. Rep. (N.S.) Chanc. 231; Law Rep. 15 Eq. 159.

**119.**—Although in sales directed by the Court, it is usual to fix the reserved price at the amount at which the estate has been valued, an exception will be made where a mortgagee, who being also a trustee, is incapable of bidding, is desirous of having it fixed at an amount sufficient to cover his debt. *Tennant v. Trenchard*, 41 Law J. Rep. (N.S.) Chanc. 779.

(b) *Opening biddings.*

**120.**—In order to justify opening the biddings under the Sales of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), after a sale by the Court there must be fraud or conduct bordering on fraud, *i.e.*, there must be some impropriety of conduct, not merely error of judgment, which shews that the owners of the estate have not been fairly dealt with. *Delves v. Delves*, Law Rep. 20 Eq. 77.

(c) *Sale of infant's property.*

[See INFANT, 7, 8.]

(PP) SEQUESTRATION.

[And see SEQUESTRATION.]

**121.**—Dividends already accrued on a fund in Court to which a married woman was entitled for life for her separate use without power of anticipation ordered to be paid to the sequestrators of her property on their petition. *Claydon v. Finch*, 42 Law J. Rep. (N.S.) Chanc. 416; Law Rep. 15 Eq. 266.

**122.**—Sequestrators were held entitled to attach a deposit on an appeal made by, and which had been ordered to be returned to, the person against whom the writ of sequestration had issued. *Conn v. Garland*, Law Rep. 9 Chanc. 101.

(QQ) SERVICE.

(a) *Of petition.*

**123.**—Petition for the opinion of the Court as to investments by English and Irish trustees of the will of a testator whose domicile was Irish, the domicile of the tenant for life being English, No application having been made to the Irish Court of Chancery, this Court exercised jurisdiction and did not require the petition to be served on any person. *In re French's Trusts*, Law Rep. 15 Eq. 68.

**124.**—The Court has power to order service of a petition under the Trustees Relief Act upon a respondent out of the jurisdiction, in the same manner as in the case of proceedings commenced by bill. *In re John Haney*, 44 Law J. Rep. (N.S.) Chanc. 272; Law Rep. 10 Chanc. 275.

(b) *Of decrees.*

*As to service of decree on taking bill pro confesso.* [See supra 38-40.]

(c) *Out of jurisdiction.*

**125.**—On an *ex parte* motion, founded on an affidavit that the defendant was in Glasgow, leave

was given to serve a copy of the bill and interrogatories on the defendant in Scotland, "or elsewhere out of the jurisdiction." Service was effected in Glasgow. On motion to set aside the order for irregularity,—Held, that the order, though irregular in form, would not be set aside, but no costs were given to the respondent. *The Phospho-Guano Company (Lim.) v. Guild*, 43 Law J. Rep. (n.s.) Chanc. 360; Law Rep. 17 Eq. 432.

A bill was filed by the P. Company, which had its registered office in England, against G., who was resident out of the jurisdiction, asking for a declaration that G. was a trustee of certain shares held by him in the company for the benefit of the company, and for incidental relief:—Held, that this Court was the proper forum in which to try the matter. *Ibid.*

**126.**—Upon a petition under the Trustees Relief Act, the Court has jurisdiction to order service on a respondent out of the jurisdiction, and also substituted service. *In re Bonelli's Electric Telegraph Company; Cook's Claim*, 43 Law J. Rep. (n.s.) Chanc. 720; Law Rep. 18 Eq. 655.

(d) *Substituted service.*

[See last case.]

**127.**—Substituted service of a notice of motion for an injunction and receiver allowed on three out of five partners, the other two being out of the jurisdiction. *Leese v. Martin*, Law Rep. 13 Eq. 77.

**128.**—Where, in a creditor's suit for administration of the real and personal estate of an intestate, the heir-at-law had gone out of the jurisdiction after the service of the bill, but without having appeared, and it appeared that the real estate had been sold by a mortgage, and an appearance had been entered for the heir-at-law:—Held, that substituted service of the notice of motion for decree upon the administratrix for the heir was sufficient. *Deanes v. Kitchen*, Law Rep. 13 Eq. 461.

**129.**—Where the medical officer of an asylum refused to allow service of a bill on a lunatic who was not so found by inquisition the Court allowed substituted service on the medical officer. *Raine v. Wilson*, 43 Law J. Rep. (n.s.) Chanc. 460; Law Rep. 16 Eq. 576.

(RR) *SHORT CAUSE.*

**130.**—The certificate of the plaintiff's counsel is *prima facie* ground for setting down a cause as short. If a defendant desires it to go into the general paper, he must shew some fair reason: if he do not, it will be heard short. *Felstead v. Gray*, Law Rep. 18 Eq. 92.

**131.**—Where a cause for the administration of the real and personal estate of a testator has been instituted by one creditor, and a summons for the administration of the personal estate only has been taken out by another creditor, which is returnable before the cause can be heard as a short cause, the Court will, with the consent of all parties to the cause, make an immediate adminis-

tration decree on motion, without requiring the cause to be in the paper, and heard as a short cause. *Scaffold v. Hampton*, 43 Law J. Rep. (n.s.) Chanc. 137.

Semble—the rule is the same, even if the summons is for the administration of the real as well as the personal estate. *Ibid.*

(SS) *SPECIAL CASE.*

**132.**—Where, after a special case has been set down for hearing a female party to it marries, the order setting down the case for hearing should be discharged, the case should be amended by making the husband a party, and a new order for setting it down should be obtained. *Atty v. Etough*, 41 Law J. Rep. (n.s.) Chanc. 782; Law Rep. 13 Eq. 462.

**133.**—When, after a special case has been set down for hearing, a child is born who is a necessary party to the case, the order for setting down the original case should be discharged, and the child brought before the Court by amendment of the special case. *Savage v. Snell*, 40 Law J. Rep. (n.s.) Chanc. 216; Law Rep. 11 Eq. 264.

**134.**—The provisions of Statute, 15 & 16 Vict. c. 86, s. 61, extend to a special case. *Palmer v. Flower*, 41 Law J. Rep. (n.s.) Chanc. 193; Law Rep. 13 Eq. 250.

**135.**—On special case under 22 & 23 Vict. c. 35 and 23 & 24 Vict. c. 38 the Court declined to give power to trustees to grant leases of real estate for a term not exceeding ten years. *Naylor v. Arnitt* (1 Russ. & M. 501) disapproved of. *In re Shaw's Trusts*, Law Rep. 12 Eq. 124.

**136.**—Special case amended by leave at the hearing by adding a party in existence before the case was filed, but accidentally omitted, and ordered to be set down as amended against the added defendant. *Barnaby v. Tussell*, Law Rep. 11 Eq. 363.

(TT) *SPECIAL EXAMINER.*

**137.**—A person summoned under section 115 of the Companies Act, 1862, is not entitled to be heard on the appointment of the special examiner before whom he is to be examined. *In re The Contract Corporation; Hakim's case*, 41 Law J. Rep. (n.s.) Chanc. 225; Law Rep. 13 Eq. 27.

(UU) *STAYING PROCEEDINGS.*

(a) *Pending appeal.*

**138.**—Where a decree has been made for the payment of money, it is the general rule to stay proceedings pending an appeal, when the party against whom the decree is made pays the money into Court, and the appeal is not frivolous. *Touche v. The Metropolitan Railway Warehousing Company*, 40 Law J. Rep. (n.s.) Chanc. 496.

A decree was made for payment to two plaintiffs of the sum of 2,000*l.* One of the plaintiffs was abroad. The defendants appealed from the decree, and stated that a Queen's counsel had advised that the appeal would succeed:—Held, that it was a matter of course to stay proceedings upon

the defendants paying the money into Court. *Ibid.*

(b) *In other cases.*

**139.**—On a bill for an account under a French contract of moneys in the hands of foreign merchants in London, and to restrain them from handing over such moneys to one of the parties to the contract, the Court refused to stay proceedings pending litigation in France as to the construction of the contract, there being portions of the relief sought as to which the defendants were bound to answer, and the motion being in the nature of a demurrer. *Wilson v. Ferrand*, Law Rep. 13 Eq. 362.

**140.**—When the plaintiff is in contempt for non-payment of costs of an interlocutory application, and the defendant has obtained an order staying further proceedings on the plaintiff's part until such costs are paid, a motion by the defendant, asking the Court to fix a time for payment of the costs, and in default to dismiss the bill, is irregular. *Gould v. Twine*, 43 Law J. Rep. (n.s.) Chanc. 381.

**141.**—Proceedings in a suit by a foreign government were stayed until the means of discovery were secured in a cross-suit. Dicta of Lord Chelmsford and Lord Cairns in *The United States of America v. Wagner* (36 Law J. Rep. (n.s.) Chanc. 624; Law Rep. 2 Chanc. 582) followed. *The Republic of Peru v. Weguelin*; *Weguelin v. The Republic of Peru*, 44 Law J. Rep. (n.s.) Chanc. 583; Law Rep. 20 Eq. 141.

#### (VV) STOP ORDER.

*Stop order: costs of.* [See COSTS IN EQUITY, 30.]

#### (WW) SUBJECT-MATTER.

*Suit for subject-matter less than sixty shillings: "special circumstances" within Cons. Ord. ix. 1.* [See MARINE INSURANCE, 50.]

*Smallness of interest.* [See supra No. 81.]

#### (XX) SUIT IN FORMÂ PAUPERIS.

**142.**—A person who has valuable property which he is restrained by injunction from selling or removing, will not be permitted to sue *in formâ pauperis*. *Ridgway v. Edwards*, Law Rep. 9 Chanc. 143.

#### (YY) TRANSFER OF CAUSE.

[See supra CONCURRENT SUITS, Nos. 45-49.]

#### (ZZ) WITNESS.

**143.**—A party attending proceedings in chambers under an administration decree, is entitled to cross-examine before one of the examiners of the Court, as to matters in question connected with the accounts, a defendant executor, whose accounts are being settled by the chief clerk. But notice of such cross-examination should be given before the chief clerk's decision has been stated, and the cross-examination should be strictly confined to the particular matter in dispute. *Glover v. Ellison*, 41 Law J. Rep. (n.s.) Chanc. 288.

**144.**—The party called upon to produce his witness for cross-examination by the opposite party in the cause must, in the first instance, pay the expenses of the witness's production. *Richards v. Goddard*, 43 Law J. Rep. (n.s.) Chanc. 144; Law Rep. 17 Eq. 238.

**145.**—A defendant who is summoned to cross-examine on an account he has filed, is entitled to notice of the items objected to. *McArthur v. Dudgeon*, 42 Law J. Rep. (n.s.) Chanc. 263 Law Rep. 15 Eq. 102.

*Cross-examination on affidavit.* [See supra Nos. 9-13.]

### PRE-EMPTION.

An Act of Parliament gave a company power to buy lands for the purpose of its undertaking, and to re-sell any lands which it might purchase but not make use of, and directed it before selling any land, to offer the same to the person or persons of whom it was purchased, but it fixed no limit of time within which the sale of surplus land was to be made:—Held, that the right of pre-emption thus given was merely personal to an individual from whom land was purchased, and was extinguished on his death. *The Highgate Archway Company v. Jeakes*, 40 Law J. Rep. (n.s.) Chanc. 408; Law Rep. 12 Eq. 9.

### PREScription.

The Prescription Act (2 & 3 Will. 4. c. 71) has not taken away any of the modes of claiming easements which existed before the statute. *Aynsley v. Glover*, 44 Law J. Rep. (n.s.) Chanc. 523; Law Rep. 10 Chanc. 283.

*Repair of fences.* [See NEGLIGENCE, 12.]

*Light and air.* [See LIGHT AND AIR, 1, 2, 4; EASEMENT, 5, 6.]

*Right of common.* [See COMMON, 2.]

*Watercourse.* [See that title.]

### PRESUMPTION.

(A) OF DEATH.

(B) OF MARRIAGE.

(C) AGE OF CHILD-BEARING.

(D) OF OWNERSHIP OF HIGHWAY.

#### (A) OF DEATH.

**1.**—The death of a legatee is presumed after he has not been heard of for seven years, and there is no presumption of law that he lived beyond the first day of the seven years; but the onus of proving that he survived a given day, lies on those who claim under him. And the fact that the person who takes in case of lapse, whether as next-of-kin or as residuary legatee, is the one to commence



proceedings to obtain payment of the money to himself, does not shift the onus of proof. *In re Lewes' Trusts*, 40 Law J. Rep. (N.S.) Chanc. 602; Law Rep. 6 Chanc. 356.

2.—Where a person in needy circumstances, who was accustomed to receive certain small quarterly sums, disappeared on a tour after receiving payment in March, 1866, never demanded payment in June, 1866, and was, in fact, never heard of after she disappeared,—Held, as between those in remainder and the mortgagees of her life interest, that she must be presumed to have died shortly after June, 1866. *Hickman v. Upsall*, Law Rep. 20 Eq. 136.

#### (B) OF MARRIAGE.

[See LEGITIMACY DECLARATION ACT, 1.]

#### (C) AGE OF CHILD-BEARING.

3.—Money ordered to be paid out of Court on the presumption that a woman aged forty-nine years and nine months, who had been long married to a husband still living, and had never had any children, would not have any children by him. *In re Milner's Estate*, 42 Law J. Rep. (N.S.) Chanc. 44; Law Rep. 14 Eq. 245.

4.—The Court will presume a woman to be past child-bearing when she is in her fifty-fourth year. *In re Widow's Trust*, 40 Law J. Rep. (N.S.) Chanc. 380; Law Rep. 11 Eq. 408.

#### (D) OF OWNERSHIP OF HIGHWAY.

5.—Evidence to the effect that the lords of a manor had received tolls and other payments in respect of a certain street was held sufficient to rebut the presumption of law that the owners of the lands abutting on the street, were entitled to the soil *ad medium filum viæ*. *Beckett v. The Corporation of Leeds*, Law Rep. 7 Chanc. 421.

### PREVENTION OF CRIME.

[Amendment of Penal Servitude Acts and of Vagrant Act. Provisions as to punishment of certain offences. Regulations as to evidence of vagrancy, previous convictions, and receiving stolen property. 34 & 35 Vict. c. 112.]

### PRINCIPAL AND AGENT.

#### (A) RELATION OF PRINCIPAL AND AGENT HOW CONSTITUTED.

#### (B) RIGHTS AND LIABILITIES OF PRINCIPAL.

##### (a) Liability to indemnify agent.

##### (b) Liability as affected by usage or custom of trade.

##### (1) When usage is binding on principal.

##### (2) Evidence of custom making agent liable.

##### (3) Rules of Stock Exchange.

##### (c) Liability of disclosed principal on written contract by agent.

##### (d) Liability of undisclosed principal.

##### (1) Where principal has settled with agent.

##### (2) Election to treat agent as debtor.

##### (e) Rights of principal against third parties.

##### (1) Fraudulent scheme by agent.

##### (2) Foreign correspondent of English agents.

##### (3) Set-off against principal.

#### (C) AUTHORITY OF AGENT.

##### (a) Factors' Act: "agent entrusted."

##### (b) Commission agent and foreign principal.

##### (c) House agent.

##### (d) Managing director of company.

##### (e) Contract by letter.

##### (f) Evidence of extent of authority.

#### (D) LIABILITIES AND DUTIES OF AGENTS.

##### (a) Incapacity of agent to profit by his agency.

##### (b) Suit for account against agent: damages for negligence.

##### (c) Liability in respect of money paid by mistake.

##### (d) Liability of broker in trover.

##### (e) Fraud by agent.

##### (f) Confidential agent: trade secret.

#### (E) RIGHT OF AGENT TO COMMISSION.

#### (A) RELATION OF PRINCIPAL AND AGENT, HOW CONSTITUTED.

*Inspectorship deed: no relation of principal and agent between trustee and inspectors.* [See INSPECTORSHIP DEED, 5.]

*Promise by chairman of Local Board.* [See PRINCIPAL AND SURETY, 3.]

#### (B) RIGHTS AND LIABILITIES OF PRINCIPAL.

##### (a) Liability of principal to indemnify agent.

Extends to all the liabilities of the agent.  
[See STOCK EXCHANGE, 3.]

##### (b) Liability as affected by usage or custom of trade.

##### (1) When usage is binding on principal.

1.—Although a person who as principal employs a broker to transact business for him in a particular market is bound by the usage of that market, though unknown to him, provided the usage is one that merely regulates the mode of performing the contract, and does not change the intrinsic character of the contract, yet where the usage is one which gives the broker an interest at variance with his duty, as by converting him into a principal instead of a mere agent to establish privity of contract between two principals, such a usage is not binding on a principal who, being ignorant of the usage, employs a broker to whom the usage is known to perform the ordinary and accustomed duties belonging to the office or employment of a broker. The principal is not bound to enquire what the usage may be, or whether

there be any particular usage affecting the market in which he proposes to deal. *Robinson v. Mollett* (H. L.), 44 Law J. Rep. (N.S.) C. P. 362; Law Rep. 7 E. & I. App. 802.

The appellant, a Liverpool merchant, employed the respondents, brokers of London, to buy tallow for him in the London tallow market. They having other orders, bought in their own name a quantity sufficient to cover all their orders, and by letter they informed the appellant that they had bought on his account so many tons; but they did not mention the name of the seller. A few days after they sent him notice that they were ready to deliver to him so many casks of tallow in fulfilment or part fulfilment of his order, but they did allude to any third party as the seller. The appellant acknowledged the receipt of these notices without observation. There is a custom on the London tallow market for brokers when they receive orders to contract in their own names, and if their principals refuse to accept or deliver, to buy or sell against them, and charge them with the loss. The appellant was ignorant of this custom. On becoming aware of it, and of the mode in which his orders had been executed, tallow having in the meantime fallen, he refused to take the tallow:—Held, reversing the decision of the Court of Exchequer Chamber (41 Law J. Rep. (N.S.) C. P. 65; Law Rep. 7 C. P. 84), that as the respondents were employed to act as brokers only, the custom which converted them into principals was inconsistent with the employment, and as the appellant was ignorant of it when he gave his orders, he was not bound by the custom. Also as the first notice sent by the brokers was that they had bought on the appellant's account, he was not thereby put on enquiry as to the custom or as to the name of the seller, and he was not bound to accept when it turned out that his own brokers might in fact be the vendors, or to pay them the difference between the price at which they bought and that at which they sold in consequence of his having refused the contract.

## (2) Evidence of custom making agent liable.

2.—The defendants, M. & W., fruit brokers in the City, gave the plaintiffs, who were wholesale grocers there, the following contract note, addressed to plaintiffs:—"We have this day sold for your account to our principal fifty to seventy tons of raisins. (Signed) M. & W., brokers"—Held, in an action against the defendants as purchasers, first, that evidence was admissible of an usage in the fruit trade, by which in a contract worded as above, without mentioning the buyer, the broker was liable to make good any loss through the default of his principal; secondly, *dubitante* Cockburn, C.J., that evidence of a similar usage in the colonial market was also admissible, as shewing the liability of brokers in a trade of a similar character. *Fleet v. Merton*, 41 Law J. Rep. (N.S.) Q. B. 49; Law Rep. 7 Q. B. 126.

Semble, per Blackburn, J.—That the declaration should have been framed so as to charge the defendants, not as principals, but as having under-

taken a liability in the nature of that of a *del credere* agent. *Ibid*.

3.—Where a person contracts in the body of a charter-party and signs "as agent," his principal being undisclosed, evidence is admissible to shew a custom that he shall be personally liable if he does not disclose his principal's name within a reasonable time. *Hutchinson v. Tatham*, 42 Law J. Rep. (N.S.) C. P. 260; Law Rep. 8 C. P. 482.

## (3) Rules of Stock Exchange.

*Rules of London Stock Exchange.* [See STOCK EXCHANGE, 1, 2, 3.]

### (c) Liability of disclosed principal on written contract by agent.

4.—The defendant authorised C., a broker, to buy goods for him, telling him to keep his name out of the transaction; C. bought of the plaintiffs, who refused to trust him and required the principal's name, which was given; a written agreement was then entered into in which only C.'s name appeared; C. then sent the defendant a note saying he had bought on the defendant's account; afterwards, on breach of the agreement, the plaintiffs communicated with C. on the matter:—Held (affirming the decision of the Court of Common Pleas, 40 Law J. Rep. (N.S.) C. P. 89), that though the defendant's name was known at the time of the contract in C.'s name, parol evidence was admissible to shew, and it was a question for the jury, whether or not the defendant was liable as principal, and whether or not the plaintiffs had made an election as against C. *Calder v. Dobell* (Exch. Ch.), 40 Law J. Rep. (N.S.) C. P. 224; Law Rep. 6 C. P. 486.

### (d) Liability of undisclosed principal.

#### (1) Where principal has settled with agent.

5.—The defendants were merchants at Liverpool, who were in the habit of giving orders to A. and B. sometimes for grey and sometimes for white or bleached shirtings. A. and B. were commission merchants carrying on business at Manchester, sometimes for themselves and sometimes acting in pursuance of orders from constituents. When an order was given to A. and B. for white shirtings, the course of business was for them to procure grey shirtings for the purpose of having them bleached, and when they were bleached, to deliver them to defendants, charging them with the cost of the purchase of the cloth and of the bleaching, with one per cent. commission on the amount, and also with any charges incurred for packing, &c., and this amount the defendants always paid to A. and B., and usually on the next pay day after receiving the goods. The defendants knew that A. and B. must have procured some one to supply the grey cloth and some one to bleach it, but they had never enquired respecting such persons, and had never been brought into communication with them. The plaintiff in his dealings with A. and B. had also never enquired whether they had principals or not.

A. and B., in pursuance of an order from the defendants for a quantity of white shirtings, bought from the plaintiff a like quantity of grey shirtings to be paid for thirty days after delivery. When the grey shirtings were delivered A. and B. had them bleached and sent them to the defendants with an invoice stating that the shirtings had been purchased on their account, and charging them with an amount comprising the price actually payable by A. and B. to the plaintiff, the cost of the bleaching, one per cent. on these sums, and some packing charges. The defendants *bonâ fide* paid A. and B. this amount on the first pay-day after receiving the goods. Subsequently, the time for payment by A. and B. to the plaintiff of the price of the grey shirtings having arrived, he applied to them for payment, but was refused. He waited a few days considering what he should do, when they stopped payment. Having discovered the relation between them and the defendants, he sued the latter for the amount due to him:—Held, the Court having power to draw inferences of fact, first, that the plaintiff's delay did not by itself prejudice his case. Secondly, that (assuming that the relation of principal and agent subsisted between A. and B., and defendants, so as to establish a privity of contract between the plaintiff and the defendants), after the defendants, as principals, had settled with A. and B. at the time when the plaintiff was unaware that any agency existed, it was too late for him to recover from the defendants. *Armstrong v. Stokes*, 41 Law J. Rep. (N.S.) Q. B. 253; Law Rep. 7 Q. B. 598.

(2) *Election to treat agent as debtor.*

6.—B., a butty collier, working upon a mine of the defendants, gave orders in his own name to the plaintiffs for a supply of gunpowder to be used in the mine. The gunpowder was supplied, and subsequently the plaintiffs became aware that the defendants were B.'s principals. B. filed a petition in liquidation, whereupon a clerk of the plaintiffs made an affidavit of debt, treating B. as the debtor, for the purpose of proving under the liquidation. The affidavit was placed upon the file of proceedings, although an endeavour was made by the plaintiffs' attorneys to prevent its being so filed. It remained upon the file, but the plaintiffs took no further step in the liquidation, nor did they receive any dividend:—Held, that there was no such election by the plaintiffs to treat B. as their debtor as would be a bar to their maintaining an action against the defendants, the principals. *Curtis v. Williamson*, 44 Law J. Rep. (N.S.) Q. B. 27; Law Rep. 10 Q. B. 57.

*Right of undisclosed principal to sue on marine policy.* [See MARINE INSURANCE, 49.]

(e) *Rights of principal against third parties.*

(1) *Fraudulent scheme by agent.*

7.—A., as agent, but without the knowledge or authority of his principal, B., and the general manager of a bank without the knowledge or authority of the bank directors, concerted for

their own purposes the following scheme, which the Court held to be entirely void for fraud, and not binding on B. Two accounts were opened with the bank in the respective names of the agent and the principal. The agent, on behalf of his principal, requested the bank to honour the agent's cheques, and guaranteed the repayment thereof, all moneys standing to the credit of the principal to be charged with such payment. The agent paid to his principal's account 1,500*l.* belonging to the principal, and drew on his own account for a like sum, which he spent in promoting the scheme. He drew other cheques on his own account, and paid the proceeds to his principal's account as moneys belonging to the principal. Thus, in the bank books the agent's account stood with a large debit, and the principal's account stood with an equal credit charged with the guarantee. The principal having brought an action against the bank to recover the whole amount standing to his credit,—Held, that he could recover 1,500*l.* thereof, his own money; but not the residue, which never had been his money. *The British and American Telegraph Company (Lim.) v. The Albion Bank (Lim.)*, 41 Law J. Rep. (N.S.) Exch. 67; Law Rep. 7 Exch. 119.

(2) *Foreign correspondent of English agents.*

8.—Where a foreign correspondent instructs his English agents to order goods for him in this country the person contracting with the agent to supply such goods is not, although he knew for whom the goods were intended, liable to an action for breach of his contract at the suit of the principal. *Die Elbinger Actien-Gesellschaft für Fabrication von eisenbahn-Materiel v. Claye*, 42 Law J. Rep. (N.S.) Q. B. 151; Law Rep. 8 Q. B. 313.

(3) *Set-off against principal.*

9.—Where an agent is permitted to, and does, sell goods, as if he were principal, and becomes bankrupt, it is no defence to an action by the principal against the vendee for not accepting the goods, that there were mutual credits, not alleged to be the subject of ordinary set-off, between the agent and vendee, resulting in a balance in favour of the latter. *Turner v. Thomas*, 40 Law J. Rep. (N.S.) C. P. 271; Law Rep. 6 C. P. 610.

10.—To an action by a principal for the price of goods sold by his agent to the defendant, a plea setting off a debt due to the defendant from such agent, which averred that the agent was entrusted by the plaintiff with the possession of the goods as apparent owner, and that the agent sold the same in his own name and as his own goods with the consent of the plaintiff, and that at the time of such sale the defendant believed the agent to be the owner, and did not know that the plaintiff was the owner, or that the agent was agent, was held good, although it did not by express averment negative either the defendant's means of knowing that the agent was such agent, or that the defendant had had notice that the plaintiff was the owner. *Borries v. The Imperial Ottoman Bank*, 43 Law J. Rep. (N.S.) C. P. 3; Law Rep. 9 C. P. 38.

It being an immaterial averment in a plea so

pleaded that the defendant had not the means of such knowledge, a replication thereto that at the time of the sale the defendant had the means of knowing that the agent was the plaintiff's agent, and as such sold the goods, was held bad. *Ibid.*

*Liability of company for acts of agent.*

[See COMPANY, D 4-7.]

(C) AUTHORITY OF AGENT.

(a) *Factor's Act: agent entrusted.*

[See FACTOR, 1.]

(b) *Commission agent and foreign principal.*

11.—A commission merchant has no authority, in the absence of express agreement to the contrary, to pledge the credit of his foreign constituent. The circumstance that the foreign constituent and the commission merchant had agreed to purchase and ship goods on a "joint account" was held not to affect the application of the rule. *Hutton v. Bullock*, Law Rep. 8 Q. B. 331: affirmed, on appeal, (Exch. Ch.), Law Rep. 9 Q. B. 572.

(c) *House agent.*

12.—An estate or house agent to whom instructions are given to procure a purchaser for property, has not, though the price is named in the instructions, authority to enter into a binding contract with a purchaser to sell such property. *Hammer v. Sharp*, 44 Law J. Rep. (N.S.) Chanc. 53; Law Rep. 19 Eq. 108.

(d) *Managing director of company.*

13.—Where the managing director of a company, being aware that by agreement between the company and the defendant certain funds owing to A. were to be appropriated to the payment of a debt due from A. to the company for which the defendant was surety to the company, procured payment out of such funds of a private debt owing to such director from A.:—Held, that the company were not responsible for the act of their managing director, as he was not acting within the scope of his employment. *McGowan & Co. (Lim.) v. Dyer*, Law Rep. 8 Q. B. 141.

(e) *Contract by letter.*

14.—If a principal gives an order to an agent in such uncertain terms as to be susceptible of two different meanings and the agent *bonâ fide* adopts one of them and acts upon it, it is not competent to the principal to repudiate the act as unauthorised because he meant the order to be read in another sense of which it is equally capable. *Ireland v. Livingstone* (H.L.), 41 Law J. Rep. (N.S.) Q. B. 201; Law Rep. 5 E. & I. App. 395.

(f) *Evidence of extent of authority.*

15.—The plaintiffs were partners and creditors of the defendant for 30*l.*, the price of goods supplied; they wrote to their traveller M. a letter, saying, "we should like to draw" upon the defendant for that amount. M., who had authority

to collect debts due to the plaintiffs, shewed this letter to the defendant who thereupon accepted a bill drawn by M. in blank and payable to "my" order. M. subsequently filled in his own name as drawer and received the proceeds of the bill; he never accounted for it to the plaintiffs, and subsequently absconded; the bill was paid by the defendant at maturity. Upon two former occasions the defendant had paid the plaintiffs by bills, one of which was drawn in blank. The plaintiffs having sued for the debt of 30*l.*, the defendant pleaded payment:—Held, that the foregoing facts were no evidence of payment by the defendant to the plaintiffs, and that the plaintiffs were entitled as matter of law to have the verdict entered for them. *Hogarth v. Wherly*, 44 Law J. Rep. (N.S.) C. P. 330; Law Rep. 10 C. P. 630.

(D) LIABILITIES AND DUTIES OF AGENT.

(a) *Incapacity of agent to profit by his agency.*

16.—The defendant having been authorised by the plaintiff to purchase on his behalf a particular ship as cheaply as she could be got, made an arrangement, without the plaintiff's knowledge, with the vendor's broker, who had a right to retain the excess of the purchase-money over 8,500*l.*, by which the defendant purchased the ship for 9,250*l.* and retained for his own use 225*l.*, part of the excess:—Held, that the plaintiff was entitled to the amount so retained by the defendant, inasmuch as it was a profit acquired by an agent in connection with his agency, without the sanction of his principal, and that it could be recovered in an action for money had and received. *Morison v. Thompson*, 43 Law J. Rep. (N.S.) Q. B. 215; Law Rep. 9 Q. B. 480.

17.—The rule that an agent must account to his principal for any secret profit made in the course of his agency does not apply where the principal is aware that the agent is remunerated by some allowance from the other parties, but is under a misapprehension (but not misinformed) as to its actual extent. *The Great Western Insurance Company (of New York) v. Cunliffe*, 43 Law J. Rep. (N.S.) Chanc. 741; Law Rep. 9 Chanc. 525.

18.—Where A., knowing that B. desired to purchase certain shares, contracted to buy them for 2*l.* a share, and then represented to B. that he could procure them for B. for 3*l.* a share, which B. directed him to do, and afterwards paid him at that rate,—Held, that A. acted as agent for B., and must pay back to B. the difference between the two prices. *Kimber v. Barber*, Law Rep. 8 Chanc. 56.

19.—An agent for sale who takes an interest in a purchase negotiated by him is bound to disclose to his principal, not merely that he has an interest, but the exact nature of his interest. The onus of proof lies on the agent, and is not discharged by his mere oath if contradicted. *Dunne v. English*, Law Rep. 18 Eq. 524.

20.—Contract by a telegraph works company with a telegraph cable company, to lay a cable to be paid for by instalments on the certificate of the cable company's engineer. Shortly afterwards the

engineer entered into a sub-contract with the works company to lay down the cable for a sum to be paid him as the instalments were received under the original contract:—Held, that this agreement by the engineer was a fraud, and that the cable company were entitled to have the contract set aside and the return of the money paid by them. *The Panama and South Pacific Telegraph Company v. The India Rubber Gutta Percha and Telegraph Works Company*, Law Rep. 10 Chanc. 515.

Decision of Malins, V.C., affirmed. *Ibid*.

**21.**—The shareholders of a joint-stock bank, in pursuance of a proposal of their directors, passed resolutions for the increase of their capital by the issue of 20,000 new shares of 50*l.* each, to be offered, in the first place, to the old shareholders in the proportion of one new share to each old share, each allottee paying 25*l.* as a premium and 5*l.* as a call per share, the shares unaccepted by the old shareholders to be sold by the directors to other persons at 30*l.* premium per share, out of which each shareholder rejecting the allotment of new shares offered to him was to receive a cash bonus of 5*l.* for each new share so rejected. The directors made an arrangement with S., by which he was to take all the unaccepted new shares at the premium of 30*l.* per share, to be issued to him at the rate of 1,000 a month. Under this arrangement 9,778 new shares were allotted to S., who paid thereon 5*l.* per share, and procured the issue of them in batches as he found purchasers, the certificates in the meantime being retained by the bank until the 30*l.* per share had been paid, when the shares were registered in the names of the purchasers from S. Four of the directors, at the request of S., took over a large number of the new shares, at 30*l.* per share, before they had been issued to S., and sold them at a considerable profit. Bonus shares in the company were subsequently issued to the holders of the new shares, and a considerable number of these were allotted to the same four directors. The bank, by their public officer, subsequently filed a bill against the four directors, alleging that the issue of the new shares and the arrangement with S. was carried into effect in pursuance of a scheme and secret understanding between the defendants and S., devised and entered into for their own profit. The bill, which was founded on the ground of fraud in reference to this alleged scheme and also on the ground of breach of trust arising out of the purchase by the defendants as persons in a fiduciary position of trust property, sought to make the defendants jointly and severally accountable for the profits made by them out of the transaction. The evidence in support of the allegations of fraud was extremely voluminous:—Held, first, that so much of the bill as rested on fraud must be dismissed with costs, but that the defendants were trustees for the bank of the profits which they had made from the transaction, and must respectively account for the same. Secondly, since the suit was improperly framed in making unfounded charges of fraud to which the defendants could not submit, the plaintiff would not be

allowed any part of his costs. *Parker v. McKenna*, 44 Law J. Rep. (N.S.) Chanc. 425; Law Rep. 10 Chanc. 96.

Although charges of fraud which turn out to be unfounded are mixed up with the plaintiff's case and put prominently forward as a ground of relief, yet if the bill alleges also a different case for relief which can be separated from the charges of fraud, the Court may give the plaintiff relief on this second ground, and is not bound to dismiss the bill altogether. *Ibid*.

[And see COMPANY, D 27, 28.]

(b) *Suit for account against agent: damages for negligence.*

**22.**—Where a bill against an agent for an account alleges certain specific questions that have arisen as the ground for taking the account, and these questions are decided against the plaintiff, the bill will be dismissed. *The Great Western Insurance Company (of New York) v. Cunliffe*, 43 Law J. Rep. (N.S.) Chanc. 741; Law Rep. 9 Chanc. 525.

The rule that an agent must account to his principal for any secret profit made in the course of his agency does not apply where the principal is aware that the agent is remunerated by some allowance from the other parties, but is under a misapprehension (but not misinformed) as to its actual extent. *Ibid*.

A claim against an agent in the nature of damages for neglect of duty cannot be passed as an item in taking an account between principal and agent, but must be enforced in an action at law. *Ibid*.

A marine insurance company in New York employed merchants in this country as their agents to settle claims and grant insurances, and also to effect reinsurances. A percentage was paid by the company on the first two classes of business, but the agents were remunerated as to the reinsurances by the brokerage allowed to them by the underwriters. They charged the company the full amount of the premiums, but were allowed by the underwriters, first, 5 per cent. on the premiums, and secondly, 2 per cent. on the balance (if any) payable by them to the underwriters on the account for the year, crediting the underwriters with the premiums (less the 5 per cent.), and debiting losses. This was according to the usual custom on the credit system as between brokers and underwriters, but the 12 per cent. allowance was for some time unknown to the company:—Held, that the agents were entitled to both the percentages. *Ibid*.

A bill was filed by the company, alleging that in taking the accounts questions had arisen, and, after stating three questions—the first as to a loss through the alleged neglect of the agents to insure a vessel, the second a question as to interest, and the third the above question as to the 12 per cent. discount—praying a general account against the agents. It being decided (reversing the decision of Bacon, V.C.), that the first question must be tried at law, and that on the other two

the plaintiffs were wrong,—Held, that the bill must be dismissed. *Ibid.*

(c) *Liability in respect of money paid by mistake.*

**23.**—On a purchase and sale of cotton by two cotton brokers, A. and B., A. overpaid B., by mistake. The mistake was not discovered till some months afterwards, and, in the meantime, B. had allowed the money to be settled in account between himself and his principals, who were indebted to him. By the usage of the cotton market, cotton brokers treated each other as principals:—Held, that A. was entitled to recover back the overpayment from B., and that the case did not come within the rule by which an agent who has *bond fide* paid over money to his principal is relieved from liability. *Holland v. Russell* (4 B. & S. 14; 32 Law J. Rep. (N.S.) Q. B. 297) commented on. *Newall v. Tomlinson*, Law Rep. 6 C. P. 405.

(d) *Liability of broker in trover.*

**24.**—Any person who, however innocently, obtains the possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion, unless the possession was obtained by him as finder or as bailee, or by purchase in market overt or from an agent, so as to be protected by the Factors Acts. *Hollins v. Fowler* (H.L.), 44 Law J. Rep. (N.S.) Q. B. 169; Law Rep. 7 E. & I. App. 757; affirming the Court of Exchequer Chamber, 41 Law J. Rep. (N.S.) Q. B. 277; Law Rep. 7 Q. B. 617.

Whether brokers when they purchase as agents are bound at their peril to enquire into the title of selling brokers with whom they deal, *Quære?* *Ibid.*

Also, if brokers are not liable for purchases made by them as agents for principals, and when acting as brokers, whether if they further obtain delivery of and remove the goods so purchased on behalf of their clients, they are liable should the selling broker turn out to have no title, *Quære?* *Ibid.*

(e) *Fraud by agent.*

*Fraud by agent: criminal proceedings.*  
[See FRAUD, 8, 9; COMPANY, D 7.]

(f) *Confidential agent: trade secret.*

**25.**—Sembles—that a confidential agent is, in the absence of agreement to the contrary, at liberty to disclose a trade secret of his employers, after the termination of his employment, if he has acquired knowledge of the secret through an independent investigation made by himself. *Estcourt v. Estcourt Hop Essence Company*, 44 Law J. Rep. (N.S.) Chanc. 223; Law Rep. 10 Chanc. 276.

(E) RIGHT OF AGENT TO COMMISSION.

**26.**—A house agent was entitled to commission, if a house was sold "through his intervention." A purchaser seeing that the house was for sale called at the agent's office and obtained there a

card to view, but, on viewing the house, thought the price too high and went away; afterwards he opened negotiations with a friend of the owner, and bought the house at a lower price:—Held, that there was evidence to go to the jury that the house was sold through the intervention of the agent:—Held, also, that a question was properly put by the Judge to the purchaser whether he would have bought the house if he had not gone to the office and got the card. *Mansell v. Clements*, Law Rep. 9 C. P. 139.

PRINCIPAL AND SURETY.

(A) VALIDITY AND CONSTRUCTION OF GUARANTEE.

(a) *Consideration for.*

(1) *Withdrawal of proceedings.*

(2) *Fraudulent preference.*

(b) *Promise by chairman of local board.*

(c) *Continuing guaranty.*

(B) PAYMENT BY SURETY: EFFECT OF.

(a) *Rights of surety under limited guaranty.*

(b) *Set-off.*

(c) *Marshalling.*

(d) *Contribution between co-sureties.*

(C) DISCHARGE OF SURETY.

(a) *Payment by principal.*

(1) *Appropriation of payments by creditor.*

(2) *Payment in contemplation of bankruptcy.*

(b) *Giving time.*

(c) *Laches by creditor.*

(d) *Composition with principal debtor.*

(e) *Guarantee for honesty of servant.*

(A) VALIDITY AND CONSTRUCTION OF GUARANTEE.

(a) *Consideration for.*

(1) *Withdrawal of proceedings.*

**1.**—A guaranty was given to the plaintiff by the defendants in the following terms: "In consideration of your withdrawing the petition you have presented for winding up the A. Company (Lim.) we agree to pay all the costs you have incurred in reference to the petition. We further agree to guarantee the payment to you within eighteen months, by the company or the liquidator thereof, of the principal of your debt of 722*l.*" To a declaration on this guaranty, alleging as a breach the non-payment of the 722*l.* the defendants pleaded that after the alleged withdrawal of the said petition, and before a reasonable time had elapsed, and within the said eighteen months, the plaintiff presented another petition for winding up the company, which prevented the collection of the assets of the company. At the trial, the jury found that the presentation of the second petition did not prevent the collection of assets:—Held, that the withdrawal of the first petition was a sufficient consideration for both promises of the guarantors; that the plea, as

proved, afforded no defence; and that on the finding of the jury the plaintiff was entitled to recover. *Harris v. Venables*, 41 Law J. Rep. (N.S.) Exch. 180; Law Rep. 7 Exch. 235.

(2) *Fraudulent preference.*

2.—The defendant, G. S., gave a guarantie to the plaintiffs, a bank, partially indemnifying them against a debt due to them from his brother, J. S., and to recover which the bank had threatened to take bankruptcy proceedings against J. S. J. S. subsequently made an arrangement with his other creditors, which the bank did not oppose. No payment having been made by G. S. under his guarantie the bank filed a bill, against him to enforce it. The defendant, G. S., pleaded as a defence to the bill, that the guarantie amounted to a fraudulent preference in favour of the bank over his brother's other creditors, but the plea did not contain an averment that at the date of the guarantie bankruptcy proceedings were then pending or imminent. Plea overruled with costs. *McKewan v. Sanderson*, 42 Law J. Rep. (N.S.) Chanc. 296; Law Rep. 16 Eq. 316.

(b) *Promise by chairman of local board.*

3.—The chairman of a Local Board of Health verbally promised a contractor that if he would do certain work connected with the sewers he would see him paid. The contractor did the work and made his claim against the board, and afterwards, finding that the chairman in fact had no authority to pledge the credit of the board, and that the board refused, and were not legally compellable to make the payment, he sued the chairman:—Held, that whether or not the parties, or either of them, intended only a contract of suretyship, there was a personal contract by the chairman on which he was primarily liable, and not merely a promise to answer for the debt, default or miscarriage of another, such as would require a memorandum thereof in writing under section 4 of the Statute of Frauds. *Lakeman v. Mountstephen* (H.L.), 43 Law J. Rep. (N.S.) Q. B. 188; Law Rep. 7 E. & I. App. 17.

And by Lord Selborne, there can be no suretyship unless there be a principal debtor constituted by matters *ex post facto*, if not existing at the time of the transaction. *Ibid.*

Held also, that the plaintiff's own evidence, that he said to the chairman—"I have no objection to do the work if you or the board will give me the order," and that the chairman replied, "Do the work and I will see you paid," was evidence which ought to have gone to the jury in support of a declaration to the effect that the chairman had promised, first, as if he were the authorised agent of the board, or secondly, that he would obtain a legal contract from the board, or thirdly, that he would pay for the work if the board refused. *Ibid.*

The plaintiff below, respondent in this appeal, had been employed by a Local Board of Health to construct a main sewer between which and the houses along the line of street connections had yet to be made. The owners of the houses were,

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under section 69 of 11 & 12 Vict. c. 63, liable to make these connections after the expiration of a twenty-one days' notice from the board calling on them to do so. The owners of the houses did not seem disposed to make the connections, and the notices were served on them. The plaintiff had, by direction of the board, brought on the ground the necessary pipes, and one day, as he was leaving the work, which he had completed, and before the expiration of the notices, the surveyor asked him not to go away, as there was more work to be done. The plaintiff asked him who was to be responsible for the payment, and the surveyor said that the defendant was waiting to see him about it. The defendant was the chairman of the Local Board of Health. The plaintiff then saw the defendant, and, according to his own evidence, the defendant there and then asked him, "What objection have you to making the connections?" to which the plaintiff said, "I have none, if you or the board will order the work, or become responsible for the payment." The defendant, in reply, said, "Go and do the work, and I will see you paid." Accordingly the plaintiff did the work, and applied to the board for payment. The board disclaimed all liability. The plaintiff then sued the defendant on the ground that he had, when making the promise, assumed to be the duly authorised agent of the board, and also that he had promised that he would obtain a legal contract from the board to pay him. To these counts a third count was by leave of the Judge added, that the defendant had promised to pay for the work if the board refused. The defendant entirely denied that such a conversation as that deposed to by the plaintiff took place. But the jury found that it did take place, and they returned a verdict for the amount claimed:—Held, that a rule to enter a nonsuit, or that the verdict should be set aside, or a new trial directed, was properly discharged, for that there was evidence of a primary liability on the part of the plaintiff which was properly left to the jury. *Ibid.*

(c) *Continuing guarantie.*

4.—A father gave his son a promissory note for 2,000*l.*, which was endorsed by the son, and discounted by a banking company, who took from the father an agreement under seal, that in consideration of their discounting the note, certain deeds of the father's, deposited at the same time, should remain a security for all money due or to become due from the son to the company on any account whatsoever. At the date of the agreement the son owed the company 3,000*l.* upon a running account, and the amount was subsequently increased to 5,000*l.* The father having died,—Held, in a suit to administer his estate, that the agreement was a continuing guarantie, and that the bank were entitled to prove against the father's estate, not only for the 2,000*l.*, the amount of the note, but for all sums due to them from the son. *Burgess v. Eve*, 41 Law J. Rep. (N.S.) Chanc. 515; Law Rep. 13 Eq. 450.

For due cause a guarantie may be withdrawn, although under seal, upon payment of all sums

due thereunder at the date of the notice of withdrawal. *Ibid.*

5.—The plaintiffs (of whom D. had been in the habit of buying goods) having heard of a bill of sale given by D. to the defendants, declined to let D. have certain goods he had then bought of them without a telegram from the defendants that the defendants would be answerable for them. The defendants sent such telegram, and D. had the goods, and in due time paid for them. By the post of the same day on which the telegram was despatched, the defendants sent to the plaintiffs a letter, in which, after referring to the telegram, and stating that they had done business with D. for five years, and had never known anything dishonest in his transactions, they wrote, "what you have heard was done to protect him from a dishonest tradesman, and will in no way we hope be to the injury of his creditors. Having every confidence in him he has but to call upon us for a cheque, and have it with pleasure, for any account he may have with you. When to the contrary we will write you."—Held, that this letter was a continuing guarantie for the amount of goods D. should buy of the plaintiffs until they should hear from the defendants to the contrary. *The Nottingham Hide, &c., Market Company v. Bottrill*, 42 Law J. Rep. (N.S.) C. P. 256; Law Rep. 8 C. P. 694.

6.—F. gave a guarantie to secure his son's account current with a bank, the guarantie to continue until six months after notice "under my hand of my intention to discontinue the same." He died, appointing his son his executor, and the account was continued nearly three years after his death, when the son became insolvent. No notice was ever given by the father or his son to determine the guarantie; but the bank were aware shortly after his death that his personal estate was of trifling amount, and that his realty was given to persons other than the son. On the bank seeking to prove against the father's estate under the guarantie,—Held, by the Master of the Rolls (Law Rep. 15 Eq. 311), that the power to determine was personal to the guarantor, and could not be exercised by his executors, and therefore that the guarantie determined on his death. On appeal, this view was doubted by the Lords Justices, who held, however, affirming the decision, that the bank, knowing it was the debtor's duty, as executor, to give notice of determination, could not rely on its being given. Held also, on the facts, that the guarantie had been treated by the parties as determined, and that, on that ground also, it could not be relied on. *Harris v. Fawcett*, 42 Law J. Rep. (N.S.) Chanc. 502; Law Rep. 8 Chanc. 866.

[And see No. 21 *infra*.]

#### (B) PAYMENT BY SURETY: EFFECT OF.

##### (a) Rights of surety under limited guarantie.

7.—A. guaranteed to B. & Co. the payment for all goods supplied by them to C., "but so as his liability under the guarantie should not at any time exceed 250%." C. having become bankrupt,

owing B. & Co. 650% for goods, B. & Co. received 250% from A. under the guarantie, and a dividend in the bankruptcy on the 650%.—Held, reversing Stuart, V.C., that A. was entitled to a proportionate part of the dividend. *Hobson v. Bass*, Law Rep. 6 Chanc. 792.

8.—Four directors of a company for the accommodation of the company made and gave to the manager of a bank a promissory note for 2,000% for the purpose of the same being transferred to the bank "as a security for any balance which might be due from the company to the bank." The company was subsequently wound up. At the date of the winding-up a balance of 3,659% was owing by the company to the bank. The bank sued one of the directors on the note, and recovered the sum of 2,067% for the amount of the note and interest. They also proved in the winding-up for the whole amount of their debt and received a dividend:—Held, affirming the decision of Bacon, V.C. (41 Law J. Rep. (N.S.) Chanc. 281; Law Rep. 7 Chanc. 680), that the security was only for part of the debt, and that the director was to be considered a surety for the company, and was entitled to a rateable part of the dividend received by the bank in respect of the amount paid by him to the bank. The form of order in such a case discussed. *Gray v. Seckham*, 42 Law J. Rep. (N.S.) Chanc. 127.

##### (b) Set-off.

Promissory note: *equitable defence by surety: set-off*. [See PLEADING AT LAW, 6.]

##### (c) Marshalling.

9.—H. was surety to an insurance company for a loan secured on policies on the life of the debtor. The office held another policy as security for another loan from the same debtor. The debtor became bankrupt, and the company sued H. H. paid part of the debt:—Held, that on the falling in of the policies, H. was entitled to have the securities marshalled so as to be paid in full, including the costs of defending the action. *Heyman v. Dubois*, 41 Law J. Rep. (N.S.) Chanc. 224; Law Rep. 13 Eq. 158.

The debtor's wife had paid H. part of the money he had paid as surety out of her separate estate:—Held, that she was not a necessary party to a suit by H. to obtain the benefit of his security. *Ibid.*

##### (d) Contribution between co-sureties.

10.—Upon one of the two sureties under a bond compounding with his creditors, the money under the terms of the bond became immediately payable; a third person, A., thereupon entered into a separate bond for the whole amount. The principal having become insolvent, the creditor sued A., and recovered; A. then filed his bill against the other surety to the first bond for contribution:—Held, that a co-suretyship was intended by the parties, but that even if the defendant had not known of the plaintiff's suretyship he



would have been liable to contribute. *Whiting v. Burke*, Law Rep. 6 Chanc. 342.

*Equity of sureties joining in mortgage, as to title deeds.* [See MORTGAGE, 41.]

(C) DISCHARGE OF SURETY.

(a) *Payment by principal.*

(1) *Appropriation of payments by creditor.*

[See BILL OF EXCHANGE, 27.]

(2) *Payment in contemplation of bankruptcy.*

11.—S. and the defendant as his surety, made and delivered to the plaintiff a joint promissory note, for the payment of money due from S. to the plaintiff. S. paid to the plaintiff the amount of the note, and the plaintiff in good faith received such amount, but at the time of making the payment S. was in insolvent circumstances, and made the payment in contemplation of bankruptcy, of which the plaintiff was ignorant. After the time of payment, S. made an assignment to trustees for the benefit of his creditors. The trustees elected to treat the payment by S. to the plaintiff as a fraudulent preference, and the plaintiff paid the amount to them:—Held, that the plaintiff had a right to maintain an action against the defendant, and that the latter was not discharged from liability in respect of the promissory note. *Petty v. Cooke*, 40 Law J. Rep. (N.S.) Q. B. 285; Law Rep. 6 Q. B. 790.

(b) *Giving time.*

12.—Although the mere omission to sue the principal debtor does not discharge the surety, yet if the creditor contracts with the principal debtor to give him time the surety is discharged. So also, if he contracts with the principal to give time to the surety, for this is merely the expression of what is tacitly implied in the contract to give time to the principal. And it makes no difference if, at the time of contracting the debt, the surety was, or was believed by the creditor to be a principal. It is, however, competent to a creditor giving time to the principal expressly to reserve his rights against the surety, because in that case the surety's right to sue the principal is preserved. *The Oriental Financial Corporation v. Overend, Gurney & Company*, 41 Law J. Rep. (N.S.) Chanc. 332; Law Rep. 7 Chanc. 142.

13.—If after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety, and after that he gives time to the principal debtor without the consent and knowledge of the surety the surety is discharged. Although the giving of additional security by the principal will not of itself discharge the surety, yet if the additional security is given as the consideration for a contract to give time, the giving of time without the privity of the surety discharges the surety. In order to reserve a creditor's right against a surety there must be a distinct expression of intention to re-

serve it. *Overend, Gurney & Company v. The Oriental Financial Corporation (H.L.)*, Law Rep. 7 E. & I. App. 348.

*Renewal of Bill.* [See BILL OF EXCHANGE, 18.]

(c) *Laches by creditor.*

14.—By indenture of mortgage, dated the 25th of August, 1870, the goods of B. & P. were assigned to the plaintiffs, as security for money advanced to them by the plaintiffs. The defendant was a party to the indenture, as surety for B. & P. In that capacity he covenanted for payment, on the 25th of August, 1871, and on other days, of a certain sum of money to the plaintiffs. The first instalment of interest became due from B. & P. upon the 25th of February, 1871. It was not paid, and to the knowledge of the plaintiffs B. & P. became embarrassed in their affairs. On the 5th of August they filed a petition in liquidation; a trustee was appointed, one of the plaintiffs being the solicitor in the liquidation, and the goods were sold by auction. The defendants knew nothing of the embarrassed state of B. & P. By the terms of the deed B. & P. were to remain in possession until default was made; but upon default being so made, the plaintiffs were also, by the terms of the deed, entitled to take possession of the goods, and after giving a month's notice to sell the goods. They did not avail themselves of this power:—Held, in an action by the plaintiffs against the defendant as surety, that, to the extent of the value of the goods assigned, the defendant was released from liability, by reason of the laches of the plaintiffs in not registering the deed, under the Bills of Sale Act, and in not taking possession of the goods when default was made in the payment of interest, and when bankruptcy was, to their knowledge, impending. *Wulff v. Jay*, 41 Law J. Rep. (N.S.) Q. B. 322; Law Rep. 7 Q. B. 756.

(d) *Composition with principal debtor.*

15.—Of two obligors of a joint and several bond one executed it as surety for the other, whereof the obligee then had notice. Afterwards, and without the consent of the surety, the principal debtor by deed conveyed to the obligee of the bond, as trustee for the creditors of the principal debtor, all his estate to be administered for the benefit of the creditors, in like manner as if the principal debtor had been at the date thereof duly adjudged bankrupt, and in consideration thereof each of the creditors did thereby release the principal debtor "from his and their respective debts in like manner as if" the principal debtor "had obtained a discharge in bankruptcy." The obligee having sued the surety on the bond,—Held, by Kelly, C.B., and Bramwell, B. (*dissentiente* Pigott, B.), that the obligee by executing the deed had released the surety. *Gragoe v. Jones*, 42 Law J. Rep. (N.S.) Exch. 68; Law Rep. 8 Exch. 81, *nom. Gragoe v. Jones*.

16.—A surety is not discharged by the creditor voting for a composition under the Bankruptcy Act, 1869, with the principal debtor, without

reserving his rights against the surety. *Ex parte Jacobs*; *In re Jacobs*, 44 Law J. Rep. (N.S.) Bankr. 34; Law Rep. 10 Chanc. 211.

Semble—the rights of creditors against sureties cannot be reserved in a composition, under the Act, with the principal debtor, so as to leave the surety a remedy over against the debtor, as this would prevent the debtor's complete discharge. *Ibid.*

17.—Two partners bound themselves jointly and severally to secure partnership debts. A new partner was taken in, and one retired. The estate of the new firm was liquidated by arrangement under the Bankruptcy Act, 1869, sections 125, 126; the obligees proved and joined with the creditors of the new firm in resolutions accepting a composition, payable by instalments, the deed reserving in terms the rights of creditors against sureties though the resolutions did not:—Held, that the obligees thereby released the retiring partner. *Wilson v. Lloyd*, 42 Law J. Rep. (N.S.) Chanc. 559; Law Rep. 16 Eq. 60.

18.—By a trust deed under the Bankruptcy Act, 1861, the principal debtor assigned all his property to trustees to sell, with power to the trustees to advance moneys necessary for converting the prepared earth, part of the property assigned, into bricks, and for selling the same, and ultimately to pay thereout rateably, so far as it would extend, the debts of the several creditors. It was also declared by such deed that the creditors did, "subject to the proviso hereinafter-mentioned, acquit, release, and for ever discharge" the said debtor, and then followed a proviso that any creditor who had any security for his demand, or to the payment whereof any person was liable as surety for the said debtor, might execute the deed without prejudice to such security, or to the claim against any surety:—Held, that the deed operated only as a covenant not to sue, and not as a release extinguishing the debts, and that, therefore, the creditors' rights against any surety of the debtor were legally reserved. *Bateson v. Gosling*, 41 Law J. Rep. (N.S.) C. P. 53; Law Rep. 7 C. P. 9.

19.—When a joint and several bond is executed by one of the obligors as surety for his co-obligor, who afterwards files a petition for liquidation under the Bankruptcy Act, 1869, and the creditors, without the assent of the surety, duly resolve under section 125 that the debtor's discharge be granted, the surety is not discharged from liability, although the obligee of the bond votes in favour of the resolution, and although there is no reservation of rights against sureties. *Ellis v. Wilmot*, 44 Law J. Rep. (N.S.) Exch. 10; Law Rep. 10 Exch. 10.

*Composition deed: covenant by surety: right of action against surety after suing principal.* [See COMPOSITION DEED, 3.]

(e) *Guarantie for honesty of servant.*

20.—A bond was given by the obligor as surety that a servant would from time to time, and at all times during the service, satisfactorily account for and pay over to the master all moneys

received by the servant for the master's use. One of the terms of the service was that it should be terminable by one month's notice on either side, but this was not known to the surety. After the commencement of the service, the master and servant agreed, without the knowledge of the surety, that the service should be terminable at three months' notice:—Held, by Kelly, C.B., Pigott, B., and Pollock, B., *dubitante* Martin, B., that the surety was not discharged. But the servant having failed satisfactorily to account for or pay over moneys which he had received for the master's use, and the master, having with knowledge and without informing the defendant thereof, retained the servant in his service,—Held, that the surety was discharged as to defaults committed by the servant after he was so retained. *Sanderson v. Aston*, 42 Law J. Rep. (N.S.) Exch. 64; Law Rep. 8 Exch. 73.

21.—The defendant guaranteed that he would be answerable for any loss, not exceeding 50*l.*, which the plaintiff might sustain through any breach of duty by S., her servant, in receiving, collecting and paying over to her moneys due from customers. To an action brought upon such guarantee, the defendant, in respect of moneys received by S. on account of the plaintiff, after the giving by the defendant of the guarantee, and before the 12th of November, 1869, paid money into Court; and with respect to the residue of the plaintiff's claim, the defendant pleaded, by way of defence upon equitable grounds, that, after the giving of the guarantee of the defendant, and before the 12th of November, 1869, S. embezzled moneys received by him to the amount of 57*l.*, that the plaintiff became aware of this on or about the 20th of November, 1869, and that without informing the defendant thereof, she agreed with S. that he should continue in her service, and should pay her 3*l.* a month, in liquidation of the sum of 57*l.*; and thereupon S. agreed to continue and did continue in the service of the plaintiff until the 4th of April, 1871; that during that time he paid to the plaintiff sums of money amounting to 48*l.*; that during such continuance of S. in such service, he collected the moneys for and on behalf of the plaintiff comprised in the residue therein pleaded to; that during the whole of the time S. collected the said sums of money the defendant was ignorant of the embezzlements prior to the said 20th of November, 1869; and that the defendant was prevented from revoking the guarantee, and compelling S. to pay to him, the defendant, the moneys he was liable under the guarantee to pay to the plaintiff:—Held, by Cockburn, C.J., Lush, J., and Quain, J., that the plea was good, and that in the case of a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and if, instead of dismissing the servant, as he may do at once, and without notice, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the ser-

vant during the subsequent service:—Held, by Blackburn, J. (with some hesitation), and on the grounds expressed by Malins, V.C., in *Burgess v. Eve* (41 Law J. Rep. (N.S.) Chanc. 515; Law Rep. 13 Eq. 450; No. 4 supra), that the defendant was entitled to judgment upon the demurrer to the plea. *Phillips v. Foxhall*, 41 Law J. Rep. (N.S.) Q. B. 293; Law Rep. 7 Q. B. 666.

#### PRIORITY.

*Of mortgages.* [See MORTGAGE, 10-28.]  
*Of holders of bill of sale.* [See BILL OF SALE, 25.]  
*Of patentees.* [See PATENT, 9-11.]

#### PRIVILEGE OF PARLIAMENT.

[See PEBBAGE, 1; PARLIAMENT, 1, 2, 15; BANKRUPTCY, K.]

#### PRIVILEGED COMMUNICATION.

[See LIBEL, 8-12; PRACTICE AT LAW, 17; PRODUCTION, 1-4, 14-18.]

#### PRIZE OF WAR.

[See FOREIGN ENLISTMENT ACT.]

#### PRIVY COUNCIL.

##### *Leave to appeal.*

1.—Special leave to appeal from an order of the High Court for the North-West Provinces of India, removing an infant daughter from the custody of her mother, a Mohammedan, on the ground that the minor's deceased father had been a Christian, and that the mother, who was, as the Court held, living in adultery, was inducing her daughter to adopt the Mohammedan faith. Liberty given, pending the appeal, for the petitioner to apply to the High Court for access, at suitable times, to her daughter. *In the matter of Victoria Skinner*, Law Rep. 3 P. C. 451.

2.—Special leave to appeal allowed, where the sum was below the appealable amount, on the ground that the construction of a Colonial Act, which affected the interests of a large class in the colony, was involved. The appeal limited to the construction of the Act. *Brown v. McLaughan*, Law Rep. 3 P. C. 458.

3.—Special leave to appeal granted where the Supreme Court of the Straits Settlement had refused leave on the ground of want of jurisdiction to grant it. *Nco v. Nco*, Law Rep. 5 P. C. 89.

*Appeal for Costs.* [See ADMIRALTY, 48.]

##### *Judgment reversed: interest on money paid.*

4.—By Order in Council (1845), regulating appeals from Hong Kong, it is provided that the Supreme Court shall in all cases of appeal conform to, execute, and carry into immediate effect such judgment and orders as Her Majesty, in Her Privy Council, shall make thereupon, in such manner as any original judgment or decree of the Supreme Court can or may be executed. In June, 1867, the respondents recovered from the appellants in an action of trover in the Supreme Court at Hong Kong, a large sum of money, as principal, interest and costs, and execution was had, and the money was paid. Upon appeal in February, 1869, this judgment was reversed. In June, 1869, the Supreme Court directed the respondents to repay to the appellants the money, but declined to direct interest to be paid during the time the money remained in the respondents' possession:—Held, first, that it is the duty of all Courts to take care that the act of the Court does no injury to the suitor, and that by the act of the Court is meant not merely the primary Court, but the act of the Court as a whole, from the lowest Court to the highest, which finally disposes of the case; secondly, that it was in the power of the Court at Hong Kong to make every order which was fairly and properly consequential upon the reversal of the original judgment, and that the appellants were entitled to the current rate of interest, whilst the money remained in possession of the respondents, on both the principal and interest, but not on the costs. *Roger v. The Comptoir D'Escompt de Paris*, 40 Law J. Rep. (N.S.) P. C. 1; Law Rep. 3 P. C. 465; and *Rajah, &c. v. Maharajah*, Law Rep. 3 P. C. 471, n.

##### *Ecclesiastical appeal.*

5.—Before an appeal is presented to the Queen in Council in respect of an order directing the reformation of articles of charge or other pleadings, the actual reformation which appears to the Judge to be required, should be made by him on the face of the order, so that on appeal the very passages omitted may be clearly brought under the judgment of the Judicial Committee. *Sheppard v. Bennett*, 41 Law J. Rep. (N.S.) Ecc. 1; Law Rep. 4 P. C. 371.

[And see COLONIAL LAW, 14, 23.]

#### PRO CONFESSO.

[See PRACTICE IN EQUITY, 38-40.]

#### PROBATE AND ADMINISTRATION.

[See EXECUTOR; WILL, FORMALITIES.]

(A) JURISDICTION OF COURT OF PROBATE.

- (a) *Will of realty.*
- (b) *Probate granted abroad.*
- (c) *Setting aside will on ground of undue influence.*

## (B) GRANT OF PROBATE OR ADMINISTRATION.

- (a) *To whom granted.*
  - (1) *When refused to executor.*
  - (2) *Executor for all property not named in will.*
  - (3) *Substituted executors.*
  - (4) *Substituted trustees.*
  - (5) *To husband of wife convicted of felony.*
  - (6) *When necessary to cite husband.*
  - (7) *To husband's estate after judicial separation.*
  - (8) *Chose in action of wife not reduced into possession.*
  - (9) *To guardian without citing next-of-kin.*
  - (10) *To unsuccessful opponent of will.*
  - (11) *Receiver.*
  - (12) *Next-of-kin.*
    - (i) *Grant to nominee.*
    - (ii) *Joint grant.*
  - (13) *Residuary legatee.*
  - (14) *Grant to stranger: special circumstances.*
  - (15) *Guardians of union as creditors of pauper lunatic.*
  - (16) *Equitable creditor.*
- (b) *Of what granted.*
  - (1) *Will of married woman having protection order.*
  - (2) *Alterations in military will.*
  - (3) *Words introduced by mistake.*
  - (4) *Erasure and substitution of legatee.*
  - (5) *Offensive paragraphs in will.*
  - (6) *Two wills.*
    - (i) *French and English: incorporation by reference.*
    - (ii) *Scotch disposition and settlement, having testamentary effect.*
    - (iii) *Inconsistent wills.*
  - (7) *Will in execution of power.*
  - (8) *Contingent will.*
  - (9) *Will and codicils in England without codicils abroad.*

## (C) GRANT OF ADMINISTRATION LIMITED.

- (a) *To bequest to child of married woman under 1 Vict. c. 26, s. 33.*
- (b) *To trust property.*
- (c) *To property in Court of Chancery.*
- (d) *To property remitted from India.*
- (e) *Grant to legatee where executor out of jurisdiction.*
- (f) *Supplementing limited grant.*

## (D) ADMINISTRATION PENDENTE LITE.

## (E) ADMINISTRATION BOND.

## (F) RENUNCIATION.

## (G) WITNESSES: EXAMINATION.

- (a) *Witness described as "elderly person."*
- (b) *Witness neither old nor infirm.*

## (H) EVIDENCE.

- (a) *Legitimacy.*
- (b) *Execution of lost will.*

## (I) PLEADING AND PRACTICE.

- (a) *Estoppel.*
  - (1) *Order of Court of Chancery.*

(2) *Withdrawal of caveat.*

- (b) *Survivorship: form of procedure.*
  - (c) *Service.*
  - (d) *Motion.*
  - (e) *Subpena.*
  - (f) *Property allowed to be sworn under different amounts.*
  - (g) *Amendment of probate.*
  - (h) *Revocation suit: interest.*
  - (i) *Testamentary suit.*
    - (1) *Examination of next-of-kin.*
    - (2) *New trial.*
  - (k) *Order to attend for examination.*
  - (l) *Compromise.*
  - (m) *Change of proctor or attorney.*
- (K) COSTS.
- (a) *Costs out of estate in testamentary suit.*
    - (1) *Unsuccessful claim.*
    - (2) *Unsuccessful opposition.*
    - (3) *Charge on real estate.*
    - (4) *Estate in hands of purchaser for value without notice.*
  - (b) *Plea of undue influence in testamentary suit.*
  - (c) *Executor condemned in costs.*
  - (d) *Costs against Queen's Proctor.*
  - (e) *Calling in probate.*
  - (f) *Taxation of costs: compromise.*
- (L) PROBATE DUTY.

## (A) JURISDICTION OF COURT OF PROBATE.

(a) *Will of realty.*

1.—When a will disposes of real estate only, directions in it for the payment of debts, for the sale of a portion of the estate, and the payment of legacies out of the proceeds, do not give the Court jurisdiction to grant probate. And probate of such a will cannot be granted to suit the convenience of the parties interested. *In the goods of Bootle*, 43 Law J. Rep. (N.S.) P. & M. 41; Law Rep. 3 P. & D. 177.

2.—The Court has no jurisdiction under 20 & 21 Vict. c. 77, s. 61, to determine the validity of a will in respect of realty, unless the same will which regulates the disposition of the personality also regulates that of the realty. *Campbell v. Lucy*, 40 Law J. Rep. (N.S.) P. & M. 22; Law Rep. 2 P. & D. 209.

A domiciled Scotchman entitled to personality and also to realty in England, executed a will and two codicils affecting the realty, all valid by the law of Scotland, but the will only valid by the law of England. The executors propounded this will and codicils, and cited the coheirresses-at-law to see proceedings:—Held, that as the disposition of the realty in England was regulated by the will only, and that of the personality by the will and codicils, this Court had no jurisdiction to make a decree binding on the realty in England. *Ibid.*

(b) *Probate granted abroad.*

3.—Where probate of the will of a testator who dies domiciled abroad has been granted by a competent Court of the domicile, the validity of the will cannot be disputed in this Court, although it

was proved abroad in common form only. *Miller v. James*, 42 Law J. Rep. (n.s.) P. & M. 21; Law Rep. 3 P. & D. 4.

The executor propounded a will alleging that the deceased died domiciled in Jersey, and that probate had been granted by a competent Court of Jersey. The next-of-kin pleaded, 1, undue execution; 2, incapacity; 3, undue influence. The Court ordered the 2nd and 3rd pleas to be struck out, on the ground that it was bound by the foreign probate. *Ibid.*

(c) *Setting aside will on ground of undue influence.*

[See UNDUE INFLUENCE, 7.]

*County Court Jurisdiction.* [See COUNTY COURT, 16.]

## (B) GRANT OF PROBATE OR ADMINISTRATION.

(a) *To whom granted.*

(1) *When refused to executor.*

4.—The Court cannot refuse probate to an executor on account of the badness of his character only. But when he is resident out of the United Kingdom at the time of the testator's death, and he is unfitted to act by reason of his position or bad character, the Court may refuse him the appointment, and make a grant of administration under 20 & 21 Vict. c. 77, s. 73, to some other person, with such limitations as it may think fit. *In the goods of Samson*, 42 Law J. Rep. (n.s.) P. & M. 59; Law Rep. 3 P. & D. 48.

*Grant to executor according to the tenor.*  
[See EXECUTOR, 1-6.]

(2) *Executor for all property not named in will.*

5.—The testator, by his will, which did not dispose of the residue of his personal estate, nominated and appointed his daughter A. B. to be his "executrix for all property whatsoever and wheresoever not named in the will."—Held, that A. B. was not entitled to probate of the will. *In the goods of Wakeham*, 41 Law J. Rep. (n.s.) P. & M. 46; Law Rep. 2 P. & D. 395.

(3) *Substituted executors.*

6.—A will contained this clause:—"I appoint my wife sole executrix, and, in default of her, I appoint K. and F. to be executors"—Held, that the substitution of executors was not confined to the event of the wife's dying without having taken probate, but that it also took effect where she proved the will and died, without having fully administered. *In the goods of Forster*, 41 Law J. Rep. (n.s.) P. & M. 18; Law Rep. 2 P. & D. 304.

(4) *Substituted trustees.*

7.—A., who died intestate, was one of the executors and trustees of his father's will, and applied to his own use considerable sums, part of the trust funds, which came into his hands as trustee. A renunciation and consent having been filed by the next-of-kin, the Court granted, under section 73, administration of the personal estate and effects

of the deceased to B. and C., the substituted trustees under his father's will. *In the goods of Bond*, 44 Law J. Rep. (n.s.) P. & M. 41.

8.—The effect of the order made by a Court of Equity under the Trustee Act, 1850, substituting new trustees for those named in the will, is to transfer to the new trustees all the rights and powers of the old ones. The Court, therefore, granted administration (with will annexed) to the substituted trustees without requiring the execution of a deed of conveyance to them by the old trustees. *In the goods of Woodfall*, 42 Law J. Rep. (n.s.) P. & M. 64; Law Rep. 3 P. & D. 108, *nom. Woodfall v. Arbutnot.*

(5) *To husband of wife convicted of felony.*

9.—The wife became entitled to a legacy of 100*l.* in 1827. In 1833 she was convicted of felony and transported to Van Diemen's Land for seven years. In 1843 she received a certificate of freedom, and was not heard of afterwards. The legacy, which was the only property to which she was entitled, became payable in 1870. The Court required notice to be served on the Queen's Proctor before granting administration of her personal estate and effects to her husband. *In the goods of Stevens*, 42 Law J. Rep. (n.s.) P. & M. 23.

(6) *When necessary to cite husband.*

10.—Husband and wife agreed to live separate and apart, the husband covenanting, among other things, to permit, in the event of the wife predeceasing him, administration of her goods and chattels to pass to those who would be entitled to it if he had died, leaving her surviving him. The wife died, and the husband refused to renounce. The Court declined to make a grant to the guardian of the children of the deceased for their use and benefit until the husband had been first cited. *In the goods of Pigott*, 42 Law J. Rep. (n.s.) P. & M. 77.

11.—A married woman whose personal estate consisted of a legacy which became payable in 1864, died in 1856 intestate. In 1845 her husband went abroad, and was last heard of in 1853:—Held, that as there was no evidence that the deceased died a widow, her next-of-kin was not entitled to administer without citing the representatives of the husband. *In the goods of Nichols*, 41 Law J. Rep. (n.s.) P. & M. 88; Law Rep. 2 P. & D. 461.

The rule that where a husband and wife perish together, and there is no evidence that the one survived the other, administration of their personal estate will be granted to their respective next-of-kin, is not applicable to such a case. *Ibid.*

(7) *To husband's estate after judicial separation.*

12.—A. B., who had obtained a decree of judicial separation against his wife on the ground of cruelty, died intestate, leaving him surviving his widow and two daughters. The Court refused to grant administration of his personal estate to the eldest daughter until the widow was first cited. *In the goods of Ihler*, 42 Law J. Rep. (n.s.) P. & M. 18; Law Rep. 3 P. & D. 50.

(8) *Chose in action of wife not reduced into possession.*

13.—A., a married woman, died, intestate, entitled to a chose in action. B., the husband, who survived her, did not reduce her property into possession during his lifetime, and died, intestate, without having administered to her effects:—Held, that a double administration was necessary to enable C., their only child, to possess himself of his mother's property. *In the goods of Harding*, 41 Law J. Rep. (n.s.) P. & M. 65; Law Rep. 2 P. & D. 394.

(9) *To guardian without citing next-of-kin.*

14.—The deceased died intestate, leaving a widow and seven children, minors. The widow died without having administered to his effects. The estate consisted of household furniture and money lent at interest, and administration was needed for the purpose of receiving and giving a discharge for this sum and making provision for the maintenance of the children. Two uncles, the next-of-kin, had been abroad, and unheard of for several years. The Court, under these circumstances, allowed the minors to elect their first cousin once removed as their guardian for the purpose of taking out administration to the personal estate and effects of their deceased father, without first citing their next-of-kin. *In the goods of Burchmore*, 43 Law J. Rep. (n.s.) P. & M. 1; Law Rep. 3 P. & D. 139.

(10) *To unsuccessful opponent of will.*

15.—The testator by his will divided the residue of his personal estate between his son, his only next-of-kin, and his three illegitimate daughters, who were minors. They propounded the will by their guardian. The son unsuccessfully opposed it, and was condemned in costs. He had a larger interest in the specific legacies than the minors, and it was proved that in fact there was no residue:—The Court refused, under these circumstances, to make the grant to the guardian of the minors, but decreed it to the son. It also declined to make the grant to the son conditional on his payment of the guardian's costs, as by so doing it would delay the payment of the legacy to the widow. *Sawbridge v. Hill*, 40 Law J. Rep. (n.s.) P. & M. 27; Law Rep. 2 P. & D. 219.

(11) *Receiver.*

16.—A. died intestate. It was alleged that his widow had possessed herself of part of his estate, though she had not taken out administration, and a bill in Chancery was in consequence filed against her by persons having claims upon the estate of the deceased. The Court of Chancery appointed a receiver, with authority to collect, get in, and receive the estate, and to apply to the Court of Probate for administration. The receiver cited the widow and all the next-of-kin and persons entitled in distribution, and upon their non-appearance to the citation, the Court made a general grant of administration to him. *In the goods of Mayer*, 42 Law J. Rep. (n.s.) P. & M. 57; Law Rep. 3 P. & D. 39.

(12) *Next-of-kin.*(i) *Grant to nominee.*

17.—Administration will not be granted to a nominee of the next-of-kin, except under very special circumstances. *Teague v. Wharton*, 41 Law J. Rep. (n.s.) P. & M. 13; Law Rep. 2 P. & D. 360.

18.—A. died intestate, leaving a niece, who claimed to be her sole next-of-kin, and other relations. A doubt being raised as to the legitimacy of the niece, she and the other relations of the deceased by deed agreed to divide the estate, and that administration should be granted to a nominee who had no interest. The niece having renounced, and, with the other parties, having consented to the grant being so made, the Court under section 73 of 20 & 21 Vict. c. 77, granted administration to their nominee. *In the goods of Hopkins*, 44 Law J. Rep. (n.s.) P. & M. 42; Law Rep. 3 P. & D. 235.

(ii) *Joint grant.*

19.—A. by his will gave B., his wife, a life interest in all his property, and directed that on her death it should be sold and divided amongst his six children. He further named his wife sole executrix, and appointed C., his eldest son, trustee to carry into effect the division of the property on her death. B. disposed of the property for 600*l.*, and this sum, with 130*l.* of her own, she invested in the purchase in her own name of two leasehold houses. She died intestate, leaving C. and five other children, her next-of-kin, her surviving. There was no other property than the two leasehold houses. The Court refused to make a joint grant of administration to C. and the nominee of the other next-of-kin, but made the grant to C. alone, he giving justifying security. *In the goods of Stainton*, 40 Law J. Rep. (n.s.) P. & M. 25; Law Rep. 2 P. & D. 212.

20.—The deceased died intestate, leaving a widow and several minor children by a former wife. During his lifetime he had been assisted in his business by his brother. His widow was unacquainted with its management, and she was desirous that the brother (who was elected by the children their guardian for the purpose) should be joined with her in the grant. The Court held, that the circumstances did not warrant a joint grant, and refused the application. *In the goods of Richards*, 40 Law J. Rep. (n.s.) P. & M. 29; Law Rep. 2 P. & D. 216.

21.—The Court refused, in the absence of special circumstances, to make a grant under the 73rd section of the Probate Act to the nominee of the next-of-kin, who was an old lady of the age of 81, and a party entitled in distribution. *In the goods of Richardson*, 40 Law J. Rep. (n.s.) P. & M. 36; Law Rep. 2 P. & D. 244.

(13) *Residuary legatee.*

22.—Administration with the will annexed will be granted to a residuary legatee only on the renunciation, or citation and non-appearance, of the executor: his consent alone is not sufficient. *Garrard v. Garrard*, Law Rep. 2 P. & M. 238.

(14) *Grant to stranger: special circumstances.*

**23.**—The deceased was assisted in the latter years of his life by A. B., his wife's nephew. His personal estate and defects (principally furniture) were valued at 838*l*. The debts owing by him at the time of his death amounted to 972*l*., and these were paid by A. B. out of his own money. The next-of-kin having renounced, the Court granted letters of administration of the personal estate and effects of the deceased to A. B. under the 73rd section of 20 & 21 Vict. c. 77. *In the goods of Bateman*, 40 Law J. Rep. (n.s.) P. & M. 24; Law Rep. 2 P. & D. 242.

**24.**—The mere fact that the person who would be entitled to administration desires that some other person should take the grant, does not constitute such a special state of circumstances as to justify a grant under the 73rd section of 20 & 21 Vict. c. 77. In such a case the proper course to be adopted is for the person entitled to administration to take the grant, and then appoint his nominee to act as his or her attorney. *In the goods of Hale*, 44 Law J. Rep. (n.s.) P. & M. 45; Law Rep. 3 P. & D. 207.

(15) *Guardians of union as creditors of pauper lunatic.*

**25.**—The deceased was a pauper lunatic, and from 1862 until his death in 1870, the cost of his maintenance in the county asylum was paid by the union to which he belonged. On the death of his wife in 1865 he became entitled to a sum of 400*l*., but no steps were taken by the guardians of the union to obtain an order from the justices under 16 & 17 Vict. c. 97, s. 104, to make the fund applicable to his maintenance. The Court refused to make them a grant of administration as creditors of the deceased. *Windeatt v. Sharland*. *In the goods of Sharland*, 40 Law J. Rep. (n.s.) P. & M. 21; Law Rep. 2 P. & D. 217.

**26.**—A pauper lunatic died in an asylum, which, although not locally situate within the union to which he belonged, was the proper asylum for persons from that union, and to the support of which the union contributed. The expenses of his maintenance in the asylum during twelve months prior to his death, and of his burial, having been paid by the guardians of the union,—Held, that they were entitled under 12 & 13 Vict. c. 103, s. 16, to administration of the deceased's effects as creditors. *Windeatt v. Sharland*, 41 Law J. Rep. (n.s.) P. & M. 9; Law Rep. 2 P. & D. 266.

(16) *Equitable creditor.*

**27.**—The testator by his will appointed A. and B. executors and trustees, and directed them to allow his wife to receive the rents and profits of his estate, and to carry on his business of a tailor and draper for the term of her natural life, if she should so long remain his widow. A. & B. declined the trusts and duly renounced probate, and administration, with the will annexed, was granted to the widow, who carried on the business down to the time of her death, in January, 1874. She died not marry again, and she died insolvent and

intestate. With the exception of a policy of insurance for a small amount, the whole of the testator's property was employed by the widow in carrying on the business, and while she did so C. supplied her with goods in the way of the trade of a tailor to the amount of 399*l*. The debt remained unpaid at her decease, and C. held no security for any part of it. The parties interested under the will having been cited, and there being no opposition to the motion, the Court decreed administration with the will annexed, of the unadministered effects of the testator to C. as an equitable creditor of the estate, but required, as conditions to his obtaining the grant, that he should in the first place, as a legal creditor of the widow, take out administration to her estate, and also give justifying security. *Fairlamb v. Percy*. *In the goods of Percy*, 44 Law J. Rep. (n.s.) P. & M. 11; Law Rep. 3 P. & D. 217, *nom. Fairland v. Percy*.

(b) *Of what granted.*

(1) *Will of married woman having protection order.*

**28.**—The testatrix was deserted by her husband in 1843. She subsequently acquired property by her own industry. In 1851 she made a will, disposing of her property, but did not obtain a protection order, under 20 & 21 Vict. c. 85, s. 21, until 1858. The order, however, stated that it was "to protect all earnings and property acquired since 22nd of July, 1843, the commencement of said desertion:—Held, that the will was entitled to probate. *In the goods of Elliott*, 40 Law J. Rep. (n.s.) P. & M. 76; Law Rep. 2 P. & D. 274.

(2) *Alterations in military will.*

**29.**—The testator, an officer in the Indian army, wrote and signed his will while engaged in actual military service. The will contained material alterations in the hand-writing of the testator, but no information could be obtained as to the time at which they were made:—Held, that, in the absence of evidence to the contrary, the presumption was that the alterations were made while the testator was still engaged in actual military service, and that they were entitled to be included in the probate. *In the goods of Tweedale*, 44 Law J. Rep. (n.s.) P. & M. 35; Law Rep. 3 P. & D. 204.

(3) *Words introduced by mistake.*

**30.**—The testator intended to divide the residue of his personal estate among his sons. The intention was expressed in the memorandum of instructions for the will, which dealt with realty as well as personalty, by the words—"and the residue equally among all the sons." In drawing the will, the words, "and personal," which should have followed the word "real" in the residuary clause, were omitted by mistake, and the clause in consequence purported to dispose only of the residue of realty. There was no residue of realty, either at the date of the execution of the will or at the death of the testator, but there was residue of personalty of considerable value:—Held, assuming parol evidence to be

admissible to shew the mistake, that it was not in the power of the Court to correct it by inserting the omitted words in the clause, or otherwise to give effect to the intention of the testator by expunging from the clause the word "real;" and the will was pronounced for in its existing form. *Harter v. Harter*, 42 Law J. Rep. (n.s.) P. & M. 1; Law Rep. 3 P. & D. 11.

Semble—if the error in the will had been of a kind which the Court could have rectified, the Court would not have been precluded from doing so by the execution of a codicil, which, after making certain alterations in the will, "in all other respects" confirmed it. *Ibid.*

**31.**—A. having executed a will and two codicils, subsequently executed a will, not knowing that it contained a clause of revocation which had been inserted without her authority. The Court granted probate of the four testamentary papers, exclusive of the clause of revocation. *In the goods of Oswald*, 43 Law J. Rep. (n.s.) P. & M. 24; Law Rep. 3 P. & D. 162.

(4) *Erasure and substitution of legatee.*

**32.**—Where a testator obliterates the name of a legatee and substitutes that of another, intending to revoke the former legacy by substituting the name of the second legatee, but the second bequest cannot take effect for want of compliance with the Wills Act, the will may be pronounced for in its original state, if that is ascertainable by any means of legal proof. *In the goods of M'Cabe*, 42 Law J. Rep. (n.s.) P. & M. 79; Law Rep. 3 P. & D. 94.

(5) *Offensive paragraphs in will.*

**33.**—The Court will not exercise its power of omitting from the probate offensive or libellous passages in a will, except in cases of a very special and definite character. It therefore refused to omit from the probate a paragraph in a will which, though offensive, was not calculated to injure. *In the goods of Honeywood*, 40 Law J. Rep. (n.s.) P. & M. 35; Law Rep. 2 P. & D. 251.

(6) *Two wills.*

(i) *French and English: incorporation by reference.*

**34.**—The testator executed a will in France in 1858, and added a codicil thereto in 1865, and a second codicil in 1872. In 1860 he executed a second will, which he deposited with his bankers in England, and in it appointed executors, and confirmed and renewed in all its parts the will of 1858. The French will (1858) disposed only of his property in France, the English will (1860) disposed only of his property in England, and both contained statements to the effect that they were independent of each other:—Held, that the French papers were incorporated by reference with the English will, and that all should be included in the probate. *In the goods of Howden*, 43 Law J. Rep. (n.s.) P. & M. 26.

(ii) *Scotch disposition and settlement having testamentary effect.*

**35.**—The testator was by origin a Scotchman,

but for the greater portion of his life and at his death was domiciled in England. By a Scotch disposition and settlement, dated January, 1851, duly executed, and having a testamentary effect by the law of Scotland, he conveyed to trustees upon certain trusts, his whole heritable and moveable estate then belonging or which should belong to him at the time of his death, reserving to himself power to alter the same in whole or in part, and to revoke, cancel and annul the same as he might think proper. He executed a will on the 8th of October, 1865, by which he disposed of all his real and personal estate, whether in England or Scotland, and appointed his son executor. The will was ineffectual as a conveyance of the Scotch heritage, and it did not revoke the previous trust disposition in the Scotch form. The Court, under these circumstances, granted probate of both instruments, as together containing the will of the deceased. *In the goods of Donaldson*, 42 Law J. Rep. (n.s.) P. & M. 19; Law Rep. 3 P. & D. 45.

(iii) *Inconsistent wills.*

**36.**—Probate of two wills, the second of which was inconsistent with the first, but did not appoint an executor or revoke the appointment of an executor contained in the first, or contain a general clause of revocation, granted by consent to the executor named in the first will. *In the goods of Griffith*, Law Rep. 2 P. & D. 457.

**37.**—A testator made two wills. By the first, which disposed of all his property, he appointed his wife executrix. By the second, which disposed of part of his property, and did not revoke the first, he appointed S. his executor:—Held, that the widow was entitled to probate of both instruments, leave being reserved to S. to come in and prove. *In the goods of Andrew*, 42 Law J. Rep. (n.s.) P. & M. 38.

(7) *Will in execution of power.*

*Probate of will in execution of power: subsequent exercise of power by deed.* [See POWER, 4.]

(8) *Contingent will.*

*Contingent will.* [See WILL, CONSTRUCTION, B 1-13.]

(9) *Will and codicils in England without codicils abroad.*

**38.**—The testator left a will and six codicils. The will and first two codicils were in the possession of the executor in England. The other codicils were in India, and probate of them had been granted by the Court at Calcutta, but no exemplification or authentic copies of them had been sent to this country. It being for the benefit of the estate that the executor in England should be at once qualified to act, the Court decreed to him probate of the will and two codicils in his possession, reserving power to him to prove the other codicils when they reached England, and he filing an undertaking to do so. *In the goods of*



*Roberts*, 42 Law J. Rep. (N.S.) P. & M. 63; Law Rep. 3 P. & D. 118.

*Validity and effect of Canadian probate.*  
[See COLONIAL LAW, 8.]

(C) GRANT OF ADMINISTRATION LIMITED.

(a) *To bequest to child of married woman under 1 Vict. c. 26, s. 33.*

**39.**—A married woman who was a legatee under the will of her father, died in his lifetime and in that of her husband, leaving issue. The husband died before the father, leaving a will of which probate was granted:—Held, that as under 1 Vict. c. 26, s. 33, the bequest took effect as if the legatee had died immediately after her father, in which case she would have died a widow, her son was entitled to administration limited to the bequest, without citing the executor of the husband. *In the goods of Councill*, 41 Law J. Rep. (N.S.) P. & M. 16; Law Rep. 3 P. & D. 314.

(b) *To trust property.*

**40.**—The testator died insolvent, but leaving trust property of great variety and value to be administered. By his will he appointed his wife sole executrix and residuary legatee, and by a codicil thereto he devised and bequeathed to C. F. "all tenements, hereditaments and premises" held by him upon trust or by way of mortgage, subject to the trusts and equities affecting the same. The widow renounced probate and administration with the will and codicil annexed, and the next-of-kin were also willing to renounce administration. The Court, under these circumstances, granted administration with the will and codicil annexed, to C. F., limited to the trust estates (so far as regarded the personality) which vested in him. *In the goods of Protheroe*, 44 Law J. Rep. (N.S.) P. & M. 8; Law Rep. 3 P. & D. 209.

(c) *To property in Court of Chancery.*

**41.**—A., on the supposition that he was entitled to a certain share in B.'s estate, assigned by deed such share to C. It was subsequently determined by a decree of the Court of Chancery that the share belonged to D., A.'s father, but it ultimately devolved upon A. as one of the persons entitled under his father's estate. A. was the administrator of D., but the assignment was made in his own right. D.'s share was found to consist of 1,774*l.* 13*s.* 4*d.* This sum was placed to his credit in the name of the Accountant-General of the Court of Chancery, in the books of the Governor and Company of the Bank of England, and formed part of his estate left unadministered by A. The person entitled as next-of-kin to the grant of administration of D.'s unadministered estate was in America, and was cited by advertisement, but no appearance was entered. The Court, under these circumstances, refused to make to the executor of C. a grant of the unadministered personal estate of D., limited to the sum which was found to represent his share in B.'s estate, but made a grant limited to enabling the executor to assert C.'s rights as

assignee under the deed in the Court of Chancery, and to receive what the Court of Chancery might consider him entitled to. *Burdon v. Morgan*; *In the goods of Longhurst*, 41 Law J. Rep. (N.S.) P. & M. 26; Law Rep. 2 P. & D. 371.

**42.**—A married woman died at Rome in 1854, in the lifetime of her husband. By an indenture of post-nuptial settlement, it was provided that certain property which was then settled upon certain trusts, and any other property to which she might thereafter become entitled, should, in the event of her predeceasing her husband, and other events which happened, be distributable amongst her next-of-kin as if she had died unmarried and intestate. Her husband, an Italian, died at Rome in 1871, having executed a will, in which he appointed executors, but the will was not proved in this country. The deceased was entitled to one-third share of her father's residuary personal estate which became distributable in November, 1874, and by an order of the Court of Chancery the share was carried over to her account. The Court, under these circumstances, granted administration limited to the fund in Chancery, to one of the next-of-kin, without requiring the representative of the husband to be cited. *In the goods of Garofolini*, 44 Law J. Rep. (N.S.) P. & M. 36.

(d) *To property remitted from India.*

**43.**—The deceased, who was in the Indian Civil Service, died in Bengal in 1865, intestate, leaving a widow, his mother, and three brothers, together the only persons entitled in distribution to his personal estate and effects. The Administrator-General of Bengal took possession of his property, which was all in India, and paid one moiety of the proceeds thereof to the widow, who was living in India, and remitted the other moiety to the India Office in this country, for distribution amongst those entitled to it. The mother and two of the brothers died subsequently to 1865. The Court made a grant of administration, under 20 & 21 Vict. c. 77, s. 73, to A., the surviving brother, limited to the sum in the hands of the authorities at the India Office. *In the goods of Hughes*, 43 Law J. Rep. (N.S.) P. & M. 31; Law Rep. 3 P. & D. 140.

(e) *Grant to legatee where executor out of jurisdiction.*

**44.**—The Court, under 38 Geo. 3. c. 87, s. 1, and 21 & 22 Vict. c. 95, s. 18, may, at any time after the expiration of twelve calendar months from the testator's death, grant administration to a creditor, next-of-kin or legatee, if the executors who have proved the will are, at the time of the application, residing out of the jurisdiction. Such a grant, if made to a residuary legatee whose interest in the estate is unascertained, will be limited to enable him to sue in Chancery. If a specific sum of money is payable to the applicant, the grant will be limited to receive such sum. *In the goods of Ruddy*, 41 Law J. Rep. (N.S.) P. & M. 63; Law Rep. 2 P. & D. 330.

(f) *Supplementing limited grant.*

45.—A grant of administration limited to carry on proceedings in Chancery will not be revoked in order to make a general grant to a person entitled thereto. It will be supplemented by a *cæterorum* grant, and the two taken together have the effect of a general grant. *In the goods of Brown*, Law Rep. 2 P. & D. 455.

## (D) ADMINISTRATION PENDENTE LITE.

46.—In a testamentary suit the Court pronounced for the will, and probate was delivered out to the executors, the defendants. The plaintiff appealed, and pending the appeal the executors were unable to make such a title to certain leasehold property, part of the testator's estate, as the purchaser was entitled to require. The Court, under these circumstances, and no one opposing, allowed the executors to bring in the probate, and made to them a grant of administration *pendente lite*. *Wright v. Rogers*, 40 Law J. Rep. (n.s.) P. & M. 8; Law Rep. 2 P. & D. 179.

## (E) ADMINISTRATION BOND.

47.—Where the estate was not under 5,000*l.*, and all the debts of the intestate, with the exception of a few small debts, amounting to 25*l.*, had been paid and satisfied by the administrator, who was the only next-of-kin and the only person entitled in distribution to the personal estate of the deceased, the Court required only one surety to join in the administration bond. *In the goods of Bellamy*, 44 Law J. Rep. (n.s.) P. & M. 49.

## (F) RENUNCIATION.

48.—A renunciation by an executor is not complete until filed in the proper office. *In the goods of Morant*, 43 Law J. Rep. (n.s.) P. & D. 16; Law Rep. 3 P. & M. 151.

An executor signed a renunciation of probate, in order that administration with the will annexed might be granted to a creditor. The necessary papers, including the renunciation, to lead the grant, were taken into the registry, but a difficulty arose in the way of the grant, and all the papers were withdrawn:—Held, that there had been no renunciation by the executor within the meaning of the 79th section of the Probate Act, 1857, and that he was entitled to probate of the will. *Ibid*.

49.—An executor who has filed a renunciation will not be allowed to retract such renunciation unless he can shew that the retraction will be for the benefit of the parties interested. Whether such renunciation can be retracted in any case is not decided. *In the goods of Gill*, Law Rep. 3 P. & D. 113.

## (G) WITNESSES: EXAMINATION.

[See Rules of 1874, rr. 116–123, 43 Law J. Rep. (n.s.) P. & M. 2.]

(a) *Witness described as "elderly person."*

50.—The will purported to have been executed in the presence of two attesting witnesses.

One was abroad, the other in England. The executors who propounded the will applied for a commission for the examination *de bene esse* of the second attesting witness, who was resident in London. The affidavit alleged no physical infirmity, but described him as an "elderly person." The Court ordered the commission to issue, but intimated that if it were proposed at the trial to read the evidence taken under it, strict proof of inability to produce the witness would be required. *M'Pherson v. Parnell*, 40 Law J. Rep. (n.s.) P. & M. 30.

(b) *Witness neither old nor infirm.*

51.—The Court refused to order a commission to issue for the examination of a witness in a testamentary suit pending before it, the witness not being old or infirm, and there being no circumstance beyond the allegation that the evidence was material, calling for her examination out of the ordinary course. *Andrews v. Brooke*, 43 Law J. Rep. (n.s.) P. & M. 39; Law Rep. 3 P. & D. 181.

## (H) EVIDENCE.

(a) *Legitimacy.*

52.—The only question at issue before the jury in an administration suit was whether M. D., through whom the defendants claimed, was legitimate. In the course of their case, which was opened first, they tendered his declarations in evidence. The plaintiffs objected to the admissibility of these declarations, and tendered evidence on the *voire dire*, for the purpose of shewing that the declarant was not a member of the family. The Court being of opinion that the defendants had made out a *prima facie* case of the declarant's legitimacy, admitted the evidence of the declarations, and rejected the evidence on *voire dire* tendered by the plaintiffs. *Hitchins v. Eardley*, 40 Law J. Rep. (n.s.) P. & M. 70; Law Rep. 2 P. & D. 248.

(b) *Execution of lost will.*

53.—An entry in the ledger of a deceased solicitor in his handwriting, admitting payment of his charges for drawing and attending the execution of a will,—Held, to be evidence of the execution of the will. *In the goods of Thomas*, 41 Law J. Rep. (n.s.) P. & M. 32.

*Burden of proof of undue influence.* [See UNDUE INFLUENCE, 7.]

## (I) PLEADING AND PRACTICE.

(a) *Estoppel.*(1) *Order of Court of Chancery.*

54.—Administration of the effects of E. had been granted to W. as one of the next-of-kin. A suit was instituted in Chancery to which W. was a party, and in it the question was raised who were the next-of-kin of E. The administratrix of S., who in his lifetime was one of the next-of-kin of E., obtained leave to attend, and took part in the enquiry, which resulted in a decision that W. was not one of the next-of-kin of E. A suit for revocation of the grant of administration was

then instituted against W. by A. and B., who were the next-of-kin of S., the administratrix of S. having renounced her right to administer the estate of E.:—Held, that, although as against the administratrix of S., W. would have been estopped by the decision of the Court of Chancery from alleging that he was one of the next-of-kin of E., he was not estopped as against A. and B., as they did not claim through the administratrix of S., and were not parties to the Chancery suit. *Spencer v. Spencer*, 40 Law J. Rep. (N.S.) P. & M. 45; Law Rep. 2 P. & D. 230.

(2) *Withdrawal of caveat.*

55.—An executor of a will entered a caveat to a will of a later date, but withdrew the caveat before it was warned, and allowed letters of administration with the earlier will annexed, to be granted to one of the residuary legatees named therein:—Held, that he was not estopped by the withdrawal of the caveat under the circumstances from calling in the letters of administration (with the earlier will annexed) and propounding the alleged later will. *Goddard v. Smith*, 42 Law J. Rep. (N.S.) P. & M. 14; Law Rep. 3 P. & D. 7.

(b) *Survivorship: form of procedure.*

56.—Where a question whether a husband, who had not been heard of for many years, survived his wife, was raised by a plaintiff by petition, and not by a declaration, and the defendant applied for time to answer:—Held, that by so doing he had waived his right to object to the form of procedure. *Peppercorn v. Gardner*, Law Rep. 3 P. & D. 149.

(c) *Service.*

[Additional Rules as to service of notices, 43 Law J. Rep. (N.S.) P. & M. 1.]

(d) *Motion.*

[See Rules of 1874, rr. 124–127, 43 Law J. Rep. (N.S.) P. & M. 2.]

(e) *Subpœna.*

[See Rules of 1874, r. 132, 43 Law J. Rep. (N.S.) P. & M. 3.]

(f) *Property allowed to be sworn under different amounts.*

57.—One of two executors who proved the will swore the property under 60,000*l.*, and paid the duty thereon. The amount of the property depended on the result of a pending suit in Chancery. It was essential for the purposes of the suit that the second executor, who believed the property to be of the value of only 2,000*l.*, should take probate of the will, and he had been advised that he might be prejudiced by swearing the property under 60,000*l.* The Court allowed him, under these circumstances, to swear the property under the smaller amount. *In the goods of Bell*, 40 Law J. Rep. (N.S.) P. & M. 67; Law Rep. 2 P. & D. 247.

(g) *Amendment of probate.*

58.—After a probate had issued in which the testator was described as of his residence only, the Court allowed it to be amended by adding to the description the place where the testator carried on his business. *In the goods of Tongood*, 41 Law J. Rep. (N.S.) P. & M. 84; Law Rep. 2 P. & D. 408.

(h) *Revocation suit: interest.*

59.—To entitle a person to intervene in a suit for revocation of letters of administration, it is not necessary that he should have had an interest at the time of the death of the deceased; an interest acquired subsequently by purchase of part of the estates from the administrator is sufficient. *Lindsay v. Lindsay*, 42 Law J. Rep. (N.S.) P. & M. 32.

(i) *Testamentary suit.*

(1) *Examination of next-of-kin.*

60.—The executor named in the will having determined to propound it, cited certain persons who were next-of-kin of the deceased to see proceedings. They appeared, and there being reason to believe that there were other next-of-kin, the Court made an order upon them, under 20 & 21 Vict. c. 77, s. 24, to attend before the registrar, to be examined as to the state of the family. *Shepherd v. Beetham*, 41 Law J. Rep. (N.S.) P. & M. 44; Law Rep. 2 P. & D. 384.

(2) *New trial.*

61.—The plaintiff in a testamentary suit was examined as a witness in his own behalf, and obtained the verdict of the jury. He was subsequently convicted of perjury in the evidence which he gave on the trial, and was sentenced to twelve months' imprisonment. The witnesses on whose evidence he was convicted of the perjury were also called as witnesses in the suit on behalf of the defendant. The Court under these circumstances refused to grant a new trial of the cause. *Davies v. Brecknell*, 42 Law J. Rep. (N.S.) P. & M. 39; Law Rep. 3 P. & D. 88.

(k) *Order to attend for examination.*

62.—When an order is made on a person having knowledge of testamentary papers to attend to be examined respecting the same, the examination must be in open Court, or upon interrogatories. *In the goods of Laws*, 41 Law J. Rep. (N.S.) P. & M. 41; Law Rep. 2 P. & D. 458.

(l) *Compromise.*

63.—Where upon a compromise in a testamentary suit a verdict was given in favour of the will, but no order made as to costs, the Court refused two years afterwards to embody the terms of the compromise in an order to be enforced as a rule of Court. *Carritt v. Christian and Vane*, Law Rep. 2 P. & M. 181.

(m) *Change of proctor or attorney.*

[Additional Rules as to change of proctor, soli-

citor, or attorney, 43 Law J. Rep. (n.s.) P. & M. 1, 2.]

(K) COSTS.

[See Rules of 1874, rr. 128-131, 43 Law J. Rep. (n.s.) P. & M. 2, 3.]

(a) *Costs out of estate in testamentary suit.*

(1) *Unsuccessful claim.*

64.—On the death of A., intestate, the Crown claimed the property, on the ground of her illegitimacy. B., one of the alleged next-of-kin, disputed the claim, and obtained a verdict in his favour. At the trial in 1862 no application was made on his behalf for an order for his costs, and no order on the subject was made by the Court. Shortly afterwards letters of administration of the personal estate and effects of A. were granted to him as next-of-kin, but in subsequent proceedings in the Court of Chancery it was found that he was no relation whatever of the deceased. He now applied for an order for payment of his costs in the original suit in the Court of Probate out of the personal estate of A. The Court, looking to the time that had elapsed since the suit, to the fact that the parties interested in the estate of A. had received no notice of the application, that B. was a bankrupt, and that no claim was made either by his assignee or his attorney, refused to make the order. *Dyke v. Williams*, 40 Law J. Rep. (n.s.) P. & M. 33; Law Rep. 2 P. & D. 239.

Semble—that if a person, believing himself to be next-of-kin of the deceased, should dispute the claim of the Crown to the property and succeed in the suit, thereby protecting the property for those who have a right to it, he would be entitled to have his costs out of the estate, even though it should turn out that he was no relation whatever of the intestate. *Ibid.*

(2) *Unsuccessful opposition.*

65.—The costs of the unsuccessful opposition to a will on the ground of incapacity will be allowed out of the estate, if the testator's conduct has been such as naturally to lead to the belief that he was of unsound mind when the will was made. *Davis v. Gregory*, 42 Law J. Rep. (n.s.) P. & M. 33; Law Rep. 3 P. & D. 38.

66.—The testator was of eccentric habits, but had always managed his own affairs. The executors propounded his will, but failed to support it, the evidence shewing that at the time it was executed he was not of sound mind. The Court, being of opinion that the executors had acted in the *bona fide* belief of the testator's capacity, and that they could have had no knowledge of his true life and character until it was disclosed on the trial, allowed their costs out of the estate. *Boughton v. Knight*, 42 Law J. Rep. (n.s.) P. & M. 41; Law Rep. 3 P. & D. 64.

67.—An executor having propounded a will, and the next-of-kin having opposed it on the ground of undue influence and fraud, and failed in their opposition, the Court being of opinion that the circumstances of the case warranted the pleas,

allowed the next-of-kin, notwithstanding their failure in the suit, costs out of the estate. *Orton v. Smith*, 42 Law J. Rep. (n.s.) P. & M. 50; Law Rep. 3 P. & D. 23.

(3) *Charge on real estate.*

68.—Where, in a testamentary suit, an order was made that the costs of all parties should be paid out of "the estate," with priority to the costs of the executor, who was universal devisee as well as universal legatee, the Court declined to vary the order so as to charge the costs on the real estate in case the personalty were insufficient. *Davies v. Reynolds*, Law Rep. 3 P. & D. 90.

(4) *Estate in hands of purchaser for value without notice.*

69.—A., under a settlement made upon her marriage, had a power of appointment over a certain fund. B., her husband, in her lifetime, obtained possession of the fund, and after her death transferred it to the trustees of a settlement made in contemplation of the marriage of C., his adopted daughter. Neither C., her husband, nor the trustees, had notice of the trusts of the original settlement. In a suit instituted after B.'s death, the will of A. (appointing the fund in favour of B.) was pronounced for, and the costs of the opponents of the will were ordered to be paid out of A.'s estate:—Held, that the trustees of the settlement made on the marriage of C. were innocent purchasers for valuable consideration of the fund, and that it therefore ceased in their hands to be part of A.'s estate, or to be chargeable with costs. *Adamson v. Hammond*, 43 Law J. Rep. (n.s.) P. & M. 17; Law Rep. 3 P. & D. 141.

Semble—that where a married woman exercises by will a power of appointment over her separate personal estate, although the estate may be liable to the payment of her debts in the hands of the appointee, it would not be liable to the payment of the costs of a suit touching the validity of her will ordered to be paid out of her estate. *Ibid.*

(b) *Plea of undue influence in testamentary suit.*

70.—A party pleading undue influence does not exempt himself from liability for costs, by giving notice under rule 41 that he intends only to cross-examine the witnesses produced in support of the will. *Harrington v. Bowyer*, 41 Law J. Rep. (n.s.) P. & M. 17; Law Rep. 2 P. & D. 264.

(c) *Executor condemned in costs.*

71.—The executor propounded the will. It was opposed on behalf of the Crown by the solicitor for the Duchy of Lancaster, who alleged that the deceased had died intestate, leaving no next-of-kin, and also by persons claiming to be next-of-kin. The Crown and the other defendants, whose interest was accepted by the plaintiff, pleaded the same pleas. All parties were represented by counsel at the trial, and the will was upset. The Crown did not ask for costs, and it ultimately turned out that the other defendants

were not next-of-kin. The Court, notwithstanding, condemned the executors in the costs incurred by them in the suit. *Goss v. Hill*, 40 Law J. Rep. (N.S.) P. & M. 39.

(d) *Costs against Queen's Proctor.*

72.—The Queen's Proctor, on behalf of the Crown, unsuccessfully contested the validity of a will under circumstances which, if the litigation had been between subject and subject, would have rendered him liable for costs:—Held, that the Court had no power to condemn him in the costs of the suit. *Atkinson v. Her Majesty's Proctor*, 40 Law J. Rep. (N.S.) P. & M. 49; Law Rep. 2 P. & D. 255.

(e) *Calling in probate.*

73.—A next-of-kin, who vexatiously calls in probate of a will granted in common form, may be condemned in costs, although he has given notice under rule 41 that he intends only to cross-examine the witnesses produced in support of the will. *Beale v. Beale*, 43 Law J. Rep. (N.S.) P. & M. 70; Law Rep. 3 P. & D. 179.

But a next-of-kin who calls in probate of a will and gives the usual notice under rule 41, will not, if unsuccessful, be condemned in costs because the sole evidence upon which his opposition to the will is founded must to his knowledge be open to grave suspicion, from being that of an attesting witness who had previously made an affidavit of due execution. Such evidence, though *prima facie* untrustworthy, may justify the next-of-kin in requiring proof of the will in solemn form. *Sheffield v. Sheffield*, 43 Law J. Rep. (N.S.) P. & M. 72.

(f) *Taxation of costs: compromise.*

74.—In a testamentary suit a compromise was effected by counsel, one of the terms of the arrangement being that the plaintiffs should pay to the defendant's attorney a certain sum for his "agreed costs." The plaintiffs paid him the sum specified:—Held, there being nothing to shew that he had acted improperly in respect of the compromise, or other special circumstance in the case, that his bill of costs was not liable to taxation. *Holditch v. Carter*, 42 Law J. Rep. (N.S.) P. & M. 78; Law Rep. 3 P. & D. 115.

(L) PROBATE DUTY.

75.—One seised in fee of realty devised and bequeathed by will all his realty and personalty to trustees in trust to sell, and to stand possessed of the proceeds after making certain payments, and to invest the moneys, and to hold the investments and the income thereof in trust to pay an annuity to his widow for life, and as to the residue in trust for all his children who should attain twenty-one; in default of such children the testator bequeathed the investments, as to certain portions thereof, to certain legatees, and as to the residue on certain trusts which failed. On the testator's death his only child, Margaret, was his heiress-at-law and one of his next-of-kin. She died afterwards under twenty-one and un-

married. The realty at her death was unsold and uncontracted to be sold, but was subsequently sold under the trusts of the will for a sum which was its value, and which was paid to her legal personal representative as such:—Held, that probate duty was payable at Margaret's death upon the value of the realty as being part of her estate and effects. *The Attorney-General v. Lomas*, 43 Law J. Rep. (N.S.) Exch. 32; Law Rep. 9 Exch. 29.

76.—The testator remitted moneys from India to England by means of bills of exchange, payable six months after sight, drawn by an Indian bank upon a London bank in favour of his bankers in London. The bills were *in transitu* at sea, and unaccepted, when the testator died in India. They arrived, were paid at maturity, and the proceeds were subsequently received by the defendant, who, as the executor in England, had duly proved the testator's will in this country:—Held, that the defendant was liable to pay probate duty upon such proceeds. *The Attorney-General v. Pratt*, 43 Law J. Rep. (N.S.) Exch. 108; Law Rep. 9 Exch. 140.

PRODUCTION.

(1) *AT LAW.*

(A) *RIGHT TO PRODUCTION.*

(a) *Privileged communications.*

(1) *Confidential letters.*

(2) *Medical reports.*

(3) *Interrogatory evidence.*

(b) *In action for breach of promise of marriage.*

(c) *Libel.*

(d) *Fraudulent misrepresentation.*

(e) *Infringement of patent.*

(B) *PRACTICE IN PARTICULAR CASES.*

(a) *Mandamus to directors of company.*

(b) *Officer of body corporate.*

(c) *Documents not in possession of party interrogated.*

(d) *Attachment for non-production.*

(e) *Costs of inspection.*

(2) *IN EQUITY.*

(A) *RIGHT TO PRODUCTION.*

(a) *Privileged communications.*

(1) *Solicitor and client.*

(2) *Counsel's opinions.*

(b) *Relevancy.*

(1) *Names and addresses of customers.*

(2) *Documents relating to party's own title.*

(c) *Partnership books.*

(d) *Court rolls.*

(e) *In suit to establish right of common.*

(f) *Numerous documents: comparison of handwriting.*

(g) *Documents in constant use.*

(h) *As against mortgagee.*

(i) *As against executors retaining assets in business.*

(k) *Infringement of patent.*

(B) *PRACTICE IN PARTICULAR CASES.*

(a) *Discretion of Court.*

- (b) *Plea by defendant to whole relief.*
- (c) *Form of order to make affidavit.*
- (d) *Form and sufficiency of affidavit.*
- (e) *Vexatious delay in making affidavit.*
- (f) *Production to agent.*
- (g) *Sealing up parts of pedigree.*
- (h) *Documents subject to claims of third parties.*
- (i) *Cross-examination of secretary of company in winding-up.*
- (k) *Voluminous documents: hire of room.*

### (1) AT LAW.

#### (A) RIGHT TO PRODUCTION.

##### (a) *Privileged communications.*

###### (1) *Confidential letters.*

1.—The Court, in the exercise of its discretion, will refuse to order the production of private and confidential letters passing between the plaintiffs relative to the projected litigation with the defendants. *Allan v. Royden*, 43 Law J. Rep. (n.s.) C. P. 206.

###### (2) *Medical reports.*

2.—An insurance office in accepting a proposal to insure the life of a person acted on reports as to his health and habits made by his private friends, a report by his own medical officer on his examination of such person, and a statement by such person written on the back of the medical report. The private friends' reports consisted of replies to printed questions, with a notice by the office that the replies would be considered strictly private and confidential. The medical report was headed with the words "confidential medical examination." In an action against the office to recover the amount insured, in which the question was whether the policy had been obtained by untrue statements as to the health and habits of the person whose life was so insured, the Court allowed the plaintiffs to have inspection of the reports, as well those of the private friends as of the medical officer. *Mahony v. The National Widows' Life Assurance Fund (Lim.)*, 40 Law J. Rep. (n.s.) C. P. 203; Law Rep. 6 C. P. 252.

3.—A railway company having received from a passenger a claim for compensation for personal injuries caused on their line, instructed a medical man to examine the passenger in order to inform the company's attorneys of the nature and extent of the injuries so that they might be able to advise the company in reference to the claim, and prepare the defence. The medical man accordingly twice examined the passenger, and made two reports in writing to the company's attorneys. The passenger having afterwards brought an action against the company to enforce the claim:—Held, that the reports were privileged, and that the plaintiff was not entitled to inspect them, and that the practice in this Court was in accordance with the rule laid down in *Cossy v. The London, Brighton and South Coast Railway Company* (39 Law J. Rep. (n.s.) C. P. 174; Law Rep. 5 C. P. 146), and with that in *Fenner v. The South-Eastern*

*Railway Company* (41 Law J. Rep. (n.s.) Q. B. 313; Law Rep. 7 Q. B. 767). *Skinner v. The Great Northern Railway Company*, 43 Law J. Rep. (n.s.) Exch. 150; Law Rep. 9 Exch. 298; and *Malden v. The Great Northern Railway Company*, Law Rep. 9 Exch. 300 n.

###### (3) *Interrogatory evidence.*

4.—Documents which are written in answer to enquiries made by a railway official to the head office of the company after threat of litigation, and which, in the discretion of the Judge, appear to fall short of notes of the case to be laid before the legal advisers of the company, and are not in the nature of proofs for the trial, are not privileged from inspection, notwithstanding that the documents were not made in the ordinary course of the duty of the person writing them, but in answer to special enquiries. *Fenner v. The London and South-Eastern Railway Company*, 41 Law J. Rep. (n.s.) Q. B. 313; Law Rep. 7 Q. B. 767.

###### (b) *In action for breach of promise of marriage.*

5.—The inspection of letters written by the defendant to the plaintiff, and in her possession, was allowed, at the instance of the defendant, in an action for breach of promise of marriage, when the defendant did not deny the promise or breach, and the only question was as to the damages. *Page v. Lister*, 40 Law J. Rep. (n.s.) Q. B. 87; Law Rep. 6 Q. B. 242.

###### (c) *Libel.*

6.—In an action for libel alleged to be contained in a letter, which, since it had been received by the person to whom it had been addressed, had been returned to and was in the possession of the defendant who had written it, the plaintiff applied to a Judge at chambers for inspection of such letter, in order to enable him to declare in the action. The learned Judge made an order for such inspection, upon the defendant declining to make an affidavit that the production of the letter would tend to criminate her:—Held (Brett, J., *dissentiente*), that the Judge had no power to make such order, inasmuch as, although the plaintiff might have obtained such inspection if he had proceeded under section 50 of the Common Law Procedure Act, 1854, he was not entitled to it under section 6 of 14 & 15 Vict. c. 99 (under which the application must be considered as made), as a Court of Equity would not have granted discovery in this case, and the power of the Common Law Court under that section is limited to cases in which discovery could have been obtained in Equity, and that section is not altered or extended by section 50 of the Common Law Procedure Act, 1854. *Hill v. Campbell*, 44 Law J. Rep. (n.s.) C. P. 97; Law Rep. 10 C. P. 222.

###### (d) *Fraudulent misrepresentation.*

7.—In an action by a passenger against the agents of a ship for fraudulently misrepresenting her condition, the plaintiff was not allowed to inspect letters written to the defendants by other passengers complaining of the condition of the ship, or letters written by the captain and owner

to the defendants *post litem motam*. *Richards v. Gellatly*, Law Rep. 7 C. P. 127.

(e) *Infringement of patent.*

8.—A rule to set aside a verdict for the plaintiffs and enter the verdict for the defendants in an action for infringing a patent having been discharged, the defendants gave notice of appeal, and pending the appeal an order was made for an account of profits. This order was not appealed against, but the defendants, when before the Master, refused to produce their books:—Held, that the plaintiffs were entitled to a rule for inspection of the books, and for administering interrogatories to the defendants. *Sarby v. Easterbrook*, 41 Law J. Rep. (N.S.) Exch. 113; Law Rep. 7 Exch. 207.

(B) PRACTICE IN PARTICULAR CASES.

(a) *Mandamus to directors of company.*

9.—Where a party applies for a mandamus to compel the directors of an incorporated company to allow him to inspect their accounts, according to the directions of 8 Vict. c. 16, s. 115, 119 (the Companies Clauses Act), he must state what his object is and what the scope of his demand is, that the company and the Court may see that his demand is a reasonable one. *The Queen v. The Directors of the London and St. Katharine Docks Company*, 44 Law J. Rep. (N.S.) Q. B. 4.

(b) *Officer of body corporate.*

10.—The attorney of a body corporate is not an officer thereof within the meaning of the Common Law Procedure Act, 1854, s. 50, and therefore cannot be compelled to make a discovery of documents in an action to which the body corporate is a party. *Brown v. The Thames and Mersey Marine Insurance Company*, 43 Law J. Rep. (N.S.) C. P. 112.

(c) *Documents not in possession of party interrogated.*

11.—The 51st section of the Common Law Procedure Act, 1854, does not require an interrogatory as to documents to be limited to such as are in the possession or power of the party interrogated; but the interrogatory may ask such party to state what documents relating to the matter in question he has ever had in his possession. *Lethbridge v. Cronk*, 44 Law J. Rep. (N.S.) C. P. 381.

(d) *Attachment for non-production.*

12.—The Court in the exercise of its discretion will not issue an attachment against a witness for not producing documents in obedience to a *subpœna duces tecum* when he has only the possession of such documents as servant to his master, who has refused to allow him to take and produce them at the trial. *Crouther v. Appleby*, 43 Law J. Rep. (N.S.) C. P. 7; Law Rep. 9 C. P. 23.

(e) *Costs of inspection.*

13.—The general rule laid down under 14 & 15 Vict. c. 99, s. 6, that where inspection of documents is granted the applicant is to pay the costs of inspection, still holds good, and applies to an order to inspect documents of which discovery has been obtained by virtue of the Common Law Procedure Act (17 & 18 Vict. c. 125), 1854, s. 50; and the mere fact of the inspection being lengthy and expensive, does not constitute such an exception to the rule that the Court will interfere with an order made in accordance with it. *The Republic of Peru v. Weguelin*, 41 Law J. Rep. (N.S.) C. P. 144; Law Rep. 7 C. P. 352.

(2) IN EQUITY.

(A) RIGHT TO PRODUCTION.

(a) *Privileged communications.*

(1) *Solicitor and client.*

14.—A. and B. were co-defendants in a suit. Their London solicitor employed B., who was also a solicitor, to collect evidence, and a correspondence then ensued between A. and B. relating to the subject-matter of the suit:—Held, that the correspondence was privileged, and that therefore the plaintiff could not compel its production. *Hamilton v. Nott*, 42 Law J. Rep. (N.S.) Chanc. 512; Law Rep. 16 Eq. 112.

15.—Letters and telegrams written and sent by the defendants to their solicitors or agent, before any litigation had arisen, and described in the affidavit of documents as "confidential communications between solicitors and client, with reference to the matters 'now in question in this suit,'" were adjudged to be sufficiently described to protect them from production. *Macfarlan v. Rolt*, 41 Law J. Rep. (N.S.) Chanc. 649; Law Rep. 14 Eq. 580.

16.—All correspondence between solicitor and client relating to the subject-matter of a contract which has been entered into and which may lead to litigation is privileged. *Wilson v. The Northampton and Banbury Junction Railway Company*, Law Rep. 14 Eq. 477.

17.—Private and confidential correspondence between a party to the suit and his predecessors in title on the one hand, and his and their solicitors from time to time on the other, written in contemplation or in the course of the suit or with reference to the subject-matter in dispute, or to questions connected with the matter in dispute in the cause, is privileged from production. *Minet v. Morgan*, 42 Law J. Rep. (N.S.) Chanc. 627; Law Rep. 8 Chanc. 361.

*Lien of solicitor on documents for costs.* [See ATTORNEY, 39-42.]

(2) *Counsel's opinions.*

18.—Documents must be produced unless they are protected by being both professional communications and also confidential in their nature. *Smith v. Daniell*, 44 Law J. Rep. (N.S.) Chanc. 189; Law Rep. 18 Eq. 649.

In this case an order was made for the production of opinions of counsel, which were not claimed as confidential, but were made in anticipation of and relative to the litigation. *Ibid.*

Lord Westbury, an ex-Lord Chancellor, had given his opinion on the case as a friend; this was given confidentially, but it was ordered to be produced on the ground that it was not a professional communication. *Ibid.*

(b) *Relevancy.*

(1) *Names and addresses of customers.*

19.—The Court ought not to compel discovery of matters useless to the plaintiff for any purposes of the hearing but which may be injurious to the defendant in case the plaintiff fails at the hearing. *Heugh v. Garrett*, 44 Law J. Rep. (N.S.) Chanc. 305.

The plaintiffs employed the defendant as agent for the sale of their manufactures at a commission of 2½ per cent. on sales to their London connection and 4 per cent. on sales to shippers with whom the plaintiffs had not hitherto done business, and it was arranged that he should furnish the plaintiffs with a list of the persons with whom he was doing business for the purpose of enabling them to fix limits of credit. Having, as they alleged, discovered that the defendant was in the habit of supplying persons other than shippers and other than those named in the credit lists with the plaintiffs' manufactures, the plaintiffs filed their bill against the defendant for an account, praying that he might not be allowed to charge the plaintiffs with commission on the goods so sold. The defendant by his answer admitted supplying goods as alleged by the bill, but claimed authority to do so, and in answer to the usual order for the production of documents filed an affidavit declining to produce certain documents on the ground that the whole of his business transactions were contained therein, and stating that if and when the time should arrive for an account of such sales he should be prepared to render it:—Held, that he was bound to produce his books shewing the quantities of goods sold and the prices at which they were sold, but that he was entitled to seal up the names and addresses of the customers, as the discovery would not be of material assistance to the plaintiffs at the hearing of the cause, and might be injurious to the defendant if the plaintiffs failed to obtain relief. *Ibid.*

20.—In a suit to restrain the infringement of trade-marks the defendants refused to disclose the names of their customers, the places to which they had consigned their goods, and the prices which had been paid for them. They also, while producing their books which confessedly shewed orders for goods bearing some of the trade-marks claimed by the plaintiffs, sealed up such portions of entries therein as they swore contained orders for the impression of devices other than those claimed by the plaintiffs:—Held, that the defendants need not disclose the names of their customers or the prices of the goods, as such disclosures could not be material to the plaintiffs and might injure the defendants in their business, but that they must make the rest of the disclosure which they objected to, and that where one of a line of trade-marks had been disclosed in the order book, the

whole line must be disclosed. *Howe v. McKernan* (30 Beav. 547) not followed. *Carver v. Pinto Leite*, 41 Law J. Rep. (N.S.) Chanc. 92; Law Rep. 7 Chanc. 90, and *Moore v. Craven*, Law Rep. 7 Chanc. 94 n.

(2) *Documents relating to party's own title.*

[And see *infra* Nos. 24, 27.]

21.—Documents which a party swears relate exclusively to his own title, and to the best of his knowledge, information and belief, do not contain anything impeaching his case, or forming or supporting the title or case of the other party, and are not in any manner material to the case of the other party as to any matter in dispute in the suit, are privileged from production. *Minet v. Morgan*, 42 Law J. Rep. (N.S.) Chanc. 627; Law Rep. 8 Chanc. 361.

(c) *Partnership books.*

22.—In a suit relating to a joint adventure between the plaintiff and the defendant, the latter, who carried on business in partnership with a person not a party to the suit, was held not to be bound to produce his partnership books without his partner's consent, although he had made entries therein relating to the matters in question. Order of *Malins, V.C.*, reversed. *Hadley v. McDougal*, 41 Law J. Rep. (N.S.) Chanc. 504; Law Rep. 7 Chanc. 312.

[And see *COMPANY*, I 31.]

(d) *Court rolls.*

23.—Summons by guardian *ad litem* of infant lord to compel a steward to deliver up court rolls was dismissed. *Windham v. Giubilei*, 40 Law J. Rep. (N.S.) Chanc. 505.

(e) *In suit to establish right of common.*

24.—Bill to establish a right of common of vicinage over a common within a manor of which the defendant was lord:—Held, that the plaintiff was entitled (1) to production of records and documents relating to Court barons within the manor; (2) to production of accounts and memoranda relating to the digging of gravel and cutting of turf; (3) to have a list of documents relating to the defendant's title as lord of the manor; but not (4) to have such documents produced, the defendant stating by affidavit that they related exclusively to his own title as lord of the manor. *Minet v. Morgan*, Law Rep. 11 Eq. 285.

(f) *Numerous documents: comparison of handwriting.*

25.—The plaintiff, in support of an alleged gift to her by a testator, relied on a writing in her possession purporting to have been signed by him. The defendant, however, disputed the genuineness of the document, and charged the plaintiff with forgery. The defendant having made the usual affidavit of documents, the plaintiff obtained an order in Chambers that the defendant should make a further affidavit setting forth all cheques in



his possession drawn by the testator during a period of nine years, covering the date of the alleged gift. The defendant then by his further affidavit of documents set forth and consented to produce certain cheques bearing the testator's undoubted signature, but declined to set forth or produce others, which he alleged were forged. Upon a further summons to compel the defendant to set forth and produce the latter cheques,—Held, that the plaintiff's general right to the production of all documents relating to the matters in question in the suit ought not to be extended to the production of all documents signed by the testator, however numerous, and that consequently, on technical grounds, the application must be refused, the Court at the same time intimating its opinion that, having regard to the charges against the plaintiff, the defendant ought, in fairness, to have acceded to the application. *Wilson v. Thornbury*, 43 Law J. Rep. (N.S.) Chanc. 356; Law Rep. 17 Eq. 517.

In a suit involving a question of disputed handwriting the hearing of a summons for production of documents is not the proper stage for ordering the production of writings for purposes of comparison, inasmuch as by the Common Law Procedure Act, 1854, s. 27, disputed writings may be compared only with writings "proved to the satisfaction of the Judge to be genuine," and this proof can only be furnished at the hearing. *Ibid.*

(g) *Documents in constant use.*

**26.**—The minute book of a local board will, in a proper case, be ordered to be deposited in the Record and Writ clerks' office for inspection, notwithstanding that it is in constant use by the board. *The Attorney-General v. The Whitwood Local Board, The Attorney-General v. The Castleford Local Board*, 40 Law J. Rep. (N.S.) Chanc. 592.

(h) *As against mortgagee.*

**27.**—Firm A. were employed by a foreign government, as their agents or contractors, to bring out a loan; firm B. were employed by the government, as their bankers, to receive from firm A. the subscriptions to the loan. The loan was subscribed for; firm A. issued scrip certificates, entering in a book called the scrip book the numbers of the certificates and the names of the holders of them; and upon payment of the subscriptions they exchanged the scrip certificates for bonds. Many of the bonds had been issued to the public, when the President of the government hypothecated certain issued and unissued bonds in the hands of firm A. to firm B., to secure a debt alleged to be due from the government to firm B. A bill was filed by the foreign government against firms A. and B., and others, impeaching as fraudulent the transactions connected with the loan, and in particular the contract under which the bonds were hypothecated, and seeking accounts against the defendants:—Held, that, although firm B. objected, firm A. were bound to produce, on their cross-examination before the special examiner, the scrip certificates and scrip book, but that they were not bound to produce the bonds or to give

their numbers, as that might enable the government to destroy the security held by firm B. *The Republic of Costa Rica v. Erlanger*, 44 Law J. Rep. (N.S.) Chanc. 281; Law Rep. 19 Eq. 33.

(i) *As against executors retaining assets in business.*

**28.**—Bill against the executors of a testator for administration and account of profits made by the employment of the testator's property after his decease in his partnership business. Two of the executors, together with other persons not parties, had been partners of the testator and had allowed his estate to remain in the firm:—Held, that the executors must include the books of the firm in the schedule to their affidavit as to documents. *Vyse v. Foster*, Law Rep. 13 Eq. 602.

(k) *Infringement of patent.*

[See PATENT, 33.]

(B) PRACTICE IN PARTICULAR CASES.

(a) *Discretion of Court.*

**29.**—It is within the discretion of the Court to make or refuse an order for production by a defendant upon oath of documents under the 18th section of 15 & 16 Vict. c. 86. And where a suit to administer the estate of an intestate was instituted by a person claiming to be her next-of-kin in a distant degree against the Solicitor to the Treasury, to whom administration had been granted, the Court declined to make the order until the plaintiff had made out a *prima facie* case. *Lane v. Gray*, 43 Law J. Rep. (N.S.) Chanc. 187; Law Rep. 16 Eq. 552.

(b) *Plea by defendant to whole relief.*

**30.**—In a suit instituted in aid of proceedings at law to establish the plaintiff's title as the heir-at-law of a certain person, the defendants filed a plea to the whole of the relief, traversing the fact of the plaintiff's heirship, and put in an answer to a part of the discovery sought by the bill, merely stating their inability to set forth whether the plaintiff had descended from a certain ancestor of the person whose heir he claimed to be:—Held, that notwithstanding the plea, the plaintiff was entitled to have the usual affidavit as to documents made by the defendants. *Kettlewell v. Barstow*, 40 Law J. Rep. (N.S.) Chanc. 375.

(c) *Form of order to make affidavit.*

**31.**—A republic suing in its own name, was ordered to make an affidavit of documents "by one or more of its officers or ministers."—The order in *Ranger v. The Great Western Railway Company* (4 De Gex & J. 74; 28 Law J. Rep. (N.S.) Chanc. 741) followed. *The Republic of Liberia v. The Imperial Bank*, 42 Law J. Rep. (N.S.) Chanc. 574; Law Rep. 16 Eq. 179.

(d) *Form and sufficiency of affidavit.*

**32.**—"Bundles of letters" is not a sufficient description of correspondence in an affidavit of

documents. *Hamilton v. Nott*, 42 Law J. Rep. (N.S.) Chanc. 512; Law Rep. 16 Eq. 112.

**33.**—The plaintiffs in a suit, in which their title to a piece of land was in issue, made an affidavit of documents, refusing to produce certain documents as being immaterial to the defendant's case. But amongst the documents produced was one of a kind similar to those sought to be protected, and this one contained entries throwing a doubt upon the accuracy of the allegation in the plaintiffs' affidavit that the documents sought to be protected were immaterial:—Held, that the plaintiffs must make a further affidavit. *The Mayor and Corporation of Hastings v. Ivall*, 42 Law J. Rep. (N.S.) Chanc. 883; Law Rep. 8 Chanc. 1017.

**34.**—Where, from a defendant's answer (setting out a long list of customers of his), it could clearly be inferred that documents not mentioned in his affidavit as to documents (e.g. books relating to his business) were in his possession, he was ordered to make a further affidavit. *Saull v. Browne*, Law Rep. 17 Eq. 402.

(e) *Vexatious delay in making affidavit.*

**35.**—When a plaintiff has vexatiously delayed making a sufficient affidavit of documents in his possession relating to the matters in question in the suit, the Court will order the bill to be dismissed with costs, as against the defendant who has sought the discovery. *The Republic of Liberia v. The Imperial Bank*, 43 Law J. Rep. (N.S.) Chanc. 640; Law Rep. 9 Chanc. 569.

(f) *Production to agent.*

**36.**—Under the usual order for production of documents to the plaintiffs, their solicitors or agents, the plaintiffs, a foreign republic, required the defendants to produce the documents to S., who was stated in an affidavit made by the plaintiffs' solicitor to be the duly appointed agent of the plaintiffs, and the person from whom he received his instructions in this suit, though Y. was the person named in the bill as the agent in this country of the Republic. The defendant having refused to produce the documents to S.,—Held, affirming the decision of one of the Vice-Chancellors, that S. was the duly authorised agent of the plaintiffs within the meaning of the order. *The Republic of Costa Rica v. Erlanger* (No. 2), 44 Law J. Rep. (N.S.) Chanc. 402.

**37.**—Under the common order for the inspection of documents made in a suit for restraining a nuisance, the plaintiff has a right to have the documents inspected by his land agent, although he is a witness in the suit. *The Attorney-General v. The Whitwood Local Board; The Attorney-General v. The Castleford Local Board*, 40 Law J. Rep. (N.S.) Chanc. 592.

(g) *Sealing up parts of pedigree.*

**38.**—The plaintiff having filed his bill to establish his title by heirship to certain real estate, and being entitled to production by the defendants of a pedigree by which the descent of both parties from a common ancestor was traced, was held entitled to

see only such parts as were material to his title. *Kettlewell v. Barstow*, 41 Law J. Rep. (N.S.) Chanc. 718; Law Rep. 7 Chanc. 686.

(h) *Documents subject to claims of third parties.*

**39.**—O., after he had made an affidavit that he had certain documents, parted with them, some to his solicitors, and some to the trustees under his liquidation. He afterwards changed his solicitors. On summonses being taken out for production and inspection of these documents, O. made another affidavit, stating in what way he had parted with them, and that they were no longer in his possession or power. He also stated that the solicitors claimed a lien upon the documents:—Held, notwithstanding (affirming the order of Bacon, V.C.), that he must be ordered to produce the documents, but with liberty to apply in case he found it impossible to do so. *Vale v. Oppert*, 44 Law J. Rep. (N.S.) Chanc. 579; Law Rep. 10 Chanc. 340.

**40.**—Where the defendants admit that documents are in their custody, possession or power, they cannot afterwards object to produce them on the ground that others have an interest in them. *Plant v. Kendrick*, Law Rep. 10 C.P. 692.

*Solicitor's lien for costs.* [See ATTORNEY, 39–42.]

(i) *Cross-examination of secretary in winding-up.*

**41.**—Where the secretary of a company has made an affidavit on behalf of the company in opposition to a petition for winding it up the company must for the purposes of his cross-examination on his affidavit, produce the books of the company at the instance of the petitioner. *In re the Emma Silver Mining Company*, 44 Law J. Rep. (N.S.) Chanc. 456; Law Rep. 10 Chanc. 194.

The power of the Court of Chancery to make an order for the production of documents, for the purpose of their being put into the hands of a witness who is being cross-examined in order to test his evidence, is the same as that of a Common Law Court in a trial at Nisi Prius. *Ibid.*

[And see COMPANY, I 31–33.]

(k) *Voluminous documents: hire of room.*

**42.**—Where the documents in the defendant's possession relating to the matters in question in a suit were so numerous that they could not all be contained in the room in which the defendants offered inspection of them, the Court gave leave to the plaintiffs to hire a room, and provide proper safeguards, and ordered the defendants to produce the books to them there. Under the same circumstances the Court ordered inspection to be permitted to any twelve persons the plaintiff might name, the names and addresses of the proposed inspectors being furnished to the defendants. *The Republic of Peru v. Wequelin*, 41 Law J. Rep. (N.S.) Chanc. 165.

*Inspection in patent suit.* [See PATENT, 33, 34.]

PROHIBITION.

- (A) DISCRETION OF COURT AS TO GRANTING PROHIBITION.
- (B) PROHIBITION TO COURT OF ADMIRALTY.
- (C) PROHIBITION TO LORD MAYOR'S COURT.
- (D) PRACTICE: COSTS.

(A) DISCRETION OF COURT AS TO GRANTING PROHIBITION.

1. Where it is clear on the facts and the law, that an inferior Court is exceeding its jurisdiction, the granting a prohibition is in the discretion of the superior Court, where the applicant for the prohibition is a stranger. *Worthington v. Jeffries* (44 Law J. Rep. (n.s.) C.P. 209; Law Rep. 10 C.P. 379) not followed. *Chambers v. Green*, 44 Law J. Rep. (n.s.) Chanc. 600; Law Rep. 20 Eq. 552.

2.—Whether a writ of prohibition be applied for by either of the parties to the suit in the inferior Court, or by a stranger to such suit, the only discretion which the superior Court has to refuse such writ is if it doubt in fact or law whether the inferior Court is exceeding its jurisdiction or is acting without jurisdiction. *Worthington v. Jeffries*, 44 Law J. Rep. (n.s.) C.P. 209; Law Rep. 10 C.P. 379.

The party against whom an application is made for a writ of prohibition has no right to an order from the Court that the plaintiff in prohibition should declare in prohibition, but it is always in the discretion of the Court whether such plaintiff shall be put to declare, and where the Court is clear both in fact and law that the inferior Court is acting in excess of, or without jurisdiction, it will issue the writ of prohibition without putting the plaintiff in prohibition to declare. *Ibid*.

(B) PROHIBITION TO COURT OF ADMIRALTY.

3.—The ship C. ran down the ship B. in the river Thames. The C. was arrested under a warrant of the Court of Admiralty issued in a cause of damage instituted in the said Court on behalf of the owners of the B. A rule *nisi* was granted for a prohibition on the ground that the C. was the property of the Khedive of Egypt. In shewing cause against the rule, affidavits were used alleging that the C. was, at the time of the collision, in reality used for carrying cargo and passengers. The Court declined to issue the prohibition; the question whether or not the C. was the property of a sovereign potentate, so as by the law of nations to be exempt from liability being one which might properly be decided in the Court of Admiralty. *In re the Steamship "Charkeie"*, 42 Law J. Rep. (n.s.) Q.B. 75; Law Rep. 8 Q.B. 197.

[And see COUNTY COURT, 13, and ADMIRALTY, 15.]

(C) PROHIBITION TO LORD MAYOR'S COURT.

4.—A defendant in a suit in the Lord Mayor's Court cannot move for a writ of prohibition to stay proceedings in a foreign attachment. *Baker v. Clarke*, Law Rep. 8 C.P. 121.

5.—The Mayor's Court of London being an in-

ferior Court, the whole cause of action must arise within its jurisdiction, and therefore, where a material fact necessary to be proved in order to sustain the plaintiffs' case occurs out of the jurisdiction of such Court, the garnishee against whom process of foreign attachment has been issued to attach moneys owing by him to the defendant, is entitled to a prohibition against such Court proceeding with the suit. *Cooke v. Gilly*, 42 Law J. Rep. (n.s.) C.P. 98; Law Rep. 8 C.P. 107, and *Whinney v. Schmidt*, Law Rep. 8 C.P. 118.

6.—The defendant in a suit in the Lord Mayor's Court may move a superior Court for a writ of prohibition to stay proceedings in the suit, section 15 of the Mayor's Court Act, 1857 (20 & 21 Vict. c. clvii.), applying to objections taken by the defendant in that Court only.—*Manning v. Farquharson* (30 Law J. Rep. (n.s.) Q.B. 22), and *Baker v. Clark* (Law Rep. 8 C.P. 121), not followed. *Jacobs v. Brett*, 44 Law J. Rep. (n.s.) Chanc. 377; Law Rep. 20 Eq. 1.

[And see LONDON, 6, 8, 9.]

(D) PRACTICE: COSTS.

7.—Where a rule for a prohibition is made absolute without any pleading, &c., there is no judgment giving a title to costs under 1 Will. 4. c. 21.—*The King v. Kealing* (1 Dowl. P.C. 440), in the Bail Court, approved of. *The Liverpool United Gas Company v. The Overseers of the Township of Everton*, 40 Law J. Rep. (n.s.) C.P. 201; Law Rep. 6 C.P. 245, *nom. Ex parte Overseers of Everton*.

8.—It is no objection to an affidavit for a rule *nisi* in prohibition that it is stated to be "In the matter of an action commenced" in the inferior Court. *Wallace v. Allan*, 44 Law J. Rep. (n.s.) C.P. 351; Law Rep. 10 C.P. 607.

It is no objection to a rule for a prohibition before verdict that a part of the cause of action arose within the jurisdiction of the inferior Court. *Ibid*.

Upon making absolute a rule for prohibition the Court has a discretion to give costs. *Ibid*.

PUBLIC BODY.

The Metropolitan Board of Works purchased a metropolitan common. They agreed that if within a stipulated time the common should not be devoted to the public, having no part of it sold or let on building or other lease, the plaintiff, who had been beneficially entitled to part of the common, should re-purchase his share. The Board prepared a scheme for the Inclosure Commissioners under the above Act, which provided for the sale or letting of a part of the common, which scheme was promulgated by the Commissioners. The Court restrained the Board of Works from promoting such scheme. *Telford v. The Metropolitan Board of Works*, 41 Law J. Rep. (n.s.) Chanc. 589; Law Rep. 13 Eq. 574.

*Performance of statutory duty: exemption from liability to make compensation for omissions of duty.* [See NEGLIGENCE, 33.]

*Injunction against public body.* [See INJUNCTION, 33-35.]

[Consolidation and amendment of the Acts relating to public health in England. Repeal of pre-existing enactments with exceptions in certain cases as to the metropolis. 38 & 39 Vict. c. 55.]

(A) ADOPTION OF THE ACT: PLACE HAVING A KNOWN AND DEFINED BOUNDARY.

PUBLIC ENTERTAINMENTS.

[Amendment of law. Saving of certain occasional licenses under the Licensing Act, 1872, 38 & 39 Vict. c. 21.]

Under 25 Geo. 2. c. 36, s. 2, which imposes a penalty upon every person keeping any house for public dancing, or other public entertainment of a like kind, in the cities of London and Westminster, without a license for that purpose, and empowers justices to grant such licenses as they in their discretion shall think proper, the justices are at liberty to grant a separate license for music without dancing, and a person who, having a license for music only, keeps open a house for public dancing, is liable to an action for the penalty. *Brown v. Nugent* (Exch. Ch.), 41 Law J. Rep. (N.S.) M. C. 166; Law Rep. 7 Q. B. 588.

The judgment of the Court of Queen's Bench (40 Law J. Rep. (N.S.) M. C. 217; Law Rep. 6 Q. B. 693) affirmed. *Ibid.*

PUBLIC HEALTH AND LOCAL GOVERNMENT ACTS.

(A) ADOPTION OF THE ACT: PLACE HAVING A KNOWN AND DEFINED BOUNDARY.

(B) ELECTION OF LOCAL BOARD.

(a) *Notice of qualification.*

(b) *Fabrication of voting paper.*

(C) POWERS OF LOCAL BOARDS.

(a) *Fouling stream.*

(b) *Filling up ditches at roadside.*

(c) *Buildings.*

(1) *New buildings.*

(2) *Line of buildings.*

(3) *Party-walls.*

(4) *Dangerous buildings.*

(d) *Borrowing money upon security of rates.*

(D) PAVING STREETS.

(a) *Highway within sect. 69 of the Public Health Act, 1848.*

(b) *Apportionment of paving expenses.*

(c) *Surveyor's certificate.*

(d) *Who liable as "owner" of premises.*

(e) *Time to recover paving expenses.*

(f) *Service of notice preliminary to information.*

(E) SEWERS.

(F) LIMITATION OF SANITARY RATES.

(G) NOTICE OF ACTION.

1.—By the Local Government Act, 1858 (21 & 22 Vict. c. 98), it is enacted that the Act may be adopted in corporate boroughs and places under the jurisdiction of a board of competent commissioners, and in all other places having a known or defined boundary, by resolution of the owners and ratepayers, subject to appeal to the Local Government Board:—Held, that in interpreting the words "place having a known or defined boundary" in the above statute, the word "place" is to be received with the widest possible signification, and is not restricted to the accustomed legal divisions of the country, such as manors, hamlets, townships, or parishes, and may, therefore, consist of portions of different townships or parishes, and a place so composed has a "known or defined boundary," which has a physical, visible and notorious boundary, so that there can be no mistake as to its limits. Therefore where the township of Grasmere contained certain small detached portions of the neighbouring townships of Rydal and Loughrigg wholly surrounded by portions of the township of Grasmere, and included within the boundary of that township, the district so composed was held to be a place having a known or defined boundary within the above statute, and an order of the Local Government Board made under section 17 of that Act, and 34 & 35 Vict. c. 70, s. 2, for the adoption of the first-mentioned Act by such district, was held valid. *The Queen v. The Local Board of Grasmere*, 42 Law J. Rep. (N.S.) Q. B. 131; Law Rep. 8 Q. B. 227, *nom.* *The Queen v. Local Government Board.*

(B) ELECTION OF LOCAL BOARD.

(a) *Notice of qualification.*

2.—By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 20, at the election of members of a local board of health, the ratepayers in respect of property in the district, and the owners of such property, shall be entitled to vote according to a certain scale; and any person who is owner and also occupier of the same property, shall be entitled to vote both in respect of the ownership and occupation; and no owner shall be entitled to vote as such unless, fourteen days at least previously to the day of tendering his vote, he shall have delivered to the clerk a statement in writing of his name and address, and containing a description of the nature of his interest in the property creating the qualification. By section 24 any person entitled to vote may nominate for the office of member of the local board himself, if qualified to be elected, or any other person or persons so qualified (not exceeding the number of persons to be elected); and every such nomination shall be in writing, and shall state the names, residences, calling, or quality of the persons nominated, and shall be signed by

[The law relating to public health amended. 35 & 36 Vict. c. 79.]

the party nominating, and be sent to the chairman:—Held, that the statement of the voter's qualification as owner cannot be delivered once for all, but must be delivered before every election. *The Queen v. Morgan*, 41 Law J. Rep. (n.s.) Q. B. 55; Law Rep. 7 Q. B. 26.

At an election of members of a local board a nomination paper was signed, "A. B. being duly qualified as owner in the district." A. B. was not qualified as owner, but was qualified as ratepayer:—Held, that the nomination was valid, as the Act did not require the qualification of the nominator to be stated, and the words "as owner" might be rejected as surplusage. *Ibid*.

(b) *Fabrication of voting paper.*

3.—At an election of a member of a local board of health, the respondent was canvassing for one of the candidates. The wife of a voter, in the absence of her husband, promised his vote, and not being able to write placed a mark on the voting paper, which was in the form prescribed by Schedule A of the Local Government Act, 1848, which requires that in the case of a voter who cannot write a witness shall attest the voter's mark and place the voter's initials against the name of the persons for whom the voter intends to vote. The respondent, believing that the wife was authorised to fill up the voting paper, and that he was not acting contrary to the Act, attested the mark made by her, describing it as the mark of the voter, and placed the voter's initials against the name of the candidate. On an information under the Local Government Act, 1858, section 13, sub-section 5, for fabricating a voting paper:—Held, that in the absence of an unlawful intention on the part of the respondent, he had not fabricated a voting paper within the meaning of the Act. *The Aberdare Local Board of Health v. Hammett*, 44 Law J. Rep. (n.s.) M. C. 49; Law Rep. 10 Q. B. 162.

[And see *Quo Warranto*, 2.]

(C) POWERS OF LOCAL BOARDS.

(a) *Fouling stream.*

4.—The statute 24 & 25 Vict. c. 61, s. 4, gives power to a local board to make an outfall of drains beyond their district, with a proviso that nothing therein contained shall authorise them to pour any noxious matter into any stream. On an information to restrain a local board from pouring noxious matter into a stream through an outfall beyond their district, the local board tendered evidence to shew that no damage was caused to any one thereby:—Held, that this was immaterial and an injunction a matter of course. *The Workington Local Board v. The Cockermouth Local Board*; and *The Attorney-General v. The Cockermouth Local Board*, 44 Law J. Rep. (n.s.) Chanc. 118; Law Rep. 18 Eq. 172.

(b) *Filling up ditches at roadside.*

5.—Where a local board were empowered to fill up ditches "at the side of" a road,—Held, that they had no right to fill up a ditch, adjoining the

plaintiff's land, and which was separated from the road by a strip of greensward one foot wide, and by posts and rails set up by former owners of the plaintiff's land, and usually repaired by the plaintiff and his predecessors. *Tutill v. The West Ham Local Board of Health*, Law Rep. 8 C. P. 447.

(c) *Buildings.*

(1) *New buildings.*

6.—A local board of health, acting under the Local Government Act, 1858, s. 34, made a by-law, requiring every person intending to erect a new building to give fourteen days' notice of such intention, and to deliver with such notice detailed plans and sections, which were to be approved or disapproved by the board within fourteen days after their receipt, and that any person erecting any new building without giving such notice and delivering such plans and sections, or without having them approved by the board, or contrary to plans and sections which had been approved, should be liable to a penalty:—Held, that the by-law was within the powers given by the statute, and was reasonable, and not inconsistent with another by-law which gave power to remove, alter, and pull down work done contrary to any by-law. *Hattersley v. Burr* (4 Hurl. & C. 523) and *Young v. Edwards* (33 Law J. Rep. (n.s.) M. C. 227) not followed. *Hall v. Nixon*, 44 Law J. Rep. (n.s.) M. C. 51; Law Rep. 10 Q. B. 152.

7.—The occupier of a house in a town in which a local board was constituted under the Local Government Act, 1858 (21 & 22 Vict. c. 98), caused a small building, which had been erected against the wall of the yard belonging to his house, to be removed to another side of the yard, using in its reconstruction other parts of the wall of the yard for two sides of it, but in other respects substantially the same materials as were used to form it originally. The wall of the yard had been built before the formation of the local board:—Held, that the building so reconstructed was a new building within the meaning of section 34 of the Local Government Act, 1858, and of a by-law made thereunder by such local board, which required notice to be given to the surveyor of the board before the erection of any new building. *Hobbs v. Dance*, 43 Law J. Rep. (n.s.) M. C. 21; Law Rep. 9 C. P. 30.

(2) *Line of buildings.*

8.—The Folkestone Improvement Act, 1856 (whereby the Towns Improvement Clauses Act, 1847, is incorporated), enacted that in case the width of any street should not be forty feet, the corporation might prescribe the line in which any "house" to be thereafter built should be erected, that no new street should be less than forty feet, and that in case any existing street should not be of that width, the houses to be thereafter erected should be set back so as to allow of that width. Compensation was, however, to be paid to the "owner" of any house required to be set back. Under the provisions of 43 Geo. 3. c. 108, a piece of land in the borough of Folkestone fronting to a road less than forty feet wide was conveyed to

the Vicar of Folkestone and his successors as a site for a church, and the Vicar proceeded to build a church upon it. The corporation did not actually prescribe the line of building until after the foundations of the church had been laid and the walls commenced, when they required the Vicar to set back the church, a part of which was being built within the line so prescribed, offering to pay him compensation:—Held, that the church was a “house” and the Vicar “an owner” within the meaning of the Local Improvement Act, and that under the circumstances the corporation were too late in prescribing the line of building, and were not entitled to have the church set back or to restrain the Vicar from building as he proposed. *The Corporation of Folkestone v. Woodward*, 42 Law J. Rep. (n.s.) Chanc. 782; Law Rep. 15 Eq. 159.

### (3) *Party-walls.*

9.—A local board of health made a by-law under 11 & 12 Vict. c. 63, s. 115, and 21 & 22 Vict. c. 98, s. 34, as to the structure of new buildings, requiring the party-wall of a house of more than one storey to be built of the thickness of nine inches, subject to a penalty, and by another by-law a penalty was imposed of forty shillings, *de die in diem*, in case of a continuing offence under other by-laws after written notice by the board to the offender. A person built a house of more than one storey with a party-wall of the thickness of four and a half inches, and sold and disposed of the house and did nothing more to it. Five months afterwards he was fined under the former by-law. Subsequently, notice having been given to him to make the walls of the requisite thickness, he was fined again under the latter by-law in a continuing penalty for seven days of five shillings a day:—Held, that the latter by-law did not apply to an offence of this description, which was complete before the first conviction, and that the latter conviction was, therefore, bad. *Marshall v. Smith*, 42 Law J. Rep. (n.s.) M.C. 108; Law Rep. 8 C.P. 416.

*What is a ‘party-wall.’* [See BRISTOL IMPROVEMENT ACT.]

### (4) *Dangerous buildings.*

10.—A local Act enacted that “if the surveyor of the City” of M., “or, in his absence, any other duly qualified surveyor, shall certify in writing that there is imminent danger from any building, the corporation” of the city “shall and may, without any presentment, notice or other formality, cause the same to be taken down either wholly or in part, or to be repaired or secured in such manner as the corporation shall think requisite.” It also enacted that if any summons, demand or notice or other such document under the Act “require authentication by the corporation, the signature of the town clerk thereto shall be a sufficient authentication:”—Held, that the certificate of the surveyor was conclusive as to whether danger was imminent, and that the corporation was bound to act upon it; secondly, that by force of the statutory provisions, the directions

by the town clerk to the surveyor must be deemed the act of the corporation, which had ratified his proceedings; and that the certificate of the surveyor sufficiently described two houses having internal communication as “a building, No. 95, Market Street.” *Cheetham v. The Mayor, &c., of Manchester*, 44 Law J. Rep. (n.s.) C.P. 139; Law Rep. 10 C.P. 249.

### (d) *Borrowing money upon security of rates.*

11.—The commissioners appointed under a local Act were by the Act empowered to raise money upon the security of the rates for the purposes of local improvement. Of the money so borrowed the sum of 100*l.* at the least in every year was to be repaid to such of the mortgagees as should be selected by ballot. The interest upon the mortgage was duly paid, and annual instalments were paid in the prescribed manner, though not with complete regularity. The plaintiffs, as mortgagees, gave notice to the commissioners, requiring them to pay off their mortgage (800*l.*) in six months. The commissioners refused to do so, whereupon the plaintiffs filed their bill to establish their right to be paid off, and for a receiver of the rates:—Held, affirming the decision of one of the Vice-Chancellors (41 Law J. Rep. (n.s.) Chanc. 310), that the plaintiffs had no right to have their mortgage debt paid off, except under the provisions of the Act, and that the Court had no jurisdiction to appoint a receiver of the rates, and an appeal against the Vice-Chancellor’s order dismissing the plaintiff’s bill was dismissed with costs. *Preston v. The Mayor, &c., of Great Yarmouth*, 41 Law J. Rep. (n.s.) Chanc. 760; Law Rep. 7 Chanc. 655.

*Liability of local board for insufficiently buoying sunken anchor.* [See NEGLIGENCE, 22.]

*Exemption from stamp-duty of conveyance by local board.* [See STAMP, 2.]

## (D) PAVING STREETS.

### (a) *Highway within sec. 69 of the Public Health Act, 1848.*

12.—In the year 1798, by a local Act, 8 Geo. 3. c. xlv., for better paving, &c., the streets in the township of H., trustees were appointed to repair, &c., the streets, and to levy rates therefor on the inhabitants who on paying them were to be exempt from all other charges for paving, &c., the streets. In the year 1816 A. laid out a street on his land, which in 1819 became dedicated to the public by user. In the year 1823, by another local Act, 4 Geo. 4. c. xc., for paving, &c., the streets of H., the former Act was repealed, trustees were appointed for similar purposes, and it was provided that all persons should be exonerated from statute duty and compositions and all liability for highway repairs, that surveyors should be appointed who were to be in the position of surveyors of highways, all costs to be paid by the trustees out of rates to be levied by them, and the trustees to be authorised to pave, &c., present and future

streets, and when any new streets already or thereafter laid out and made were properly paved, &c., on application by the owners of adjoining houses to declare them public, whereupon they were to be public and repaired by the trustees, and where any streets then or thereafter set out on private property had been opened and used for three years, to cause them to be paved, &c., whereupon they should be deemed public. In the year 1851 the Public Health Act, 1848, was applied to H., and the Local Acts repealed as far as the liability of the surveyors, the powers of the trustees to pave and liability of owners to reimburse them; and the Local Board having duly paved the street before mentioned, called on the appellant to contribute as an adjoining owner, under section 69 of the last-mentioned Act which excepts highways defined by 15 & 16 Vict. c. 42, s. 13, to be highways repairable by the inhabitants at large. Rates had been paid in respect of the premises under the Local Acts, but the street had never been paved, &c., never been dedicated under 5 & 6 Will. 4. c. 50, and no steps taken by the trustees or the Local Board to make it public:—Held, that the first Local Act did not prevent a dedication to the public, that the second only applied to streets then in course of construction or afterwards constructed, and that therefore the street was a highway within the exception in section 69 of the Public Health Act, 1848, and the appellant not liable. *Hirst v. The Local Board of Health of Halifax*, 40 Law J. Rep. (N.S.) M.C. 43; Law Rep. 6 Q. B. 18.

*Wallington v. White* (30 Law J. Rep. (N.S.) M.C. 209, affirmed, 32 Law J. Rep. (N.S.) C.P. 86, *sub nom. Willes v. Wallington*) distinguished. *Ibid.*

13.—A piece of ground dedicated by user to the public as a road is not a "street not being a highway" within the meaning of section 69 of the Public Health Act, 1848. *Healey v. The Corporation of Batley*, 44 Law J. Rep. (N.S.) Chanc. 642; Law Rep. 19 Eq. 375.

(b) *Apportionment of paving expenses.*

14.—By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 69, and the Local Government Act, 1858 (21 & 22 Vict. c. 98), s. 64, the expenses incurred by local boards in paving, &c., private streets under the powers of the former Act are to be charged upon the owners of premises abutting upon the street, in such proportion as shall be settled by the surveyor, or in case of dispute by arbitration, and where the matter in dispute is less than 20*l.*, by two justices:—Held, first, that the surveyor having made one apportionment upon a wrong principle has a right to make a fresh apportionment; secondly, that neither the arbitrators nor the justices in settling such proportions are entitled to enquire whether the amount alleged to have been expended by the surveyor has been actually so expended. *Cook v. The Ipswich Local Board of Health*, 40 Law J. Rep. (N.S.) M.C. 169; Law Rep. 6 Q. B. 451.

(c) *Surveyor's certificate.*

15.—By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 2, notwithstanding, that he was liable to contribute as "owner" under sec-

tion 63, s. 69, and the Local Government Act, 1858 (21 & 22 Vict. c. 98), ss. 63, 64, the expenses incurred by local boards in paving, &c., . . . streets (not being highways), under the powers of the former Act, are to be charged upon the owners of premises abutting upon the street, in such proportion as shall be settled by the surveyor, &c., and where such expenses have been so settled as payable by such owners, "such apportionment shall be binding and conclusive upon such owner, unless within the expiration of three months from the time of notice being given by the local board or their surveyor, of the amount of the proportion so settled by the surveyor to be due from such owner, he shall by written notice dispute the same."

The Local Board of A. gave notice to the owners of the houses forming a street, requesting them to sewer, pave, &c., the street, and upon their default executed the work, the cost of which was apportioned by the surveyor, according to the frontage. The appellant, one of the owners, did not give notice within three months under 21 & 22 Vict. c. 98, s. 63, that he disputed the apportionment, but when summoned before the justices to pay his proportion, contended that he was not liable, on the ground that the street was a highway repairable by the inhabitants at large.

The justices having held that the appellant was not entitled to raise before them the question, whether the street was a highway or not:—Held, that the decision was wrong, as the certificate of the surveyor was conclusive as to the apportionment, but not as to the original liability of the person charged. *Hesketh v. The Local Board of Atherton*, 43 Law J. Rep. (N.S.) M.C. 37; Law Rep. 9 Q. B. 4.

(d) *Who liable as "owner" of premises.*

16.—By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 2, the word "owner" shall mean the person for the time being receiving the rack rents of the land or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would receive the same if such land or premises were let at rack rent. By section 69, in case any street not being a highway be not sewered, levelled, paved, &c., to the satisfaction of the local board of health, the board may by notice require the owners or occupiers of the premises fronting, &c., such parts of the street as require it to sewer, level, pave, &c., them, and upon default the board may themselves execute the works; the expenses to be paid by the owners. A school-house and two dwellings for teachers were, under the provisions of 4 & 5 Vict. c. 38, conveyed by deed to the appellant and others as trustees, upon trust to allow them to be used only as a school for the education of the poor in the principles of the Established Church, and for the residence of the master or mistress of the school. The appellant, having no power to let the premises, neither received nor could receive any rent in respect of them:—Held, notwithstanding, that he was liable to contribute as "owner" under sec-

tion 69 of the Public Health Act, to the paving, &c., of a street in front of the premises as, although he was not entitled to let them, he would receive the rent if they were actually let. *Bowditch v. The Wakefield Local Board of Health*, 40 Law J. Rep. (N.S.) M. C. 214; Law Rep. 6 C. P. 567.

(e) *Time to recover paving expenses.*

17.—In 1858, the respondents, a local board of health, served upon the appellant, who was an owner of premises within the meaning of 11 & 12 Vict. c. 63, a notice to execute certain specified works in paving, &c. The works not having been executed by the appellant, the respondents completed them on the 30th of November, 1860, and on the 21st of January, 1861, apportioned the expense among the appellant and the other owners, giving notice on the same day to the appellant that “unless the amount of this account is paid within fourteen days after delivery, interest at the rate of five per cent. per annum will be charged thereon until fully liquidated. To proportion of sewerage, levelling, paving, flagging, channelling, &c., namely, fifty-ft. frontage, at 5s. 4d., 13l. 6s. 8d.” The amount was not paid by the appellant, and the respondents, on the 25th of August, 1870, resolved and declared that the said amount of 13l. 6s. 8d. should be “private improvement expenses,” and subsequently that the amount should be paid by two instalments. The appellant refused to pay, and an information was laid against him:—Held, that the respondents having elected in 1861 to treat the amount as a debt due from the appellant could not now treat it as a private improvement expense, and further, that in order to recover the amount from the appellant proceedings must have been taken within nine months from the service of the notice of the 21st of January, 1861, which must be considered as a demand. *Wilson v. The Mayor, &c., of Bolton*, 41 Law J. Rep. (N.S.) M. C. 4; Law Rep. 7 Q. B. 105.

(f) *Service of notice preliminary to information.*

18.—On an information for not paying an apportionment under 11 & 12 Vict. c. 63, s. 69, evidence must be given that the preliminary notice required by that section was served. *The Jarrow Local Board of Health v. Kennedy*, Law Rep. 6 Q. B. 128.

(E) SEWERS.

*Award by umpire of compensation for making sewer.* [See ARBITRATION, 19.]

[And see SEWER.]

(F) LIMITATION OF SANITARY RATES.

19.—In 35 & 36 Vict. c. 79, s. 43, providing that any “limit” imposed in respect of any rate by any local Act shall not apply to any rate for sanitary purposes under the Act, the word “limit” does not mean exemption, and buildings, &c., which under a local Act were wholly exempt are not rateable. *The Walton Commissioners v. Walford*, Law Rep. 10 Q. B. 180.

(G) NOTICE OF ACTION.

20.—Section 139 of the Public Health Act, 1848, which requires notice of action for anything done or intended to be done under that Act:—Held, to apply to a case where injury was caused by insufficiently buoying a sunken anchor which was part of certain works authorised by a local Act. *Jolliffe v. The Wallasey Local Board*, 43 Law J. Rep. (N.S.) C. P. 41; Law Rep. 9 C. P. 62.

*Award under ss. 123, 124 of Public Health Act, 1868: pleading.* [See ARBITRATION, 19.]

## PUBLIC SCHOOLS.

[31 & 32 Vict. c. 118, amended. 35 & 36 Vict. cc. 54, 60.]

[31 & 32 Vict. c. 118, amended as to the property of Shrewsbury and Harrow Schools. 36 & 37 Vict. c. 41. Section 24 amended as to Eton College property. 36 & 37 Vict. c. 62.]

The governing body of a school constituted under the Public Schools Act, 1868, has, under the 13th section of that Act, absolute power to dismiss the head master of the school “at their pleasure,” that is, without assigning any reason; and so long as this power is fairly and honestly exercised the Court of Chancery cannot interfere. *Hayman v. The Governing Body of Rugby School*, 43 Law J. Rep. (N.S.) Chanc. 834; Law Rep. 18 Eq. 28.

They may do so, moreover, although the head master received his appointment from a prior governing body in existence before the passing of the Act, whose powers of dismissal were subject to restrictions as to time and place of exercise. *Ibid.*

Semble—if the governing body gives reasons for the dismissal, the Court will look at the sufficiency of those reasons. *Ibid.*

## PUBLIC WORKS LOANS.

[Consolidation of the Acts relating to loans for public works. 38 & 39 Vict. c. 89.]

[And see CHURCH-RATES.]

## QUARE IMPEDIT.

The words “next avoidance of, or presentation to, any benefice,” as used in 12 Anne, st. 2, c. 12, s. 2, refer only to chattel interests, and do not extend to freehold estates in an advowson, and therefore a clerk in holy orders, who by payment of a pecuniary consideration becomes seized of an advowson for the life of another and claims to be admitted when the benefice is subsequently vacant, does not commit simony within the meaning of



that statute. *Walsh v. The Bishop of Lincoln*, 44 Law J. Rep. (n.s.) C.P. 244; Law Rep. 10 C.P. 518.

A clerk in holy orders who is seised of a freehold estate in an advowson may by the common law offer himself to the ordinary and pray to be admitted whenever the benefice is vacant, and the bishop is bound to institute him. *Ibid.*

### QUARTER SESSIONS.

[See JUSTICE OF THE PEACE, 5-11.]

### QUO WARRANTO.

1.—A rule for an information, in the nature of a *quo warranto*, in respect of an annual office of guardian of the poor, the election to which was on the 14th of May, on the ground that the mode of election adopted was not a proper one, was not applied for till the 13th of January following, and it was then not shewn that any ratepayer had been prevented from voting, or that the result of the election was affected by the mode adopted. In the exercise of its discretion, the Court discharged the rule. *The Queen v. Cousins*, 42 Law J. Rep. (n.s.) Q.B. 124; Law Rep. 8 Q.B. 216.

2.—W. was chairman of a local board, and it was his duty under 11 & 12 Vict. c. 63, s. 21, to conduct and complete the elections of members for the ensuing year, and by the same section if the chairman became unable to act, some other person was to be appointed by the local board to perform such of his duties as then remained to be performed. F. was appointed by the local board to act as returning officer in case of nomination of the chairman as a candidate. W. published a notice, fixing the day of election and the day for receiving nomination papers. He received a nomination paper nominating himself, and afterwards continued to receive other nomination papers. More candidates were nominated than vacancies. W. filled up the form of voting paper under section 23, and sent it to be printed, with directions for the printer to return it to F., and from that time forward everything was done by F. W. was elected, and returned by F. No improper motive was imputed to W., nor did his acts produce any inconvenience, or in any way influence the result of the election. The Court, in the exercise of its discretion, refused leave to file an information in the nature of a *quo warranto*. *The Queen v. Ward*, 42 Law J. Rep. (n.s.) Q.B. 126; Law Rep. 8 Q.B. 210.

*Office of alderman: time for application.*  
[See MUNICIPAL CORPORATION, 6.]

### RAILWAY.

#### (A) CONSTRUCTION OF SPECIAL ACT.

- (a) *Charges for conveyance of goods.*
- (b) *Stopping up streets.*
- (c) *"Ordinary train."*

(d) *Deposited plans.*

(e) *Power to lease superfluous lands.*

(f) *Solicitor's costs of obtaining Act of Parliament.*

#### (B) CONTRACTS BY.

(a) *Contractor: engineer's certificate.*

(b) *Contract to build railway station.*

(c) *Covenant to stop trains.*

(d) *Running powers.*

(e) *Branch railway: what is.*

#### (C) POWERS.

(a) *Compulsory powers to take land.*

(b) *Summary petition for delivery of arbitrator's certificate.*

#### (D) RIGHTS OF UNPAID VENDORS.

#### (E) RIGHTS OF CREDITORS.

(a) *Judgment creditor.*

(b) *Creditor leaving claim unascertained.*

(c) *Dissolution of company.*

#### (F) LEVEL CROSSINGS.

(a) *Grant of right of way.*

(b) *Liability for unsafe condition.*

#### (G) FENCES; DUTY OF RAILWAY COMPANY.

#### (H) REPAIR OF BRIDGES.

#### (I) RIGHT TO RUN ENGINES OVER RAILWAY.

#### (K) COMMUNICATION BETWEEN PASSENGERS AND GUARD.

#### (L) DEPOSIT UNDER RAILWAYS CONSTRUCTION FACILITIES ACT, 1864.

#### (M) DEPOSIT UNDER RAILWAYS ABANDONMENT ACT.

#### (N) OPENING OF RAILWAY.

#### (O) ARRANGEMENT.

(a) *Under Railway Companies Act, 1867.*

(b) *Under special Act.*

#### (P) LIABILITY FOR ACTS OF SERVANTS.

#### (Q) LIABILITY FOR NEGLIGENCE.

#### (R) LIABILITY AS CARRIERS.

#### (S) RAILWAY AND CANAL TRAFFIC ACT; UNDUE PREFERENCE.

#### (T) RATES AND ASSESSMENTS.

#### (U) DUTY ON PASSENGER FARES.

#### (V) OFFENCES.

(a) *Obstructing signals.*

(b) *Wilful trespass.*

[Provisions as to inspection of railways by the Board of Trade, and of returns of accidents and other statistics by railway companies to the board, &c., 34 & 35 Vict. c. 78.]

[Appointment of commissioners to carry into effect the Railway and Canal Traffic Act, 1854. Provisions for the regulation of through traffic, &c., 36 & 37 Vict. c. 48.]

[Provisions for returns of signal arrangements, &c., by railways to the Board of Trade. 36 & 37 Vict. c. 76.]

[30 & 31 Vict. c. 126, s. 4 and c. 127, s. 4 as to liability of rolling stock made perpetual. 38 & 39 Vict. c. 31.]

#### (A) CONSTRUCTION OF SPECIAL ACT.

(a) *Charges for conveyance of goods.*

1.—The Act under which the appellant company was incorporated fixed a maximum charge for the

conveyance of goods, "except a reasonable sum for services incidental to the business of a carrier." They permitted the respondent to occupy land at one of their stations for the purpose of depositing his coal:—Held (affirming the judgment of the Exchequer Chamber), that this was not a "service incidental to the business of a carrier," within the meaning of the Act, and that charges as for such service paid by the respondent to the company over and above the maximum fixed by the Act might be recovered by him as money had and received to his use. *Lancashire and Yorkshire Railway Company v. Gidlow*, 45 Law J. Rep. (n.s.) Exch. 625; Law Rep. 7 E. & I. App. 517.

The appellants had imposed restrictions on the coal traffic of the respondent which the Court found to be unreasonable and improper:—Held, that damages for loss of customers arising from such restrictions were not too remote to be recovered. *Ibid.*

Interest will, as a matter of course, be given for the time that execution has been delayed by a proceeding in error. *Ibid.*

2.—A special Act relating to the Lancashire and Yorkshire Railway Company, provided that where goods were carried on the company's railway, or partly on their railway and partly on some other railway of which they were joint owners, or which they had a right to use, for a less distance than six miles, the company should be entitled to take tolls as for six miles. The Act also provided that the tolls for goods carried over the company's line and over portions of other lines of which they were part owners, or which they had a right to use, should be computed as if the company's line and the said portions of the said other lines formed one railway. Goods were passed over the line of which the company were sole owners for a distance of less than six miles: the same goods on their transit to their ultimate destination passed over another line of which the company was part owner for a distance of more than six miles. This latter line was under the sole management of another company. The goods were accompanied by two declaration notes, one made out in the name of the first company and the other in the name of the other company, but the station of ultimate destination mentioned in both notes was the same:—Held, that the company was not entitled to split the contract, that the two lines must be treated as one, and that the six-mile clause was not applicable. *Lancashire and Yorkshire Railway Company v. Gidlow* (H. L.), 42 Law J. Rep. (n.s.) Exch. 129.

The same Act of Parliament, while providing the maximum rate of tolls to be charged, made an exception in respect of special services to be rendered by the company for loading, unloading, collection and delivery of goods:—Held, that the company were not entitled to charge for special services, though found by a jury to have been actually rendered by them; the customer charged for such services, not having had the offer and option first distinctly given him of either availing himself of such services at the company's rate of

charge or of doing them himself, such services being incidental to the ordinary business of a carrier, and such as the customer, without notice, might have supposed were covered by the company's charges for toll. *Ibid.*

### (b) *Stopping up streets.*

3.—A railway company having, under their special Act, stopped up one end of a street which they required for the purposes of their station, and having purchased all the houses in the street were held to be entitled to stop up and appropriate the rest of the street and a motion for injunction was refused. *Temple v. Flower*, 41 Law J. Rep. (n.s.) Chanc. 604.

The railway company and the Attorney-General ought to be parties to such a suit. *Ibid.*

4.—Representations made on plans deposited by the promoters of an intended railway in pursuance of the Standing Orders of the Houses of Parliament previous to an application for an Act do not bind the railway company after the Act is obtained nor give other persons any equity against the company, except so far as they are incorporated with the Act. *Attorney-General v. The Great Eastern Railway Company*, 41 Law J. Rep. (n.s.) Chanc. 505; Law Rep. 7 Chanc. 475.

Where a General Act of Parliament is incorporated with a Special Act, if there is any contradiction between them, the Special Act is to prevail. *Ibid.*

A Special Act of Parliament, with which was incorporated the Railways Clauses Consolidation Act, 1845, empowered a railway company to stop up all streets within a certain area in the City of London. The deposited plans shewed that S. Street which was within the area was not to be stopped up but to be crossed by an arch. The same plans shewed that other streets within the area were to be stopped up. Subsequently the company obtained another Act, authorising them to make an underground instead of an aboveground railway, and re-enacting the powers given them by the previous Act. In a suit for an injunction to restrain the company from stopping up S. Street,—Held (reversing a decision of Bacon, V.C., 41 Law J. Rep. (n.s.) Chanc. 202; Law Rep. 7 Chanc. 478 n), that the plans were not incorporated in the Special Act, and that the power to stop up all streets within the area, including S. Street, was an existing power and capable of being exercised. *Ibid.*

Affirmed on appeal to the House of Lords (Law Rep. 6 E. & I. App. 307).

### (c) *"Ordinary train."*

5.—Trains having a special object, not being trains for the ordinary traffic and purposes of a branch line of railway; being also substantially faster than the other trains; stopping only at one of the two stations on the branch line; put on it to be in connection with fast trains on the main line of the London and South-Western Railway, and so materially shortening the through journeys, are not "ordinary" trains within the 27th section

of the Ringwood, Christchurch and Bournemouth Railway Act, 1859. *Turner v. The London and South-Western Railway Company, and The Ringwood, &c., Railway Company*, 43 Law J. Rep. (N.S.) Chanc. 430; Law Rep. 17 Eq. 561.

(d) *Deposited plans.*

6.—A Railway Company's Act empowered them to make their railway "in the line and upon the lands delineated on the said plans, and described in the said book of reference." The deposited plans had numbers placed on some of the pieces of land required by the company; but those pieces of land were shewn on the plans to be enclosed on three sides only (one of such three sides being the centre line of the railway) and not on all the four sides. Those pieces were mentioned in the notices to treat; but it was contended that they were not properly "delineated" and could not be taken by the company:—Held, first, that for the construction of the railway itself, lands within the limits of deviation, although not shewn to be bounded on all the four sides, might be taken by the company up to the line of deviation. Secondly, that as the plaintiffs (landowners) had notice that some portion of the same lands were outside the line of deviation, the company could take those portions. Thirdly, as to the words "delineated and described," that the word "delineated" does not mean "surrounded on every part by lines," but "sketched or represented or so shewn, that landowners would have notice that the land might be taken;" and fourthly, that where Parliament has not clearly defined the position of the centre line of a railway, the company are acting within their powers if they have taken the measurement for the purposes of their Act, from a point which competent engineers consider a proper one from which to find the centre of the line of railway. *Dowling v. The Pontypool, Caerleon and Newport Railway Company*, 43 Law J. Rep. (N.S.) Chanc. 761; Law Rep. 18 Eq. 714.

Circumstances under which a piece of land, numbered in the deposited plans, but not included in the notices to treat, was considered to be well taken by the company. *Ibid.*

Special circumstances under which the plaintiffs' bill was dismissed with costs. *Ibid.*

(e) *Power to lease superfluous lands.*

7.—A railway company had the usual power of selling superfluous lands. By a subsequent extension Act, powers were given to the company of leasing and mortgaging, without limit as to time, such of these lands as were connected with the structure of the railway:—Held, that the extension Act did not take away the power of sale and substitute powers of leasing and mortgaging, but amplified the power of sale by removing some of the restrictions upon it. *Tomlin v. Budd*, 43 Law J. Rep. (N.S.) Chanc. 627; Law Rep. 18 Eq. 368.

(f) *Solicitor's costs of obtaining Act of Parliament.*

8.—A solicitor and parliamentary agent, not being promoters of a railway company, expended

moneys in procuring an Act in 1859; the railway was not constructed, and the company had no assets till 1872. On their then obtaining assets,—Held, that the claims of the solicitor and agent were not barred, as the Statute of Limitations did not run until the company had assets. The special Act gave a right to sue the company for the costs of the Act and incorporated the Companies Clauses Act:—Held, that this right was additional to, and not substitutional for, the right given by the latter Act. *In re The Kensington Station Act*, Law Rep. 20 Eq. 197.

(B) *CONTRACTS BY.*

(a) *Contractor: engineer's certificate.*

9.—Contract under seal by contractors with a railway company to complete works at prices fixed by the specification of the company's engineer, with provisions making the engineer's certificate conclusive between the parties:—Held, first, that the contract could not be varied by mere verbal promises made by the engineer, or, secondly, because the amount of the works to be executed was under-stated in the certificate; and, thirdly, that the engineer's certificate must be conclusive in the absence of fraud. *Sharpe v. San Paulo Railway Company*, Law Rep. 8 Chanc. 597.

(b) *Contract to build railway station.*

10.—A contract entered into by a railway company with a landowner to build a railway station at a particular spot, nothing being said as to the user of the station, or the degree of convenience and accommodation to be afforded by it, is too vague and indefinite to be enforced by decree for specific performance; but the Court will give damages for the breach of such contract, and in assessing those damages will give the landowner the benefit of all such presumptions as, according to the rules of law, are made against wrong doers. *Wilson v. The Northampton and Banbury Railway Company*, 43 Law J. Rep. (N.S.) Chanc. 503; Law Rep. 9 Chanc. 279.

(c) *Covenant to stop trains.*

11.—In a lease by a railway company of their refreshment rooms at S., the company covenanted with the lessee that all trains carrying passengers, not being goods trains or trains to be sent express or for special purposes, and except trains not under the control of the company, which should pass the S. station either up or down, should, save in case of emergency or unusual delay arising from accidents, stop there for refreshment of passengers for a reasonable period of about ten minutes, and that as far as the company could influence the same, trains not under their control should be induced to stop for the like purpose. The Postmaster-General, having in the exercise of his power required that trains carrying mails should not stop at S. more than five minutes,—Held, first, that those trains were not as regards stopping under the control of the company; and secondly, reversing the decision of one of the Vice-Chancellors, that the company were not by their covenant

prohibited from carrying passengers by such trains. *Phillips v. The Great Western Railway Company*, 41 Law J. Rep. (N.S.) Chanc. 614; Law Rep. 7 Chanc. 409.

(d) *Running powers.*

12.—A. company, being owner of a station, entered into an agreement with B. company to make a new junction between their respective lines, so that B. company might use such station. C. company, having running powers over A. company's line, subsequently entered into agreement with B. company for use of B. company's line. An attempt of C. company to go from B. company's line to A. company's line over the junction was resisted on the ground that C.'s agreement with B. did not give a right to use such junction, and even if it did, such agreement was *ultra vires* and invalid, as being a delegation of statutory powers and as such against public policy:—Held (reversing the decision of the Master of the Rolls), that the effect in law of the right to make the junction was to make the two lines one continuous line, which the public had a right to use, and therefore also a company working under arrangements with companies owning the two lines. That the agreement as stated did not amount to a delegation of statutory powers, nor was it *ultra vires*. *The Midland Railway Company v. The Great Western Railway Company*, 42 Law J. Rep. (N.S.) Chanc. 438; Law Rep. 8 Chanc. 841.

13.—By an agreement entered into between the L. company and the N. company, it was agreed that the N. company should, subject to the by-laws from time to time in force of the L. company, have running powers over the L. company's line upon certain terms as to the apportionment of receipts, the maintenance of a staff by the N. company, the establishment of a system of through booking, the fixing of rates and fares, and the carriage of traffic. The agreement contained a provision for reference to arbitration in case of dispute. But no limit as to the duration of the agreement was expressed, nor was power given to either company to determine it. No consideration (beyond the reciprocity of some of the terms) was expressed in the agreement, but there was extrinsic evidence to shew that the real consideration was a loan of 40,000*l.* by the N. company to the L. company to enable the latter company to construct their line:—Held, that since the evidence of the loan being the real consideration did not contradict anything in the agreement, it was admissible, and being admitted it proved that the intention of the parties was that the agreement should be permanent, and not determinable by the L. company:—Held also by James, L.J., that upon the construction of the document itself, apart from extrinsic evidence, the agreement was permanent and irrevocable. *The Llanelly Railway and Dock Company v. The London and North-Western Railway Company*, 42 Law J. Rep. (N.S.) Chanc. 884; Law Rep. 8 Chanc. 942.

Semble.—that the question whether or not the agreement was revocable could not be determined under the arbitration clause after a notice by one

of the parties purporting to revoke the agreement, since, if the notice were operative, the arbitration clause would have been equally revoked with the rest of the agreement. *Ibid.*

This case was affirmed on appeal to the House of Lords, 45 Law J. Rep. (N.S.) Chanc. 539; Law Rep. 7 E. & I. App. 550.

(e) *Branch railway: what is.*

*Covenant: limitation of covenant in its terms general: what is a branch of a railway.* [See COVENANT, 9.]

(C) POWERS.

(a) *Compulsory powers to take land.*

14.—A railway company in 1863 agreed with certain landowners to take about ten acres of land, specified in the schedule to the agreement, at the price of 2,000*l.*, and to erect and maintain a passenger station on a certain piece of land not included, and that one acre of ground should be considered as covered by the said sum of 2,000*l.* for the site and purposes of such station, and if the company should require more than one acre of ground for the site or purposes of the said station, or any additional ground for any purpose beyond that specified in the schedule, they should pay for the same at the rate of 100*l.* per acre, and it was agreed that that agreement should be supplemental to and not in substitution for the Land Clauses Consolidation Act. In 1865, before the expiration of their compulsory powers, the company served on the landowners notice to treat for additional lands, including the one acre covered by the purchase-money of 2,000*l.*, and afterwards entered into possession under the notice, and without proceeding to have the price ascertained under the Land Clauses Act. Upon a suit instituted by the landowners, for an injunction to restrain the company from continuing in possession of the lands so taken,—Held, reversing the decree of one of the Vice-Chancellors (41 Law J. Rep. (N.S.) Chanc. 50; Law Rep. 7 Chanc. 368 *n.*), first, that the agreement was co-extensive in point of duration with the compulsory powers of the company under their Act; and secondly, that the notice to treat having been given by mistake was not a waiver of the agreement. *Kemp v. The South-Eastern Railway Company*, 41 Law J. Rep. (N.S.) Chanc. 404; Law Rep. 7 Chanc. 364.

The certificate of the company's engineer as to what lands are required for the purposes of a railway is, in the absence of fraud, conclusive. *Ibid.*

[And see LANDS CLAUSES ACT, 1-24.]

(b) *Summary petition for delivery of arbitrator's certificate.*

15.—The Court of Chancery in Ireland has power under section 21 of the Railways Act, Ireland, 1851 (14 & 15 Vict. c. 70), to grant a landowner's petition for delivery of the arbitrator's certificate (under sections 14 and 15), though the award has not been made till after the com-

pulsory power to take lands under the special or local Act has expired. *The Proprietors of the Cork and Youghal Railway Company v. Harnett*, Law Rep. 5 E. & I. App. 111.

#### (D) RIGHTS OF UNPAID VENDORS.

[And see last case.]

**16.**—An unpaid vendor of land to a railway company is not entitled to an injunction to restrain the company from running trains, &c., over the land for the purpose of enforcing his lien. *Lycett v. The Stafford and Uttoxeter Railway Company*, 41 Law J. Rep. (N.S.) Chanc. 474; Law Rep. 13 Eq. 261.

**17.**—An unpaid vendor of the C. Railway Company, whose line was being worked by the L. C. & D. Railway Company under a resolution of their directors, filed his bill against both companies, and a decree was made, declaring that upon default of payment of the purchase-money by the C. Railway Company (which default was made) the plaintiff would be entitled to a lien on the lands against both companies. Subsequently, under a special Act for the purpose of arranging the affairs of the L. C. & D. Company, the suit was stayed as against the L. C. & D. Company. The Act provided for the working and maintaining of the C. Railway by the L. C. & D. Company, but the rights and remedies of the creditors of the former company were expressly preserved:—Held, that the plaintiff was entitled to an order on petition in the suit, that the amount due under the decree might be raised by a sale of the land, and in the meantime for an injunction and receiver. *Earl St. Germans v. The Crystal Palace Railway Company*, Law Rep. 11 Eq. 568.

#### (E) RIGHTS OF CREDITORS.

##### (a) Judgment creditor.

**18.**—A judgment creditor of a railway company to whom the company's land (including the line) has been delivered under a writ of *elegit* is entitled to a receiver of the tolls and earnings, and is not accountable as a mortgagee in possession if he has not obtained beneficial possession. *Kingston v. The Cowbridge Railway Company*, 41 Law J. Rep. (N.S.) Chanc. 152.

**19.**—A railway company being indebted to the contractor for its original line in a sum of 5,734*l.*, obtained an Act of Parliament for the making of an extension line, which Act authorised the raising of 85,000*l.* by shares to be called "extension shares," and of 28,000*l.* by mortgage, and enacted that the works thereby authorised should, for financial purposes, form a separate undertaking, and that the capital and new shares should constitute a separate capital, and that the money to be raised by mortgage should be applied only to the purposes authorised by the Act. The contractor having obtained judgment for the amount due to him, extended certain surplus lands acquired under the extension Act, and then petitioned the Court for a sale:—Held (affirming the decision of Wickens, V.C.), that the judgment

creditor was entitled to his order for sale; for that, whatever might be the equities of the shareholders *inter se*, that could not affect the right of the creditor to have the lands sold to pay the debt due to him. *In re Ogilvie*, 41 Law J. Rep. (N.S.) Chanc. 336; Law Rep. 7 Chanc. 174.

##### (b) Creditor leaving claim unascertained.

**20.**—Where a creditor has voluntarily left his claim unascertained, the right to interest does not accrue until after the claim has been established, and the amount ascertained. The jurisdiction of a Scotch sheriff in cases of railway compensation is final. *The Caledonian Railway Company v. Carmichael*, Law Rep. 2 Sc. App. 56.

##### (c) Dissolution of company.

*Dissolution by Act of Parliament: right of creditor and ordinary shareholder to sue.* [See COMPANY, F 2].

#### (F) LEVEL CROSSINGS.

##### (a) Grant of right of way.

**21.**—The authorities establishing the principle that a right of way cannot be increased by imposing an additional burden on the servient tenement, do not apply to lands taken by a railway company. *The United Land Company (Lim.) v. The Great Eastern Railway Company*, 43 Law J. Rep. (N.S.) Chanc. 363; Law Rep. 17 Eq. 158.

A railway company bought lands, which at the time of the purchase were either waste or marsh lands, or were used solely for agricultural purposes, subject to the obligation of making communications across their railway for the convenient occupation and enjoyment of the lands severed by it; and they contracted to make and maintain, and made and maintained, such communications by means of four level crossings, three of which were thirty feet, and the remaining one twenty feet in width. The several lands afterwards passed into other hands and became building sites:—Held, that the enjoyment of the lands meant, not merely the use and enjoyment thereof for the purposes for which they were used at the time of the contract, but the use and enjoyment thereof in any manner that subsequent events might render expedient, consistent with the existence of the railway; and that the right of way being unrestricted as to purpose, the subsequent owners and their tenants and assigns of the houses built upon the lands were entitled to the unrestricted use of the level crossings for all purposes whatever, but so as not to obstruct the proper working of the railway. *Ibid.*

##### (b) Liability for unsafe condition.

**22.**—A child, aged four and a half years, lived near a public carriage road and a footpath (both highways) which were crossed on a level by the defendants' railroad at places about 300 yards from the child's abode, and thirty yards apart from each other. There were no gates, nor was there a gatekeeper at the carriage

road level crossing, as prescribed by 8 Vict. c. 20, s. 47; neither was there any gate or stile at the foot-path level crossing, as required by section 61. One day the child left his home to go to the next house, but was shortly afterwards found upon the railway close to the footpath crossing, with his foot cut off by a train. An action having been brought against the defendants for negligence in not providing gates, fences and means to protect the crossings,—Held, that the fact of the absence of a gate or stile at the footpath level crossing, and the fact of the child being found injured there, were sufficiently connected to afford evidence for the jury of liability on the part of the defendants. *Williams v. The Great Western Railway Company*, 43 Law J. Rep. (n.s.) Exch. 105; Law Rep. 9 Exch. 157.

**23.**—A railway crossed a highway at a level. There were gates to stop carriages, horses and cattle, and a watch box and a person to close the gates as soon as such horses, &c., should have passed. There were also swing gates for foot passengers. A boy, aged fourteen, came to the crossing soon after a cart had passed over the line; the gates were still open, and he went through and got on the line; but seeing an up train approaching, he waited on the down line till it had passed. While he was thus waiting a down train approached, but the boy did not see it, though he might have done so if he had been on the look-out for it, or if his attention had not been engrossed by the up train. The up train having passed, the boy was just leaving the down line to cross, when the train knocked him down:—Held, that there was evidence of negligence to go to a jury; for the company being bound by section 47 of 8 Vict. c. 20, to have closed the gates at the time, the fact that they were open was an invitation to the boy to cross, whereby he was put off his guard, and so, perhaps being embarrassed by the train which he did see, he was injured by the other, which, in consequence of that embarrassment, he failed to see. *The North-Eastern Railway Company v. Wantless* (H.L.), 43 Law J. Rep. (n.s.) Q. B. 185; Law Rep. 7 E. & I. App. 12.

**24.**—The plaintiff had occasion between nine and ten o'clock on an evening in December to cross the defendants' line, where that line crossed a highway on a level crossing. There were gates on each side of the line, which were closed, as was usual when a train was expected; there was a small gate adjoining, through which foot-passengers could pass, and which was not kept shut. In crossing the line the plaintiff was caught by a train passing along the line, was knocked down and very seriously injured. There was no light at or near the level crossing, by which the plaintiff could see whether the gates, usually closed to prevent carriages from passing when a train was approaching, were open or shut, so as to form a judgment whether a train was likely to pass or not. He saw no light as of an approaching train, and heard no whistle from the train:—Held (per Bramwell, B., Mellor, J., Pollock, B., and Amphlett, B., *dissentientibus* Cockburn, C.J., and Cleasby, B.), that the foregoing circumstances disclosed no

evidence of negligence in the defendants. *Ellis v. The Great Western Railway Company* (Exch. Ch.), 43 Law J. Rep. (n.s.) C. P. 304; Law Rep. 9 C. P. 551.

**25.**—Where a railway, under the powers of an Act of Parliament, crosses a highway on the level, it is the duty of the company to keep the part of the way used by the public in a state of repair suitable for the ordinary and regular traffic. *Oliver v. The North-Eastern Railway Company*, 43 Law J. Rep. (n.s.) Q. B. 198; Law Rep. 9 Q. B. 409.

#### (G) FENCES; DUTY OF RAILWAY COMPANY,

**26.**—The obligation imposed on railway companies by section 68 of the Railways Clauses Consolidation Act, 1845, to fence as regards the cattle of adjoining owners and occupiers, extends to swine, and the fence must be reasonably sufficient to prevent ordinary swine from escaping on to the railway. *Childs v. Hearn*, 43 Law J. Rep. (n.s.) Exch. 100; Law Rep. 9 Exch. 176.

The defendant kept swine in a field which he occupied, and which adjoined the line of a railway company, who were bound, under section 68 of the Railways Clauses Consolidation Act, 1845, to maintain sufficient fences between their line and the field. The existing fence was sufficient to keep out oxen, sheep and horses, but not swine, and the defendant's swine crawled through the fence and upset a trolley of the company, which was travelling on the line. The plaintiff, a plate-layer in the company's service, who was travelling on the trolley in the course of his service, was injured by the accident, and now sued the defendant for the damages caused thereby. The defendant knew that some of his swine had on a former occasion strayed on to the line and been killed by a train, and he had been warned that the fence was insufficient to keep in the pigs:—Held, that the company could not have sued the defendant for trespass, because they were bound under the statute to maintain a fence sufficient to keep out swine, and that the present action would not lie, because the plaintiff could not be in a better position than the company, his employers. *Ibid.*

**27.**—When a railway company have neglected the duty imposed on them by the Railways Clauses Consolidation Act, 1845, to fence their line from the adjoining lands, and in consequence of such neglect cattle in the adjoining lands pass on to the line and are injured by the company's trains, an action for the injury may be maintained against the company by the owner of the cattle, though he has no more interest in the adjoining lands than a license from the occupier thereof to graze the cattle there. *Dawson v. The Midland Railway Company*, 42 Law J. Rep. (n.s.) Exch. 49; Law Rep. 8 Exch. 8.

#### (H) REPAIR OF BRIDGES.

**28.**—The special Act of a railway company (in which was incorporated the Railways Clauses Consolidation Act, 1845, so far as it was not

expressly varied or excepted) provided that if, after notice, the company did not, with reasonable expedition, repair a bridge over a turnpike road to the satisfaction of the surveyor of the trustees thereof, the latter might repair and recover the costs; the turnpike trust, however, was suffered to expire:—Held, that though the Railways Clauses Consolidation Act, 1845, section 65, was expressly varied by the special Act, yet it revived on the cessation of the turnpike trust, and an order to repair the bridge might be made under it. *The London, Chatham and Dover Railway Company v. The Board of Works for the Wandsworth District*, 42 Law J. Rep. (n.s.) M. C. 70; Law Rep. 8 C. P. 185.

#### (I) RIGHT TO RUN ENGINES OVER RAILWAY.

**29.**—The Court of Chancery cannot control the working of their points and signals by a railway company, so as to give effect to the desire of a colliery company to run engines over the railway, under section 92 of the Railways Clauses Consolidation Act, 1845. *The Powell Duffryn Steam Coal Company v. The Taff Vale Railway Company*, 43 Law J. Rep. (n.s.) Chanc. 575; Law Rep. 9 Chanc. 331.

#### (K) COMMUNICATION BETWEEN PASSENGERS AND GUARD.

**30.**—A railway train is or is not within the operation of section 22 of the Railways Regulation Act, 1868 (which requires railway companies to provide communication between passengers and guard when a train runs twenty miles without stopping), according to the actual instructions as to stopping given to the company's servants in charge of the train. And therefore where the primary cause of an accident to a train not provided with such means of communication was the breaking of a wheel-tire (without any negligence on the part of the company or their servants), and several minutes elapsed between the first shock felt by the passengers and the actual disaster resulting in the mischief complained of, it was properly left to the jury to say—First, What was the effect of the company's time tables taken together with the special instructions given to their servants with regard to the train in question, and second, Whether the absence of the statutory precaution was conducive to the accident which occurred. *Blamires v. The Lancashire and Yorkshire Railway Company* (Exch. Ch.), 42 Law J. Rep. (n.s.) Exch. 182; Law Rep. 8 Exch. 283.

#### (L) DEPOSIT UNDER RAILWAYS CONSTRUCTION FACILITIES ACT, 1864.

**31.**—The promoters of a railway bill paid a deposit into Court upon the warrant of the Board of Trade under the Railways Construction Facilities Act, 1864. The bill had passed the House of Commons, but was too late in the session to pass the House of Lords, so that the scheme thus became abortive. Upon petition by the promoters, the Court ordered the deposit to be paid

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out to them, although the 40th section of the above Act does not expressly provide for such a case. *In re The Widnes Railway Company*, 42 Law J. Rep. (n.s.) Chanc. 352; Law Rep. 15 Eq. 108.

#### (M) DEPOSIT UNDER RAILWAYS ABANDONMENT ACT.

**32.**—Where a railway has been abandoned, the costs of a petition by the depositor for the transfer out to him of the greater part of the deposit were ordered to be paid out of the general assets of the company. *In re The Laugharne Railway Company*, Law Rep. 12 Eq. 454.

#### (N) OPENING OF RAILWAY.

**33.**—A railway, a mile long, constructed by a railway company parallel to their main line, for the purpose of enabling the trains passing between two branch lines on opposite sides of the main line to cross the main line at one spot, instead of running over it for the distance of the mile,—Held, to be a new line which could not be opened without notice to the Board of Trade. *The Attorney-General v. The Great Western Railway Company*, Law Rep. 7 Chanc. 767.

#### (O) ARRANGEMENT.

##### (a) Under Railway Companies Act, 1867.

**34.**—A debenture holder, although he has obtained judgment and issued execution against a railway company before the filing of a scheme of arrangement under the Railways Companies Act, 1867, still remains a debenture holder for the purposes of sections 10 and 18 of that Act, and is therefore bound by the scheme when assented to by three-fourths in value of the holders of the company's debentures, and after enrolment of the scheme will be restrained on bill filed from taking any further steps to enforce his judgment. *The Potteries, Shrewsbury and North Wales Railway Company v. Minor*, 40 Law J. Rep. (n.s.) Chanc. 685; Law Rep. 6 Chanc. 621.

**35.**—An outside creditor is not bound by a scheme of arrangement filed by a railway company under the Railway Companies Act, 1867, and cannot derive any indirect benefit from it; his rights are entirely unaffected by it. *Stevens v. The Mid Hants Railway Company and The London Financial Association v. Stevens*, 42 Law J. Rep. (n.s.) Chanc. 694; Law Rep. 8 Chanc. 1064.

Unpaid vendors of land sold to the company, and debenture holders of the company, do not, by accepting debenture stock under the provisions of a scheme, lose any priority which they previously had over an *elegit* creditor, who is not bound by the scheme. *Ibid.*

Whether *Parry v. Wright* (5 Russ. 142), and cases of that kind would now be followed, *quære*. *Ibid.*

**36.**—The Court cannot sanction a scheme under the Railway Companies Act, 1867, giving to the holders of debenture stock the right to vote like shareholders. *In re The Stafford and Ut-*

*toxeater Railway Company*, 41 Law J. Rep. (N.S.) Chanc. 777.

(b) *Under special Act.*

**37.**—Where under a railway arrangement Act certain debenture stocks were substituted for existing debentures, and it was provided that no action should be brought against the railway company without the leave of the Court, except in respect of liabilities created after the passing of the Act:—Held, on bill by holders of such debenture stock for an account and receiver, that these were not liabilities created after the passing of the Act, and that the leave of the Court should have been obtained. *The London Financial Association v. The Wrexham Mold and Connah's Quay Railway Company*, Law Rep. 18 Eq. 566.

(P) LIABILITY FOR ACTS OF SERVANTS.

[See MASTER AND SERVANT, 11.]

*Implied authority to station inspector to arrest passengers.* [See FALSE IMPRISONMENT.]

(Q) LIABILITY FOR NEGLIGENCE.

[See NEGLIGENCE, 8, 11, 13, 16, 23–26, 34, 35, and supra Nos. 22–25.]

(R) LIABILITY AS CARRIERS.

[See CARRIER.]

(S) RAILWAY AND CANAL TRAFFIC ACT;  
UNDUE PREFERENCE.

**38.**—A railway company fixed an hour in the evening as the latest time at which goods were to be received at their station for despatch the same night, but although the goods brought by A. (a carrier), were never allowed to enter the station after such prescribed time, the railway company constantly admitted their own vans from their own receiving houses an hour or two later, and forwarded the goods they brought by trains of the same night:—Held, that A. was entitled to an injunction under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), to restrain the railway company from continuing such undue preference to themselves. And *Quere*, whether the railway company would have been justified in giving such preference to themselves to the exclusion of other carriers, if it were necessary in order to enable the general public to have the benefit of sending late parcels. *In re Palmer and The London, Brighton, and South Coast Railway Company*, 40 Law J. Rep. (N.S.) C.P. 133; Law Rep. 6 C.P. 194.

**39.**—Where a railway company employed an agent to receive goods arriving at the C. station, and deliver them to the consignees in the town of C., and refused to deliver at the station to carriers who had general written orders from persons in the town authorising delivery of goods arriving for them, but required written orders specifying the goods, the Court held that there was an undue preference of the company's agent, and enjoined the company to act on the general orders. *Par-*

*kinson v. The Great Western Railway Company*, 40 Law J. Rep. (N.S.) C.P. 222; Law Rep. 6 C.P. 554.

(T) RATES AND ASSESSMENTS.

*Branch line of railway.* [See RATE, 24.]

*Liability to contribute to expenses of paving new streets.* [See METROPOLIS, 10.]

*Rateability under local Act.* [See RATE, 23.]

*Rating of stable within premises of railway companies.* [See RATE, 10.]

*Rating of land taken for public purposes.* [See RATE, 15–17.]

(U) DUTY ON PASSENGER FARES.

**40.**—A train which travels along a line of railway from one terminal station to another, for the conveyance of passengers at fares not exceeding one penny per mile, and fulfils the other requirements of section 6 of the Cheap Trains Act (7 & 8 Vict. c. 85), is a cheap train within the meaning of the Act, although there may be no third-class carriages in, nor third-class tickets issued for such train, and the right of the railway company, under section 9, to exemption from duty in respect of such fares of passengers by any such train is not lost through the passengers being required, for the convenience of traffic, to change from one such train to another at a junction or other station between the termini in the course of transit, provided there is no unreasonable detention at the station where the change is made, so as to reduce the speed at which the passengers travel below the minimum speed of twelve miles an hour required by the Act. But such train must stop, so that passengers travelling at the fares aforesaid may enter and leave it, at every ordinary intermediate passenger station between the terminal ones, and the Board of Trade have no power, under section 8, to dispense with this condition. *The Attorney-General v. The North London Railway Company*, 43 Law J. Rep. (N.S.) Exch. 223; Law Rep. 9 Exch. 330: affirmed, on appeal by the House of Lords, 45 Law J. Rep. (N.S.) Exch. 45; Law Rep. 1 App. Cas. 148, *nom. The North London Railway Company v. Attorney-General*.

The fares received for return tickets issued in respect of such train are not exempt from duty unless the fares that would be charged for the single journey over the same distance would not exceed one penny per mile. *Ibid.*

Weekly tickets issued to workmen at a fare which, if the holders used them every day in the week, would not exceed one penny per mile, are nevertheless not exempt, unless the trains in respect of which those tickets are issued travel from one end to the other of a trunk, branch or junction line, and the ticket-holders are allowed to take with them half a hundred weight of luggage without extra charge, in compliance with the provisions of the Act. *Ibid.*

(V) OFFENCES.

(a) *Obstructing signals.*

**41.**—By the 24 & 25 Vict. c. 97, s. 36, whosoever by any unlawful act shall obstruct or cause



to be obstructed any engine or carriage using any railway shall be guilty of a misdemeanour. The defendant placed himself on the space between two lines of railway, at a spot between two stations, and held up his arms in the mode used by inspectors of the line when desirous of stopping a train between the two stations, and the driver of a goods train, acting upon the supposition that he was signalled by an inspector to slacken speed, shut off steam, and reduced his speed from twenty miles an hour to four miles an hour, and the defendant by this means was enabled to jump into the guard's van, and thereupon the train resumed its natural speed, and without stopping proceeded onward:—Held, that the defendant had unlawfully obstructed the train within the meaning of the above section of the said statute. *The Queen v. Hadfield* (39 Law J. Rep. (n.s.) M. C. 31) followed. *The Queen v. Hardy*, 40 Law J. Rep. (n.s.) M. C. 62; Law Rep. 1 C. C. R. 278.

(b) *Wilful trespass.*

42.—By 3 & 4 Vict. c. 97, s. 17, "if any person shall wilfully trespass upon any railway, or any of the stations or other works, or premises connected therewith, and shall refuse to quit the same upon request to him made by any officer, &c., he shall forfeit," &c. A railway company allowed a portion of the premises connected with their railway station to be occupied as a cab-stand by cabs, the drivers of which paid a weekly sum for the privilege. S., a cab-driver, placed his cab upon the stand and refused to move, although he was requested to do so by an officer of the company. He did not pay the weekly sum charged by the company, and by occupying a place upon the stand he deprived another cab-driver, who had paid the said weekly sum, from occupying a place upon the stand:—Held, that if S. intentionally and purposely kept his cab upon the stand after being requested to move off, he did so wilfully, and was liable to the penalty imposed by the above section, although he honestly believed that he was entitled to keep it there without making any payment to the company. *Foulger v. Steadman*, 42 Law J. Rep. (n.s.) M. C. 3; Law Rep. 8 Q. B. 65.

### RAPE.

The prisoner was convicted of attempting to rape a girl of fourteen years of age, who had been blind from six weeks old and wrong in her mind, hardly capable of understanding anything that was said to her, but could go up and down stairs by herself. She passively obeyed all directions given to her, but was obliged to be dressed and undressed. She was unable to do any work. There were no marks of violence on her person, but the surgeon thought that there had been recent connexion, and that she had been in the habit of having connexion. She was unable to give evidence in Court. The prisoner had known

the girl and her family for two years and more:—Held, that there was sufficient evidence of the girl's incapacity to consent to support the finding of the jury that the prisoner attempted to have connexion with her without her consent, and the conviction was affirmed. *The Queen v. Fletcher* (28 Law J. Rep. (n.s.) M. C. 85) approved, and *The Queen v. Fletcher* (35 Law J. Rep. (n.s.) M. C. 172) explained and distinguished. *The Queen v. Barratt*, 43 Law J. Rep. (n.s.) M. C. 7; Law Rep. 2 C. C. R. 81.

### RATES.

(A) WHO ARE RATEABLE TO THE POOR.

- (a) *Workmen occupying cottages.*
- (b) *De facto occupiers.*
- (c) *Exclusive occupation.*
- (d) *Beneficial occupation.*

(B) RATEABILITY OF PARTICULAR PROPERTY.

- (a) *Common land: rifle butts, area and store shed.*
- (b) *Coprolites: shifting occupation.*
- (c) *Moorings.*
- (d) *Iron mines.*
- (e) *Stable within premises of railway company.*
- (f) *Cemetery.*
- (g) *Hospital.*
- (h) *Dock-sheds appropriated to use of ship-owner.*
- (i) *Metropolitan Board of Works.*
- (k) *Lands taken for public purposes: liability to make up deficiency in poor rate.*
- (l) *Local statutes: tithes in Isle of Man.*
- (m) *General and special legislation: Serjeants' Inn.*
- (n) *Tramways.*
- (o) *Schools.*
- (p) *Railways under Local Acts.*

(C) RATEABLE VALUE AND PRINCIPLE OF ASSESSMENT.

- (a) *Branch line of railway.*
- (b) *Land lying near canal.*
- (c) *Sets of rooms: blocks of buildings.*
- (d) *Annual value.*
- (e) *Deductions.*
- (f) *Parochial and acreage principle.*
- (g) *Exceptional principle: hospital.*

(D) VALUATION LIST: ALTERATIONS.

(E) APPEALS.

[Amendment of the law respecting the liability and valuation of certain property (*e.g.* land used as plantation, rights of shooting, tin, lead, and copper mines, &c.) for the purpose of rates. 37 & 38 Vict. c. 54.]

(A) WHO ARE RATEABLE TO THE POOR.

- (a) *Workmen occupying cottages.*

1.—The appellants were colliers, working at a colliery, the owners of which possessed 340 cottages, which they filled according to their dis-

cretion with their workmen, preferring married men. Such married men as they were not able to accommodate received an allowance towards the rent they were compelled to pay in consequence of not occupying one of the cottages. It was not absolutely necessary for their work that any of them should occupy any of the cottages, but the owners desired that they should. The appellants resided in these cottages, paying no rent, and no difference being made from other men as to the earnings, all being paid the same tonnage price. They received no notice to quit, nor were they entitled to any. The notice to quit their work was a notice to quit their house, and the occupancy of the house ceased the moment when the service ceased. The colliery owners paid the full rate in respect of these houses, and did not compound or make any agreement about it with the men:—Held, that the appellants were occupiers of the cottages, and were entitled to have their names inserted by the overseers in the rate-book under section 19 of 32 & 33 Vict. c. 41. *Cross v. Alsop*, 40 Law J. Rep. (N.S.) C. P. 53; Law Rep. 6 C. P. 315 (see PARLIAMENT, 31), reflected upon. *Smith v. The Overseers of the township of Seghill*, 44 Law J. Rep. (N.S.) M. C. 114; Law Rep. 10 Q. B. 422.

(b) *De facto occupiers.*

2.—The appellants were rated to the poor's rate as the occupiers of the surface land of the S. C. Mine, with the houses, buildings, machinery, tramways, and plant. It appeared that they were grantees for a term of years of a sett or license to mine and search for minerals through certain lands, and that they held the license in trust for a Cost Book Company in which they were shareholders, and that the houses, buildings, machinery, &c., were erected within the limits of the land the subject of the license, for the general working of the mine. All the houses, buildings, &c., were on the surface land:—Held, that the appellants were liable to be rated as occupiers of the land so built upon, and that, even assuming that the grant conferred only a license upon the appellants, they were *de facto* occupiers of the soil, having been allowed to build upon it, and were therefore rateable. *Kittow v. The Assessment Committee of Liskeard Union and the Overseers of St. Cleer, Cornwall*, 44 Law J. Rep. (N.S.) M. C. 23; Law Rep. 10 Q. B. 7.

*Guest v. The Overseers of East Dean* (41 Law J. Rep. (N.S.) M. C. 129; No. 9 *infra*) decided that though an iron mine was not rateable, the surface land, if occupied, was so. *Ibid.*

(c) *Exclusive occupation.*

[See Nos. 3–7 *infra*.]

(d) *Beneficial occupation.*

[See Nos. 12, 14, *infra*.]

*Rating qualification for borough vote.* [See PARLIAMENT, 31–34.]

*Members of firm: description on rate.* [See PARLIAMENT, 28.]

(B) RATEABILITY OF PARTICULAR PROPERTY.

(a) *Common land: rifle butts, area and store shed.*

3.—Under the provisions of a special Act of Parliament the Conservators of Wimbledon Common were to permit the National Rifle Association to occupy from year to year as a rifle shooting ground and place for an encampment for the purposes of the annual Rifle Meeting any part of a certain specified area of the common, together with the butts, targets, and other conveniences for rifle shooting for the time being thereon. The occupation was not to be for more than seventy-seven consecutive days in each year, which days were not to commence earlier than the 1st of May, and were to terminate not later than the 31st of August. The association were empowered to put up a paling round the part occupied by them, and to erect temporary buildings. Prior to the passing of the Special Act, the association erected butts for shooting, and also a store shed, used for the storage of materials, except during the annual meetings, when it was intended to be used as a workshop for the repair of targets, &c. By the terms of the Act, the association were not to acquire any right in or easement over any part of the common, and were to be deemed to be merely in the enjoyment of a statutory privilege over the common. On the 27th of March last, before the period of occupation in that year commenced, a poor rate was made for the parish of Wimbledon, in which the association were rated in respect of the area, the butts and the store shed:—Held, that with respect to the area and the butts there was no such exclusive occupation as to render them liable to poor rate, but that with respect to the store shed which was occupied by them for their own purposes throughout the year they were liable. *Mildmay v. The Churchwardens and Overseers of Wimbledon*, 41 Law J. Rep. (N.S.) M. C. 133.

(b) *Coprolites: shifting occupation.*

4.—The owner of land under which there were coprolites granted to a company the exclusive right to dig, raise, and carry them away. The company were to pay for this privilege 115*l.* per acre, and were to pay a minimum rent of 1,000*l.* per annum, payable quarterly, whether they worked out sufficient land to cover that rental or not. The land to be worked was taken by them bit by bit as they required it, but they were not entitled to have more than ten acres a year allotted to them, or to use the land for any purpose but that of digging and preparing the coprolites. After digging out the coprolites more than a year was required to permit the land to dry, after which the subsoil was restored and levelled, the surface soil replaced, and the land again given over by the company to the agricultural tenant. Owing to the time required for this, the company were, at any period of time, in the occupation of ten acres, of which two and a half acres were in process of digging, one acre was occupied by mills, tramways and other works, and the remainder had been worked out and was in process of drying, but the ten acres so occupied were continually shifting,

as the company took land at one place to work, and restored it at another worked out. In this manner they actually worked out ten acres per annum. In an appeal against a poor rate for the parish where the lands were situated, in which the rates were made quarterly.—Held (by Mellor, J., Lush, J., and Archibald, J.; Cockburn, C.J., dissenting), that the company were rateable, in each quarterly rate, upon ten acres of land, at the enhanced value, although the occupation was a shifting one, and although the company were never at one time in the profitable occupation of more than three and a half acres. *The Queen v. The Overseers of Waddon*, 44 Law J. Rep. (N.S.) M. C. 73; Law Rep. 10 Q. B. 230.

5.—The owner of land let to a tenant from year to year, subject to a reservation of the minerals, agreed with contractors, in consideration of a sum of money, to permit them to enter upon such land, and to dig, search for, get, carry away and dispose of coprolites in and under the same, and the contractors agreed to remove, set apart and preserve the surface of the land during the working, and after the coprolites were gotten to restore the surface fit for agricultural purposes, and afterwards yield and deliver up the same to the tenant of the surface, and to keep the soil banks free from weeds, and to allow the tenant of the surface to cultivate such soil banks with roots without payment, if he elected so to do:—Held, that the contractors, during the workings under the above agreement, were in exclusive occupation of the land being worked, and were rateable to the poor rate in respect of such occupation. *Roads v. The Churchwardens, &c., of Trumpington*, 40 Law J. Rep. (N.S.) M. C. 35; Law Rep. 6 Q. B. 56.

(c) Moorings.

6.—The appellants were owners of a coal derrick, which rides afloat on the river Thames within the parish of Greenwich and is retained at the spot where it floats by two single fluke anchors on the side nearest the shore, by two stones on the channel side, and by two stream anchors, one at the head and the other at the stern. The anchors and stones were merely dropped into the river, but before dropping the stones a small quantity of ballast was removed in the bed of the river so that the stones might lie flat and securely. The stones were merely to serve the purpose of anchors. The derrick was formerly stationed in another part of the river, and was moved thence to its present position, bringing with it anchors and stones. It had been anchored at the same place for some years, but daily changed its position slightly with the ebb and flow of the tide. By agreement with the Conservators of the Thames, in whom the soil of the bed of the river is vested, and who have the management, and by whose permission the derrick was moored where it was, it was liable to be removed by them to another part of the river. On the hearing of summonses against the appellants for non-payment of rates, to which they had been rated in respect of the moorings by which the derrick was attached to the soil, the magistrate found as a fact that the

appellants were occupiers of the soil in the bed of the river, on which the moorings were placed:—Held, that notwithstanding the finding of the magistrate, there was no such occupation of the soil of the river, upon the facts stated in the case, by the appellants as to make them liable to be assessed to the poor rate. *Cory v. The Churchwardens and Overseers, Governors and Directors of the Poor of the Parish of Greenwich*, 41 Law J. Rep. (N.S.) M. C. 142; Law Rep. 7 C. P. 499.

7.—The plaintiffs were proprietors of floating hulks fastened to permanent moorings; the hulks were placed in the Thames by permission of the Conservators, who reserved to themselves the power of removing them upon giving the plaintiffs one week's notice; the plaintiffs were rated to the poor in respect of the moorings:—Held, that the plaintiffs had not an exclusive occupation of the moorings, and were not liable to be rated in respect thereof. *Cory v. Bristow*, 44 Law J. Rep. (N.S.) M. C. 153; Law Rep. 10 C. P. 504, reversed on appeal, Law Rep. 1 C. P. Div. 54.

Semble—that the moorings would be rateable in the hands of a person exclusively occupying the same. *Ibid.*

(d) Iron mines.

8.—Iron mines are, under 43 Eliz. c. 2, exempt from liability to be rated to the relief of the poor. *Morgan v. Crawshaw* (H. L.), 40 Law J. Rep. (N.S.) M. C. 202; Law Rep. 5 H. L. 304.

Semble—a galee of mines in the Forest of Dean is not a mere licensee of the Crown, but a grantee of an interest of the nature of real estate, therefore, if the mine were rateable, he would be liable to be rated as an occupier of such interest. *Ibid.*

9.—The appellant was owner and occupier of iron mines extending over an area of about 310 acres. He was also occupier of about two and a half acres of surface land, part of which was above and part separate from the mines. Upon the surface lands were buildings (containing pumping engines, boilers and workshops) and tramways used in bringing and conveying away the ore from the mines. This surface land, &c., apart from the mines, was practically valueless:—Held, that although the appellant was not rateable in respect of the iron mines, yet that he was rateable in respect of the surface land, &c., at a rent calculated with reference to the value of such surface land, &c., to the occupier of the mine. *The King v. Bilston* (5 B. & C. 851) discussed. *Guest v. The Overseers of East Dean*, 41 Law J. Rep. (N.S.) M. C. 129; Law Rep. 7 Q. B. 334.

[And see No. 2 supra.]

(e) Stable within premises of railway company.

10.—By agreement between a railway company and the C. C. company, the latter, in consideration of the railway company permitting them "to occupy and use a stable for the accommodation of four horses (at or near the C. station of the railway company), undertook and agreed that they would pay the railway company the clear monthly rent or sum of 17. 5s., without any deduction

(property tax excepted), and undertook and agreed, so long as they should occupy and use the stable, to observe, perform and be bound by the by-laws, rules and regulations which should for the time being be issued or prescribed by the railway company for the government and use of their railway stations, premises and conveniences, and further undertook and agreed to quit and deliver up possession of the stable at the expiration of one month after notice in writing," &c. The stable and the road approaching it were within the station and premises of the railway company. The railway company did not, in point of fact, exercise any control over or use the stables during the currency of the agreement, and none of the by-laws and regulations mentioned in the agreement were material with regard to occupation of the stable:—Held (affirming the judgment of the Queen's Bench, 44 Law J. Rep. (N.S.) M. C. 29; Law Rep. 10 Q. B. 70), that the railway company were liable to be rated to the poor rate in respect of the stable, as they remained in occupation of it notwithstanding the agreement. *London and North-Western Railway Company v. Buckmaster*, 44 Law J. Rep. (N.S.) M. C. 180; Law Rep. 10 Q. B. 444.

Semble—that where any one is rated for premises in his occupation, and for others which are not, the whole rate is a nullity, and an action of replevin is maintainable. *Ibid*.

#### (f) Cemetery.

11.—The appellants, a cemetery company, in 1869, according to their usual custom, sold plots of land to purchasers. The plots were respectively conveyed to hold unto the said purchaser, his heirs and assigns for ever, upon trust and to the intent that he the said purchaser, his heirs and assigns, might (subject nevertheless to the rules and orders for the time being of the company for the management and regulation of the cemetery) erect or construct a vault or mausoleum in or upon the same, and might use the said plot as and for a place of burial, &c., and for no other purposes whatever; and subject to the intent aforesaid in trust for the said trustees and directors, their heirs and assigns for ever, as part of the property of the company. The purchaser covenanted to repair the grave, mausoleum, &c., and to observe the rules and orders made by the company for the management and regulation of the cemetery. Part of the working expenses of the company was the keeping in order the said plots for the purchasers. The gates of the cemetery were closed at specified times, after which the purchasers were not admitted. In rating the company to the poor-rate, the sum received in 1869, as purchase-money for the sale of the plots of land, was treated as part of the annual value of the occupation of the cemetery by the company in that year:—Held, first, that the company was liable to be rated as the occupiers of the whole cemetery, including the plots; secondly, that the sum received was properly treated as part of the annual value. *The Queen v. The Abney Park Cemetery*, 42 Law J. Rep. (N.S.) M. C. 124; Law Rep. 8 Q. B. 515.

#### (g) Hospital.

12.—A hospital founded by Royal Charter as a house for the cure and healing of the diseased and infirm poor, brought to or received in the house, is within the principle of *Jones v. The Mersey Docks and Harbour Board* (11 H. L. Cas. 443; 35 Law Rep. (N.S.) M. C. 1), and is rateable to the poor under section 1 of 43 Eliz. c. 2, it being possible that a revenue might be derived from its occupation. *The Mayor, &c., of London as Governors of St. Thomas' Hospital v. Stratton*, 45 Law J. Rep. (N.S.) M. C. 22; Law Rep. 7 E. & I. App. 477.

Semble—the hospital would also have been rateable had it by charter or statute been prohibited strictly and expressly from being made a source of profit. *Ibid*.

#### (h) Dock sheds appropriated to use of shipowner.

13.—The appellants were rated as occupiers of a shed situate upon docks, within the rating parish. These docks were managed by a board, according to the provisions of a local Act, which by section 64 enacted that the board might from time to time, upon payment of such rents or other sums of money, and subject to such restrictions and regulations as they should think proper, set apart and appropriate any particular portion of any dock, sheds, &c., or any other works for the exclusive accommodation and use of any company, &c., engaged in carrying on any trade, who should be desirous of having such exclusive accommodation for the reception of the vessels and goods belonging to or employed or conveyed by them, provided that every company, &c., to whom such exclusive accommodation should be afforded, and their vessels, crews, servants, &c., should be subject to the general rules and regulations of the board applicable to their docks, sheds, &c., and the vessels entering the same, and the crews and other persons employed in and about such vessels. By s. 82 the Board might construct such dépôts and sheds for the reception of goods, and might provide such other conveniences upon or near the quays as they should think expedient for the accommodation of the trade of the port of Liverpool, and might let any such sheds, and also any portion of the quays which with or without such sheds they might think fit to appropriate as special berths for ships, for such periods, and on such rents, terms, and conditions as they might deem expedient. The appellants requested the board to appropriate a berth and other accommodation for their line of steamers, and in reply the board wrote a letter stating they had appropriated for the use of the steamers owned by the appellants the south side of the Wellington Dock, with the sheds attached, and had fixed a charge of 2s. 6d. per square yard per annum for the use of the shed space, such charge to commence from the date of their occupation. The appellants, in pursuance of this letter, used the berth, quay space and sheds appropriated to them for a number of years, paying the stipulated charges. The sheds, which were constructed on the quay, consisted of a range of sheds, covered by one continuous roof, and subdivided, by partitions reaching to the roof,

into a store shed, a transit shed, and two open sheds. The store shed was provided with doors and locks, and was used by the appellants for holding stores necessary for their ships when in port. The transit shed was situate at about the centre of the range of sheds, having open sheds at each end of it. There were sliding doors communicating at each end with the open sheds, and one on each side communicating with the roadway and the dock respectively. This shed was used for the reception of goods liable to duty, but upon which no duty had at the time been paid. By s. 88 of the Act, goods which have been more than forty-eight hours upon any dock quay are liable to pay a rental to the board of 5s. per hour; goods so lying in the appropriated sheds are liable to this charge, whether they be the goods of those to whom the sheds are appropriated or of any other person. Such charge was sometimes at the instance of the appellants exacted by the board from, and paid to the board, by the owners of goods, not the property of the appellants, but deposited on landing from the appellants' vessels in the sheds appropriated to them. Each door of the transit shed had two locks, the key of one lock was kept at the Custom House, and the key of the other by the appellants, whenever a vessel was discharging, and at all times during the day, the transit shed was open, and the servants of the board went in continually, and at their pleasure, for the purpose of examining the goods therein, or for any other purpose connected with their duties. When the sheds contained goods or ship stores belonging to the appellants they were watched at night by watchmen employed by the appellants:—Held, that the board had not parted with the occupation of any part of such sheds so as to render the appellants rateable in respect of such occupation. *Allan v. The Overseers of the Parish of Liverpool and Inman v. The Overseers of the Township of Kirkdale*, 43 Law J. Rep. (N.S.) M.C. 69; Law Rep. 9 Q.B. 180.

(i) *Metropolitan Board of Works.*

14.—The Metropolitan Board of Works was incorporated by Act of Parliament under which it acquired land in the respondent parish beyond the limits of the Metropolis. Under the powers conferred by the Act, the Board made a sewer which was carried through the respondent parish in an embankment of earth and concrete above the general surface of the ground. The board also, under like powers, erected in the said parish a pumping station and other works and buildings, all forming part of the Metropolitan\* Main Drainage Scheme:—Held, upon an appeal against a poor rate made by the respondents, that the Board was not liable to be rated in respect of the land occupied by the sewer and embankment, but that it was liable in respect of the pumping station, building and works, at the value for which the same would let to a hypothetical tenant from year to year, supposing they were not used for the purpose of the Main Drainage Scheme, but were entirely disconnected therefrom, and applied to any other use or purpose for which they could be

made available by a tenant thereof. *The Metropolitan Board of Works v. The Churchwardens of West Ham, Essex*, 40 Law J. Rep. (N.S.) M.C. 80; Law Rep. 6 Q.B. 193.

(k) *Lands taken for public purposes: liability to make up deficiency in poor rate.*

15.—The defendants were incorporated by an Act of Parliament with powers to make and construct certain railways, forming together one system. By the 80th section it was enacted that "if and while the company are possessed under this Act of any lands assessed or liable to be assessed to any sewers' rate, consolidated rate, poor rate, police rate, main drainage rate, church rate, tithe rate, or other parochial or ward rate, they shall, from time to time, until the railways or the works thereof are completed and assessed, or liable to be assessed, be liable to make good the deficiency in the assessment for such rates, by reason of those lands being taken or used for the purposes of the railway or other works by this Act authorized, and the deficiency shall be computed according to the rental at which those lands, with any buildings thereon, were rated at the time of the passing of this Act, or according to the amount of the tithe rate payable in respect of such property." The defendants having taken and used land in the parish of the prosecutors, for the purposes of their railway and works authorized by the Act, there occurred a deficiency in the assessment for rates made in the parish. Certain parts of the whole intended system of railways had been completed, and the prosecutors rated the defendants in respect of the line in the parish. The assessment and rateable value of any portion of the said railways and works, which had become assessed or liable to be assessed, was below the rental at which the lands, through which such portion of the railway was made, was rated at the time of the passing of the Act, and below the rateable value of such lands with the buildings thereon. The prosecutors demanded of the defendants the payment of the deficiency:—Held, that the defendants were bound to make up such deficiency, and that, until the whole railway and works authorised by the Act were completed, at which time the rateable value of the different portions of the railway could be ascertained, they must pay to the prosecutors the deficiency to be computed according to the rental at which the lands taken with any buildings thereon were rated at the time of the passing of the Act. *The Queen v. The Metropolitan District Railway Company*, 40 Law J. Rep. (N.S.) M.C. 113; Law Rep. 6 Q.B. 698.

16.—A company was authorised by their special Act to take lands in several parishes, and to construct thereon seven railways, which when completed were to be called the East London Railway. Section 128 enacted that, "if and while the defendants are possessed under this Act of any lands assessed, or liable to be assessed, to any sewers rate, consolidated rate, poor rate, church rate, or other parochial or ward rate, they shall, from time to time, until the railway or the works

thereof are completed and assessed, or liable to be assessed, be liable to make good the deficiency in the assessment of such rates by reason of those lands being taken or used for the purposes of the railway or works." The interpretation clause enacted that the expression "the railways," should mean "the railways, stations, works and conveniences, or any or either of them, or any part by this Act authorised." The defendants took, for the purposes of the Act, lands in R. parish assessed to parochial rates, and completed thereon all that portion of railway No. 1 which lay within R. parish, and also the stations thereof; they were constructing, but had not completed, the rest of railway No. 1. This completed portion they had let to the B. company, who had opened it for traffic, and now occupied and worked it. The defendants had also taken lands in other parishes, whereon they had completed railway No. 4, and were constructing, but had not completed, the remaining five railways:—Held, that under the 128th section of the above-mentioned local Act, as also the 133rd section of the Lands Clauses Act, 1845, railway companies are only liable to be assessed for parochial rates at the original value of the lands taken by them for the construction of their lines, so long as they have not substituted for the buildings and assessable property which they shall have taken another property capable of assessment, or actually assessed. When they have done this, as by completing and actually working a line, or part of a line, within any parish, the company can claim, and is liable to be assessed in respect of the actual letting value of the line, or part of a line, so completed and actually worked, whether it be or be not as valuable as the assessable property for which it is substituted, and whether the whole of the line of railway authorised by their Act of Parliament has or has not been completed. *The East London Railway Company v. Whitechurch*, (H. L.) 43 Law J. Rep. (N.S.) M.C. 159; Law Rep. 7 E. & I. App. 81.

*The Queen v. The Metropolitan District Railway Company* (last case) overruled. *Ibid.*

The decision of the Exchequer Chamber, 42 Law J. Rep. (N.S.) M.C. 18; Law Rep. 7 Exch. 424 (reversing a previous decision of the Court of Exchequer, 41 Law J. Rep. (N.S.) M.C. 123; Law Rep. 7 Exch. 248) reversed by their Lordships. *Ibid.*

17.—The plaintiffs were the churchwardens and overseers of St. Mary, Lambeth, from Easter, 1871, to Easter, 1872, but they were not for the previous years. By the Thames Embankment Act, 1863 (26 & 27 Vict. c. 75), the defendants were authorised to construct an embankment on the right bank of the Thames, new streets and other works in the plaintiffs' parish. By section 14, when the roadway and new streets respectively were completed, of which completion a certificate signed by the chairman of the defendants' board was to be conclusive evidence, the same with the power of rating the hereditaments within the same respectively, were to be under the jurisdiction of the same persons as the other streets in the parishes in which the same were respectively situate. The

Thames Embankment Act, 1863, also incorporated the Lands Clauses Consolidation Act, 1845, s. 133, which enacts that "if the promoters of the undertaking become possessed, by virtue of this or the special Act, or any Act incorporated therewith, of any lands liable to be assessed to the poor-rate, they shall, from time to time, until the works shall be completed and assessed to such poor rate, be liable to make good the deficiency in the several assessments for poor rate by reason of such lands having been taken or used for the purpose of the works, and such deficiency shall be computed according to the rental at which such lands with any building thereon were rated at the time of the passing of the special Act, and on demand of such deficiency, the promoters of the undertaking or their treasurer shall pay all such deficiency to the collector of the assessments respectively." The defendants in 1865 proceeded with the execution of the works, and took various lands in the plaintiffs' parish. On the 11th of May, 1870, the chairman certified that the roadway and new streets were completed:—Held, that the defendants were liable to pay the deficiency in poor rates on lands taken by them under the powers and for the purposes of the Thames Embankment Act up to the 11th of May, 1870, and that the plaintiffs could enforce payment in a lump sum of the arrears of deficiency in the poor rate up to that date. *Stratton v. The Metropolitan Board of Works*, 44 Law J. Rep. (N.S.) M.C. 33; Law Rep. 10 C. P. 76.

(l) *Local statutes: tithes in Isle of Man.*

18.—"An Act for the commutation of tithes in the Isle of Man," (1839) provided that there shall be paid annually, in lieu of tithes, a certain aggregate sum, to be apportioned by way of rent charge amongst those entitled thereto. An Act to provide an asylum for lunatics and insane persons, after directing a valuation "at their net annual value, of all lands and all real estate," provided that "as soon as the valuation is complete" the Tynwald Court shall lay a rate on the proprietors of all lands and real estate according to valuation:—Held, that a rent-charge under the Act of 1839 was not liable to be included in such valuation, or rateable under the Act of 1860. *Ingram v. Drinkwater*, 44 Law J. Rep. (N.S.) P. C. 83.

(m) *General and special legislation: Serjeants' Inn.*

19.—There being a dispute between the parish of St. Dunstan and Serjeants' Inn, Chancery Lane, as to whether the Inn was parochial or not, the 3 & 4 Will. 4. c. cx., was passed, whereby the Society of the Inn paid fixed sums for poor and church rates, and were exempt from any claim for parochial rates and assessment; by section 7 of the Representation of the People Act, 1867, no owner of a tenement is to be rated for the poor instead of the occupier, and the full rateable value is to be entered in the rate book; and by section 27 of the Poor Law Amendment Act, 1868, places which were extra-parochial or so

reputed and had no overseers were incorporated in the next adjoining parish having the longest common boundary, whereby the Inn became annexed to the said parish:—Held, that whether the Inn originally were extra-parochial or not the general statutes did not repeal the local one. *Thorpe v. Adams*, 40 Law J. Rep. (N.S.) M. C. 52; Law Rep. 6 C. P. 125.

(n) *Rateability of tramways.*

**20.**—By the Tramways Act, 1870, 33 & 34 Vict. c. 78, tramway companies shall have the exclusive use of their tramways for carriages with flange wheels or other wheels suitable only to run on the prescribed rail. By section 57, notwithstanding anything in the Act, the promoters of any tramways shall not acquire any right other than that of user of any road along or across which they lay any tramway. By section 62, nothing in the Act is to abridge the right of the public to pass along or across any road upon which a tramway is laid:—Held, that a tramway company were rateable and liable to be inserted in a valuation list in respect of the occupation of their tramways, as they had an occupation of the soil of the road, like the occupation of gas and water companies. *The Pimlico, Peckham, and Greenwich Street Tramways Company v. the Assessment Committee of the Greenwich Union*, 43 Law J. Rep. (N.S.) M. C. 29; Law Rep. 9 Q. B. 9.

(o) *Schools.*

**21.**—Under “The Sunday and Ragged Schools (Exemption from Rating) Act, 1869,” 32 & 33 Vict. c. 40, s. 1, by which rating authorities may exempt from their rates buildings used as Sunday or ragged schools, the rating authority has a discretion, and is not bound to exempt any such school. *Bell v. Crane*, 42 Law J. Rep. (N.S.) M. C. 122; Law Rep. 8 Q. B. 481.

**22.**—An industrial school certified and carried on under 29 & 30 Vict. c. 118, is liable to be assessed to the poor-rate. *The Queen v. the Overseers of the Poor of West Derby*, 44 Law J. Rep. (N.S.) Q. B. 98; Law Rep. 10 Q. B. 283.

(p) *Railways under local Acts.*

**23.**—The exemptions from poor-rates given to the Dundee and Arbroath and Arbroath and Forfar Railways by their local Acts of 1836,—Held, to be abrogated by the General Poor Law Amendment Act, 1845, and the General Valuation of Lands Act, 1854. *Duncan v. the Scottish North Eastern Railway Company*, Law Rep. 2 Sc. App. 20.

*Qualification of alehouse: premises occupied therewith.* [See ALEHOUSE, 14.]

(C) RATEABLE VALUE AND PRINCIPLE OF ASSESSMENT.

(a) *Branch line of railway.*

**24.**—A line of railway originally made by an independent company became vested in the appellants, under an agreement by which the appellants guaranteed a certain per-centage upon the money  
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expended upon the line. The line communicated with the main line of the appellants, and with three other main lines of railway owned and worked by three other companies respectively. If the line were in the market, either of such three companies would, in consequence of the traffic which it would bring to their line, be willing to acquire it upon the same terms in every respect as those upon which the appellants held and worked it:—Held, that in ascertaining the rateable value of a part of the line which passed through the parish of G., the fact of there being such four companies who would so compete for the line, might be taken into consideration. *The Queen v. the Assessment Committee of the Bedford Union, and the Overseers of Goldington*, 43 Law J. Rep. (N.S.) M. C. 81; Law Rep. 9 Q. B. 134 *nom.* *The Queen v. the London and North-Western Railway Company.*

(b) *Land lying near canal.*

**25.**—By an Act of Parliament, passed in the reign of George 3, under which a canal company was empowered to make and work their canal, the company was to be rated in respect of the lands and grounds already purchased or taken, or to be purchased or taken, and all warehouses and other buildings to be erected by them, “in the same proportion as other lands, grounds, and buildings lying near the same are or shall be rated, and as the same lands, grounds, and buildings so purchased or taken, or to be purchased or taken and erected, would be rateable, in case the same were the property of individuals in their natural capacities.” In the year 1848 the company adopted the provisions of the 8 & 9 Vict. c. 42, and commenced business as carriers on their own account, and have since carried on the trade and business of carriers, with a tariff of freights and charges different from the tolls chargeable by their private Act. Since the canal has been in operation, a railway has been made running parallel to, and in one place crossing the canal; and buildings have been erected upon much of the land lying near to the canal:—Held, upon appeal against a poor-rate made by parishes through which the company had made the canal, first, that the rateable value of the land occupied by the canal was not to be taken as being increased by the fact of the company carrying on the business of carriers; nor was it to be taken as being increased in proportion to the rateable value of the railway, treating it as a railway. Secondly, that the buildings of the company were to be rated in the same proportion as other buildings near, and that the lands and grounds of the company were to be rated in the same proportion as other lands and grounds near, the enactment as to the lands and grounds, and as to the buildings, being construed distributively. *The Grand Junction Canal Company v. the Churchwardens and Overseers of Hemel Hempstead and King's Langley*, 40 Law J. Rep. (N.S.) M. C. 25; Law Rep. 6 Q. B. 173.

(c) *Sets of rooms: blocks of buildings.*

**26.**—Certain blocks of buildings, with separate entrances to a public street, were divided respec-

tively into two ranges by an internal staircase, having one door at the street entrance. The blocks were structurally divided into 117 different sets of rooms, distinct from each other, and capable of being let and occupied separately as residences or offices. Each set had an outer door opening on to one of the internal staircases. The several sets of rooms were let by the owners, the appellants, to certain tenants under agreements by the terms of which the care of each entrance and the rooms connected therewith were to be in the charge of a resident porter, appointed and removable by the appellants. There were to be duplicate keys to the outer door of every set of rooms, one of which was to be always in the hands of the porter, the other in the care of the tenant while the rooms were in use. The tenants were to have the right, free of charge, to the general services of the porter, and to special services upon payment. "Any services, whether special or extra, so rendered by the porter, will be rendered as the servant of the tenant." The outer or street door to each block of building was kept locked at night, and a porter who was hired by the appellants resided in a distinct set of rooms in the basement of each block of building. He had a key of, and access to, the sets of rooms in each block, for the purpose of a general superintendence, and as the servant of the occupiers respectively, by whom he was, in some cases, employed and paid for looking after the rooms:—Held, that the sets of rooms ought to be valued, in the valuation list of the union, as distinct separate rateable hereditaments. *The Queen v. the Assessment Committee of the St. George's Union*, 41 Law J. Rep. (N.S.) M. C. 30; Law Rep. 7 Q. B. 90.

(d) *Annual value.*

27.—The appellants were the occupiers of docks, warehouses and works situate in different townships. By the provisions of various local Acts the docks, &c., were to constitute one estate under an uniform system of management. The appellants were rated to the poor-rate in respect of warehouses, &c., which were capable of separate beneficial occupation apart from their proximity to, and connection with, the docks, situate in the rating township, and were enhanced in value by their connection with these docks, though the income of the docks taken as a whole, and as one concern, exceeded the income derived from them:—Held, that the rate was good, and that the premises were properly rated at their enhanced value, as above mentioned. *The Mersey Docks and Harbour Board v. the Overseers of Birkenhead*, 42 Law J. Rep. (N.S.) M. C. 141; Law Rep. 8 Q. B. 445.

*Valuation of surface land used with iron mines.* [See supra No. 9.]

*Annual value: sale of plots of land by cemetery company.* [See supra No. 11.]

(e) *Deductions.*

28.—Under powers given by a drainage Act, the land in a certain district was drained, and an aliquot portion of the expense necessary for maintaining the drainage works was assessed upon the

owner of a farm within the district. This farm was let to W. The drainage works could not have been maintained without the rate imposed by the Act, and without the said drainage works the farm would be diminished in value. W., having been assessed to a poor-rate,—Held, that the sum paid by his landlord, the owner of the farm, was an expense necessary to maintain the farm in a state to command the estimated rent, and that, therefore, W. was entitled to claim under 6 & 7 Will. 4. c. 96, a deduction in respect of the amount. *The Queen v. the Assessment Committee of the Gainsborough Union*, 41 Law J. Rep. (N.S.) M. C. 1; Law Rep. 7 Q. B. 64.

29.—The appellants were the occupiers of certain docks and dock-estates. The value of the occupation depended upon the dock rates and dues, all of which were, by Act of Parliament, to be appropriated in payment of the expenses and charges of collecting the rates and dues, and for other purposes therein specified:—Held, that the appellants were not entitled to any deduction in respect of tenants' profits, in calculating the rateable value of the hereditaments occupied by them. *The Mersey Docks and Harbour Board v. the Churchwardens, &c., of Liverpool*, 43 Law J. Rep. (N.S.) M. C. 33; Law Rep. 9 Q. B. 84.

(f) *Parochial and acreage principle.*

30.—The appellants occupy docks in several parishes and townships on the Lancashire and Cheshire sides of the Mersey. By the Acts of Parliament relating to these docks it is provided that they shall constitute one estate under one management. The rates for using the dock property are for the most part uniform, and any vessel having once paid the dock rate is entitled to use all docks where the rates are not larger, and to use any other docks on paying the difference. The docks on the Lancashire side of the Mersey are by far the most profitable part of the undertaking, which is carried on at a loss on the Cheshire side of the river. The appellants had been rated by the parish of Liverpool on the principle of ascertaining the net income of the docks, &c., within the parish of Liverpool, without taking into account the profit of the whole undertaking:—Held, that the parochial principle must always, except in cases of insuperable difficulty, be preferred, that no such difficulty was shewn in the present case, and that the assessment was accordingly right. *The Mersey Docks and Harbour Board v. the Overseers of Liverpool*, 41 Law J. Rep. (N.S.) M. C. 161; Law Rep. 7 Q. B. 643.

(g) *Exceptional principle: hospital.*

31.—By 13 Geo. 2. c. xxix., lands held by the Foundling Hospital are not to be rated at any higher value than they were rated in 1739. By 34 Geo. 3. c. xcvi., the hospital is to be rated to paving and other rates under the Act according to a particular valuation. By the Valuation (Metropolis) Act, 1869, s. 45, the valuation list for the time being in force shall be deemed to have been duly made in accordance with this Act and the Acts incorporated herewith, and shall for all or any of



the purposes in this section mentioned be conclusive evidence of the gross value and of the rateable value of the several hereditaments included therein for the purposes of rates, which are afterwards specified (including the poor's rate, county rate, consolidated rate, &c.). By s. 51, the valuation list is to be according to a scheduled form which contains a statement of the gross and of the rateable value of the property; and by s. 54, nothing contained in the Act or Acts incorporated therewith shall affect any exemption or deduction from, or allowance out of any rate or tax whatever, or any privilege of or provision for being rated or taxed on any exceptional principle of valuation. The assessment committee in preparing a valuation list for the parish within which land belonging to the hospital was situate assessed this land according to its true gross and rateable value:—Held, that the assessment was right, though when a rate was made the hospital would be entitled to the exceptional principles of valuation preserved to it by s. 54 of the Valuation (Metropolis) Act. *The Queen v. The Governors of the Foundling Hospital*, 41 Law J. Rep. (N.S.) M.C. 41; Law Rep. 7 Q. B. 83.

(D) VALUATION LIST: ALTERATIONS.

**32.**—The valuation list of a parish under the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), must, when altered by the committee, be deposited for inspection under ss. 17 and 21, and if not so deposited, it is invalid, together with any contribution order based upon it. *The Queen v. Chorlton Union*, 42 Law J. Rep. (N.S.) M.C. 34; Law Rep. 8 Q. B. 5.

(E) APPEALS AGAINST.

**33.**—A ratepayer who has objected before the Assessment Committee, under 25 & 26 Vict. c. 103, s. 18, to the valuation list of a union, on the ground that he is overrated and that others are underrated, and has failed to obtain relief with respect to the valuation of his own property, may, before his other objections have been heard by the assessment committee, withdraw them, and appeal to the sessions against the rate made in conformity with the list, upon the one ground in respect of which he has failed to obtain relief. The appellant gave notice to the assessment committee, under 27 & 28 Vict. c. 39, and 25 & 26 Vict. c. 103, s. 18, of his objection to a valuation list, on the ground of unfairness or incorrectness in the valuation, both of his own property and in that of the property of three other ratepayers. The committee heard the appellant's objection to his own assessment, and refused to allow it; they then heard his objection to the valuation of one of the three ratepayers, and made a nominal alteration, and the appellant thereupon withdrew his objections to the valuation of the other two ratepayers, which were not heard:—Held, that the appellant might appeal to the sessions against the rate made in conformity with the list, confining his appeal to the grounds in respect of which he had failed to obtain relief.

*The Queen v. The Justices of Kent*, 40 Law J. Rep. (N.S.) M.C. 76; Law Rep. 6 Q. B. 132.

*The Queen v. The Justices of Cambridgeshire* (19 Law J. Rep. (N.S.) M.C. 130), doubted. *Ibid.*

**34.**—After an appeal from a poor-rate had failed before the assessment committee, there were six days before the next borough sessions beyond the twenty-one days required by the Union Assessment Act (27 & 28 Vict. c. 39), for giving notice to the assessment committee. The Recorder considered that such six days were not sufficient to enable the appellant to determine as to appealing, and that such sessions were not practicable sessions, and he allowed the appeal to be entered at the next subsequent sessions:—Held, that this Court would review the Recorder's determination of such fact, and being of opinion on such review that the six days were enough, and that therefore the September sessions were practicable, the Court granted a prohibition against the Recorder trying the appeal. *The Liverpool United Gas Light Company v. The Overseers of Everton, and The Union Assessment Committee of West Derby Union*, 40 Law J. Rep. (N.S.) M.C. 104; Law Rep. 6 C.P. 414.

**35.**—Certain persons rated in a poor-rate made in conformity with a valuation list, alleged that they were rated in respect of property in which they had no rateable interest, inasmuch as they had the use of it only as bare licensees, and were not occupiers, and they gave due notice of an appeal to the sessions to the assessment committee as well as the overseers of the parish, but did not give any notice of objection to the assessment committee, or go before them, or endeavour to obtain relief in the matter from them. The respondents did not appear at the sessions, and the appellants, upon proof of such notice of appeal as above mentioned, obtained an order of the sessions quashing so much of the rate as was appealed against with costs:—Held, that the sessions had no jurisdiction to hear the appeal, and that the notice of objection to the assessment committee and the failure to obtain relief from them, were conditions precedent, although the objection was not to the valuation of the property but to its rateability. *The Queen v. The Justices of Lancashire*, 43 Law J. Rep. (N.S.) M.C. 116.

**36.**—Where a poor-rate was made under a local Act which regulated the right of appeal, and the valuation list was made under the Valuation (Metropolis) Act, and no notice of assessment was given to the appellant pursuant to s. 9,—Held, that the appellant could not appeal direct to quarter sessions under 17 Geo. 2. c. 38, but must proceed in conformity with the local Act. *The Queen v. The Justices of Middlesex*, Law Rep. 7 Q. B. 653.

**37.**—An appeal was made by a waterworks company to quarter sessions against a poor-rate made on the company. The assessment committee of the union appeared as respondents. The overseers of the parish did not appear. The appeal, and all matters in difference relating to the rating of the waterworks, were referred to arbitration by an agreement between the assessment

committee and the appellants, with power to the arbitrator to direct at what amount the appellants had been or should be rated before the making of the award, and to order the return of the excess, if any, of any sum paid by them to the overseers of the parish. The award was not made for eighteen months, and in the meantime several rates had been made by the overseers of the parish on the appellants, and paid by them under protest, but without giving notice of appeal or taking any steps to dispute such rates. By the award the rateable value was largely reduced, and the amount paid by the appellants in excess of the sums due, according to the value so fixed, was ordered to be repaid, not only on the rate appealed against, but also the intermediate rates, and the overseers were also ordered to repay out of the next rate the balance due to the appellants, and overpaid by them. The overseers paid the difference on the rate appealed against, but refused to refund the difference on the other rates, on the ground that the assessment committee had acted *ultra vires* in referring those matters; and upon a rate being made after the award which the appellants refused to pay, setting up the award, obtained a distress warrant from the justices, and levied for the amount. The appellants thereupon replevied in the County Court, and now sought by the present rule to restrain all further proceedings by the overseers:—Held, that the overseers had acted contrary to good faith, and upon the authority of *The London and North-Western Railway Company v. Bedford* (17 Q. B. Rep. 978), that this Court would interfere to stop their further proceeding. *The Leicester Waterworks Company v. The Overseers and Churchwardens of Cropstone*, 44 Law J. Rep. (N.S.) M. C. 92.

## RECEIVER.

### (I.) IN CHANCERY.

- (A) WHEN APPOINTED.
  - (a) *In suit by judgment creditor.*
  - (b) *In suit to set aside purchase on ground of fraud.*
  - (c) *Pendente lite.*
- (B) SECURITY BY RECEIVER.
- (C) GENERAL GRANT OF ADMINISTRATION TO RECEIVER.
- (D) PROOF BY RECEIVER IN BANKRUPTCY.

### (II.) IN BANKRUPTCY.

#### (I.) IN CHANCERY.

##### (A) WHEN APPOINTED.

###### (a) *In suit by judgment creditor.*

1.—A judgment creditor who has sued out an *agere*, and got a return from the sheriff that the debtor was entitled to a life estate in realty of the debtor's, and registered the writ, may file a bill in

the Court of Chancery for a receiver of that estate. *Tillett v. Pearson*, 43 Law J. Rep. (N.S.) Chanc. 93.

###### (b) *In suit to set aside purchase on ground of fraud.*

2.—In a suit instituted for the purpose of setting aside a contract for the purchase of a colliery on the ground of fraud and misrepresentation, the plaintiffs being the purchasers in possession,—Held, considering the nature of the property, it was for the benefit of all parties that, pending the litigation, a receiver and manager should be appointed. *Gibbs v. David*, 44 Law J. Rep. (N.S.) Chanc. 770; Law Rep. 20 Eq. 373.

###### (c) *Pendente lite.*

3.—The defendant as heir-at-law of a testator entered a caveat against the grant of probate of the will, and also forcibly took possession of part of the testator's real estate. No further proceedings were taken in the Probate Court beyond entering the caveat. Upon a motion by the executor of the will for a receiver of all the real and personal estate,—Held, that this Court had jurisdiction to appoint a receiver of the real estate (except that part in the possession of the defendant) as well as of the personal estate. *Parkins v. Seddons*, 42 Law J. Rep. (N.S.) Chanc. 470; Law Rep. 16 Eq. 34.

*In suit by unpaid vendor or creditor of railway company.* [See RAILWAY, 16–19.]

### (B) SECURITY BY RECEIVER.

4.—The security of a guarantee society may be taken in cases of receivership. *Colmore v. North*, 42 Law J. Rep. (N.S.) Chanc. 4.

### (C) GENERAL GRANT OF ADMINISTRATION TO RECEIVER.

[See PROBATE, 16.]

### (D) PROOF BY RECEIVER IN BANKRUPTCY.

5.—Where a receiver without the sanction of the Court, proved in the bankruptcy of a legatee who was a debtor to the estate,—Held, that the receiver must be taken to have acted within the bounds of his authority, and that the right to set off the debt against the legacy was lost. *Armstrong v. Armstrong*, Law Rep. 12 Eq. 614.

### (II.) IN BANKRUPTCY.

[See BANKRUPTCY, P.]

## RECEIVING STOLEN GOODS.

1.—A prisoner was tried and convicted on a count of an indictment which alleged that the defendant unlawfully received goods, unlawfully, &c., obtained "by means of false pretences," with intent, &c., knowing the same to have been obtained by means of certain false and fraudulent

pretences with intent, &c.:—Held, that whether or not the indictment ought to have described and set out the false pretences, as well on principle as because it had followed the words of the statute, it was cured by verdict, and that it was too late to take such an objection by motion in arrest of judgment, and a conviction on such count was affirmed. *The King v. Mason* (2 Term Rep. 581) disapproved. *The Queen v. Goldsmith*, 42 Law J. Rep. (N.S.) M. C. 94; Law Rep. 2 C. C. R. 74.

*Of bill of sale.* [See BILL OF SALE, 1-8.]  
*Of copyright.* [See COPYRIGHT, 1, 2, 4, 6.]  
*Of company.* [See COMPANY, C 1-4.]  
*Under Land Registry Act.* [See LAND REGISTRY ACT.]  
*Of stock of married woman.* [See BARON AND FEME, 29.]  
*Of resolutions for composition or liquidation.* [See BANKRUPTCY, L 4-8; M 5, 6.]  
*Of votes.* [See PARLIAMENT, 14-56.]

## REFORMATORY AND INDUSTRIAL SCHOOLS.

[Extension of power of prison authority as to alteration, &c., of reformatory and industrial schools. 35 & 36 Vict. c. 21.]

## REGIMENTAL EXCHANGES.

[Regimental exchanges facilitated, and authorized exchanges exempted from the provisions of the above Acts. 38 & 39 Vict. c. 16.]

## REGISTRATION.

- (A) OF BIRTHS AND DEATHS.  
 (B) OF DEEDS, WILLS, AND INCUMBRANCES.

### (A) OF BIRTHS AND DEATHS.

[Previous Acts amended and in part repealed. Amendment of the law relating to the registration of births and deaths in England, and consolidation of the law respecting the registration of births and deaths at sea. 37 & 38 Vict. c. 88.]

### (B) OF DEEDS, WILLS, AND INCUMBRANCES.

In a register county, a further charge is a conveyance requiring registration, and an unregistered further charge is not simply postponed to a subsequent registered mortgage, but is void as against it, so that it cannot be tacked to the first mortgage. *Credland v. Potter*, 44 Law J. Rep. (N.S.) Chanc. 169; Law Rep. 10 Chanc. 8.

A person taking a security for a past debt was content with the mortgagor's statement that a registered deed was a mortgage to secure a certain amount, and that no more was due to the mortgagees:—Held, that he was not affected with notice of an unregistered further charge. *Ibid.*

Decree of Bacon, V.C. (43 Law J. Rep. (N.S.) Chanc. 484; Law Rep. 18 Eq. 350), affirmed. *Ibid.*

*Priority of mortgagees by registration.* [See MORTGAGE, 25-27.]

*Irish Registration Act.* [See MORTGAGE, 28.]

*Of deed under Batavian Law.* [See CONFLICT OF LAWS, 2.]

## RELEASE.

A. borrowed 1,100*l.* from his stepmother, upon an agreement that the debt should be paid by deductions of 100*l.* from each quarterly payment which she made him for her board. After two deductions had been made she declared she would make no more, and thenceforward continued to pay the quarterly sums in full. She appointed him sole executor of her will which contained no disposition of her residuary estate:—Held, that, although in order to have an effectual release in equity of a debt, there must be an actual legal release or transfer of the property, in this case the debt was satisfied on two grounds: first, because the appointment of the debtor as executor operated as a release at law, and all claim in equity to recover the debt was prevented by the intention of the testatrix to release it; Secondly, because the testatrix by making the full quarterly payments had actually completed the gift of the instalments she was entitled to retain. *Strong v. Bird*, 43 Law J. Rep. (N.S.) Chanc. 814; Law Rep. 18 Eq. 315.

*Release reserving rights as against surety held to operate only as a covenant not to sue.*

[See PRINCIPAL AND SURETY, 18.]

*Plea of release with condition subsequent.* [See ACTION, 8.]

## RE MOTENESS.

1.—A term limited, after estates for life, but antecedently to estates tail, for the purpose of raising portions on failure of the issue in tail, is void for remoteness; and a demurrer will lie to a bill to enforce the trusts of the term. *Sykes v. Sykes*, 41 Law J. Rep. (N.S.) Chanc. 25; Law Rep. 13 Eq. 56.

*Case v. Drosier* (2 Keen, 764; 5 Myl. & Cr. 246) followed.

2.—A testator, before the Wills Act, bequeathed leaseholds to his daughter E. H. He gave his residue, after a life interest to his wife, to E. H., "for her own benefit and her children;" if his daughter should die without issue he gave the whole to his wife, for life, with remainders over:—Held, that E. H. was entitled to the residue in remainder absolutely, and that the words "without issue" referred to an indefinite failure of issue, and that the gift over was void for remoteness.

*Fisher v. Webster*, 42 Law J. Rep. (N.S.) Chanc. 156; Law Rep. 14 Eq. 283.

3.—Gift of houses "to be occupied by the descendants of A. and B.," and intended to be for the residence of two families,—Held, void for uncertainty and for perpetuity. *Neo v. Neo*, Law Rep. 6 P. C. 381.

Devise of land to be used as a family burial place and not mortgaged or sold,—Held, not charitable and void for perpetuity. *Ibid*.

Dedication of a house by a testatrix to be used for religious ceremonies to herself and her late husband,—Held, not a charitable gift and void for perpetuity. *Ibid*.

[And see POWER, 12, 16, 17; WILL, CONSTRUCTION, I 33, Q 2, R; LEGACY, 33.]

### RENT.

[See LANDLORD AND TENANT; LEASE.]

### RENT-CHARGE.

1.—Where land had been sold reserving a rent to the vendor, such land was ordered to be sold to pay arrears of the rent-charge accrued since 1853. *Cupit v. Jackson* (13 Price, 721) followed. *Horton v. Hall*, Law Rep. 17 Eq. 437.

2.—The plaintiff seised in fee of land granted it unto and to the use of C., subject to the payment for ever to the plaintiff, his heirs and assigns, of a yearly rent-charge payable out of the land. C. covenanted for himself, &c., that he, his executors, administrators and assigns would pay unto the plaintiff, his heirs or assigns, the said rent-charge. The land became vested in the defendant, after which the rent-charge fell in arrear:—Held, that the plaintiff might maintain an action of debt against the defendant for the arrears, the remedy by real action having been taken away by 3 & 4 Will. 4. c. 27, s. 36. *Thomas v. Sylvester*, 42 Law J. Rep. (N.S.) Q. B. 237; Law Rep. 8 Q. B. 368.

*Conveyance of rent-charge, operation of, under Statute of Uses.* [See PARLIAMENT, 19–21.]

*Rateability of, under local statutes of Isle of Man.* [See RATE, 18.]

*Apportionment of rent-charge.* [See APPORTIONMENT, 4, 8.]

*Legacy duty.* [See LEGACY AND SUCCESSION DUTY, 3.]

*Mortgage by husband and wife.* [See BARON AND FEME, 4.]

### REPLEVIN.

1.—A judgment for the plaintiff in replevin is a bar to an action for damages for the same taking of the goods in respect of which the replevin was

brought. *Gibbs v. Cruickshank*, 42 Law J. Rep. (N.S.) C. P. 273; Law Rep. 8 C. P. 454.

2.—The rule that a new trial will not be granted for either party when the sum given or recovered is under 20*l.*, does not apply to replevin. *Edgson v. Cardwell*, Law Rep. 8 C. P. 647.

### RESERVATION.

*Of game.* [See GAME, 12; INJUNCTION, 27; INCLOSURE ACT, 2, 3.]

*Of minerals.* [See MINES, 1, 2, 5, 6; CONFIRMATION OF SALES ACT.]

### RESTITUTION OF CONJUGAL RIGHTS.

[See DIVORCE, 63, 78.]

### RESTRAINT ON ALIENATION.

[See CONDITION, 1, 2.]

### RESTRAINT ON ANTICIPATION.

[See BARON AND FEME, 17, 20, 21.]

### RESTRAINT OF MARRIAGE.

[See WILL, CONSTRUCTION OF, 9, 10.]

### RESTRAINT OF TRADE.

*Covenants in restraint of trade.* [See COVENANT, 1–4.]

*Covenant by articulated clerk.* [See ATTORNEY, 9.]

*Bond by surgeon.* [See BOND, 3.]

### REVENUE.

[See LEGACY AND SUCCESSION DUTY; STAMP.]

(A) CUSTOMS AND EXCISE.

(B) INHABITED HOUSE DUTY.

(C) INCOME-TAX.

(D) DUTY ON RAILWAY FARES.

#### (A) CUSTOMS AND EXCISE.

[Acts relating to customs and inland revenue amended and extended. 35 & 36 Vict. c. 20.]

[35 & 36 Vict. c. 20, ss. 10, 11, repealed. Exemption of hotel-keepers, &c., from duty on servants under 32 & 33 Vict. c. 14. 36 & 37 Vict. c. 18.]

[New provisions as to customs, taxes and excise. Repeal of duties charged under former Acts. 38 & 39 Vict. c. 23.]

1.—The Customs Regulation Act, 1845 (New South Wales), by section 16 provides that an entry of goods shall contain "the particulars of the quantity and quality of the goods and the packages containing the same." Section 18 provides that no entry "shall be deemed valid unless the goods shall have been properly described in such entry, and that any goods taken or delivered out of any ship or out of any warehouse by virtue of any entry not properly describing the same, shall be deemed to be goods landed without due entry and shall be forfeited." The Customs Duties Act, 1871 (New South Wales), by section 8, provides that in all cases in which goods are chargeable to an *ad valorem* duty according to the value, such value shall be verified at the time of entry, by the genuine invoice, and by a declaration. By section 13, if the declaration made with regard to any entry is wilfully false, the goods misdescribed shall be forfeited. Certain "soft" goods were consigned to the appellants in cases which also contained certain other goods consigned to the appellants. All the goods were liable to an *ad valorem* duty. On the arrival of the cases, the appellants' agent made an entry and declaration in which the "soft" goods were described, and the value declared, but the other goods were omitted from the entry and declaration, and no value declared:—Held, first, that the provisions of sections 16 and 18 of the Customs Regulations Act, 1845, were not repealed by the Customs Duties Act, 1871; secondly, that the goods omitted to be described in the declaration were "goods landed without due entry," and were therefore forfeited; thirdly, that the cases not being properly described, the entire contents were forfeited. *Prince v. The Collector of Customs of New South Wales*, 43 Law J. Rep. (N.S.) P. C. 14; Law Rep. 5 P. C. 1, *nom. Prince v. The Queen*.

#### (B) INHABITED HOUSE DUTY.

2.—Where a building assessed to inhabited house duty is used partly as offices by merchants and partly as chambers for professional men, the owner is not entitled to an abatement in respect of the portion occupied by merchants.—So held by Bramwell, B., and Cleasby, B., Kelly, C.B., doubting whether the question was sufficiently raised by the facts stated. *Rusby v. Newson*, 44 Law J. Rep. (N.S.) Exch. 143; Law Rep. 10 Exch. 322.

3.—The statute 48 Geo. 3. c. 55, provides rules for charging inhabited house duties. Rule 6 directs that, "where any house shall be let in different storeys, tenements, lodgings or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to and shall in like manner be charged to the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling-house, and shall be charged to the said duties." Rule 14 directs that "where any

dwelling-house shall be divided into different tenements being distinct properties, every such tenement shall be subject to the same duties as if the same was an entire house, which duty shall be paid by the occupiers thereof respectively." Certain blocks of buildings, each having a street entrance and one internal staircase, were structurally divided within into different suites of rooms, distinct from each other, a porter in the basement having the care of the door (locked at night) and access to the rooms. Each suite of rooms had a door opening on to the staircase, which was common to all. Some of the suites of rooms were let to tenants under special agreement not to interfere with the construction or arrangement of the premises, and only to use them as offices or residences, &c. Other of the suites of rooms were untenanted:—Held, by Bramwell, B., and Cleasby, B. (Kelly, C.B., dissenting), that the blocks of buildings were chargeable under rule 6, not under rule 14. Held also, that each block was properly assessed on the aggregate sum of the values appearing in the valuation list made under the Metropolis Valuation Act, as the values of the suites of rooms. *The Attorney-General v. The Mutual Tontine Westminster Chambers Association (Lim.)*, 44 Law J. Rep. (N.S.) Exch. 146; Law Rep. 10 Exch. 305.

#### (C) INCOME-TAX.

4.—A Turkish corporation, which by the law of Turkey was established as a state bank for the Ottoman Empire, with its seat at Constantinople, and power to establish as many branches and agencies as it might think fit, established a branch or agency in London, where the ordinary business of bankers was carried on under the management of a committee of persons who resided in England and were elected by the shareholders:—Held, that the corporation did not "reside in the United Kingdom" within the meaning of 16 & 17 Vict. c. 24, s. 3, schedule D; and that for the purpose of being assessed to the income-tax the committee were not bound to make a return of the profits accruing to the bank elsewhere than within the United Kingdom. *The Attorney-General v. Alexander*, 44 Law J. Rep. (N.S.) Exch. 3; Law Rep. 10 Exch. 20.

#### (D) DUTY ON RAILWAY FARES.

*Duty on fares of railway passengers: Cheap Trains Act.* [See RAILWAY, 40.]

#### REVERSION.

[See USURY.]

The Sales of Reversions Amendment Act leaves untouched the settled law relating to contracts in respect of reversionary interests in all cases where *mala fides*, or unfair dealing can be shewn. *Miller v. Cook*, 40 Law J. Rep. (N.S.) Chanc. 11; Law Rep. 10 Eq. 641.

*Copyhold: grant for lives in reversion.*  
[See COPYHOLD, 2.]

*Of infant.* [See INFANT, 2, 7.]

*Of married woman.* [See BARON AND FEME, 17; ELECTION, 2.]

## REVIEW OF JUSTICES' DECISIONS ACT, 1874.

Observation on the requisites of the affidavit under the Act. *The Queen v. The Justices of Exeter*, 42 Law J. Rep. (N.S.) M. C. 35.

## REVIVOR AND SUPPLEMENT.

[See PRACTICE IN EQUITY, 103-116.]

## RIVER.

Where a wharf-owner drove piles extending a distance of three feet into the bed of a navigable river sixty feet wide,—Held, that this was an obstruction which would be restrained at the suit of a public body empowered by statute to remove obstructions. Per the Master of the Rolls—In the case of a navigable river riparian owners have no right to erect any structure on the alveus. Benefit to a man's trade will not be held a justification on the ground of public advantage. *The Queen v. Russell* (6 B. & C. 566) disapproved of. *The Attorney-General v. Terry*, Law Rep. 9 Chanc. 423.

*Obstruction of highway in navigable lake.*

[See TRESPASS, 3.]

*Liability of conservators for maintenance of towing path.* [See NEGLIGENCE, 15.]

*Rights of riparian proprietors in tidal river.* [See THAMES CONSERVANCY ACT, 1.]

## ROMAN DUTCH LAW.

[See COLONIAL LAW, 20, 21.]

## SALE.

### (A) OF GOODS.

(a) *Contract in writing: alterations after signature.*

(b) *Construction of contract.*

(1) *Mercantile usage.*

(2) *Potatoes "growing on land of seller": implied condition.*

(3) *Cargo "expected to arrive."*

(4) *Time of delivery.*

(c) *Sale of specific goods: remedy in equity by injunction.*

(d) *Sale by sample.*

(e) *Sale by instalments.*

(f) *Rescission of contract.*

(1) *Breach of warranty.*

(2) *Fraud.*

(3) *In other cases.*

(g) *Transfer and vesting of property.*

(h) *Vendor's lien.*

(i) *Right to follow money in hands of consignee.*

(k) *Sub-contract: recognition of rights of sub-vendee.*

### (B) OF LAND.

[Existing enactments as to sale of food and drugs repealed. 38 & 39 Vict. c. 63.]

### (A) OF GOODS.

(a) *Contract in writing: alterations after signature.*

1.—E., as an agent to H., agreed to sell a ship to S., and a written contract was signed by S. The contract was forwarded to H., who made an alteration therein, and returned it to E., who thereupon produced the written contract, as altered by H., to S., who assented, without resigning the contract:—Held, that parol evidence was admissible to shew that S. assented, without re-signing, to the alteration made by H. in the contract after S. had affixed his signature. *Stewart v. Eddowes and Hudson v. Stewart*, 43 Law J. Rep. (N.S.) C.P. 204; Law Rep. 9 C.P. 311.

*Memorandum in writing: variation of contract: ratification not in writing.*  
[See FRAUDS, STATUTE OF, 12.]

(b) *Construction of contract.*

(1) *Mercantile usage.*

2.—If a mercantile document is insensible, when read according to the ordinary sense of the words used therein, it is a question for the jury whether the language thereof has not acquired a definite meaning by mercantile usage. *Ashworth v. Redford*, 43 Law J. Rep. (N.S.) C.P. 57; Law Rep. 9 C.P. 20, *nom.* *Ashforth v. Redford*.

The plaintiff sold to the defendants certain goods; the invoice was dated the 1st of May, and at the foot of it were written the words, "Terms—Net cash, to be paid within six to eight weeks from date hereof." The goods not having been paid for, the plaintiff issued a writ to recover the price thereof on the 18th of June, scarcely seven weeks from the 1st of May. At the trial the Judge left to the jury the question whether the credit had expired on the 18th of June according to mercantile usage. The jury having found that the action was not brought too soon,—Held, per Keating, J., and Brett, J. (Grove, J., doubting), that the direction to the jury was proper, and that the plaintiff was entitled to the verdict.

(2) *Potatoes "growing on land of seller": implied condition.*

3.—The defendant agreed to sell to the plaintiff, in March, 1872, a quantity of potatoes upon the following terms, which were committed to writing—"Two hundred tons of Regent potatoes grown on land belonging to Coupland (the seller)

in Whaplode, at the rate of 3*l.* 12*s.* 6*d.* a ton, to be delivered in September or October, and paid for as taken away." At the time of the contract the defendant had twenty-five acres actually sown with potatoes, and forty-three acres ready for sowing. The forty-three acres were afterwards sown, and the whole together were amply sufficient under ordinary circumstances to produce 200 tons. In August a great part of the crop was injured by disease, and the defendant could only deliver about eighty tons:—Held, in accordance with *Taylor v. Caldwell* (32 Law J. Rep. (n.s.) Q. B. 164; 3 B. & S. 833, 4), that the contract was subject to an implied condition that the defendant's land should produce the stipulated quantity of potatoes; and, the crop having failed without any suggestion of negligence on the part of the defendant, he was not liable. *Howell v. Coupland*, 43 Law J. Rep. (n.s.) Q. B. 201; Law Rep. 9 Q. B. 462: affirmed, on appeal, Law Rep. 1 Q. B. Div. 258.

(3) *Cargo "expected to arrive."*

4.—The agents of the defendants at Chili having purchased a quantity of nitrate of soda, and chartered the vessel *Precursor* to convey it to England, the defendants contracted to sell to the plaintiff "600 tons, more or less, being an entire parcel of nitrate of soda, expected to arrive at port of call per *Precursor*. . . . Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, the contract to be void." At the date of the sale, the greater part of the nitrate of soda intended for shipment had been destroyed by an earthquake. The charter-party was subsequently cancelled, and notice of this fact was in due course forwarded to the plaintiff. The agents of the defendants afterwards purchased a like quantity of nitrate of soda on account of the defendants, and obtained a transfer of a second charter-party made between the vendors and the owners of the *Precursor* for the conveyance of the second parcel of nitrate of soda to England. Upon the arrival of the cargo in this country, the plaintiff laid claim to it under his contract:—Held (affirming the decision of the Queen's Bench, 39 Law J. Rep. (n.s.) Q. B. 210), that the contract related only to the nitrate of soda which was then expected to be carried by the particular voyage, and that upon this voyage being rendered impossible, the liability of the defendants was terminated, and the plaintiff had no claim to the cargo subsequently purchased. *Smith v. Myers* (Exch. Ch.), 41 Law J. Rep. (n.s.) Q. B. 91; Law Rep. 7 Q. B. 139.

(4) *Time of delivery.*

5.—Contract for sale of goods "to be delivered free of charge to-morrow, or as soon as they can be got out of the hands of the guardian, but the purchasers not bound to take them if not delivered in one week, unless they like":—Held, that the vendors were bound to deliver, not upon the accrual of the legal right to the possession, but upon actual possession, and that the guardian having ceased to fill that capacity, but having refused in

another capacity to deliver the goods, the vendors were not liable. *Maclaren v. Murphy, Conolly v. Maclaren*, Law Rep. 4 P. C. 263.

6.—Contract to deliver maize, "for shipment in June and [or] July, 1869, sellers' option":—Held, affirming the Common Pleas, that the maize must be on board so that the shipment might be complete in June or July, and that the whole cargo need not actually be put on board in those months. *Alexander v. Vanderzee*, Law Rep. 7 C. P. 530.

*Damages for default in delivery.* [See DAMAGES, 5–12.]

(c) *Sale of specific goods: remedy in equity by injunction.*

7.—The defendant entered into an agreement with the plaintiff, of which the material clause was in the following words—"Sold R. F., Esq., M.P., the whole of the get of the No. 3 coal out of the Newbridge Colliery property for five years, the quantity not to be less than at present delivered to his Taff Vale works, unless the coal should fail, at 6*s.* a ton, payment as usual." He afterwards sold some of the coal to other persons, and contracted to sell the colliery itself. On demurrer to a bill seeking to restrain him,—Held, that the agreement was, in effect, for the sale of a chattel, and that not one of specific value, but a marketable commodity; that the plaintiff's remedy was at law for damages, and not in equity for specific performance; and that being so, the Court would not extend its jurisdiction in granting an injunction to restrain a breach of a portion of an agreement, when it could not enforce the whole. *Fothergill v. Rowland*, 43 Law J. Rep. (n.s.) Chanc. 252; Law Rep. 17 Eq. 132.

(d) *Sale by sample.*

[And see SCOTCH LAW, 8.]

8.—The plaintiff, having some oats for sale, applied to the manager of the defendant, a trainer of race horses, to purchase them. Some conversation took place, in the course of which a sample of the oats was handed by the plaintiff to the defendant, who kept it until the next day, and then agreed to take the oats at a named price. The plaintiff delivered the oats, but the defendant refused to accept them, alleging that he had contracted for old oats, whereas those which were sent were new. Upon the trial of an action upon the contract in the County Court, there was contradictory evidence as to whether the contract was for old oats or for new oats, and the following questions were put to the jury: First, whether the word "old" had been used by the plaintiff or the defendant in making the contract; second, whether, if they thought that the word "old" had not been so used, they were of opinion that the plaintiff believed the defendant to believe, or to be under the impression, that he was contracting for the purchase of old oats. The jury were also told that if either of these questions were answered in the affirmative, their verdict should be for the defendant. The case having been so left to them, the jury found a verdict generally

for the defendant:—Held, by Cockburn, C.J., that the Judge was wrong in leaving the second question to the jury, the minds of the parties being *ad idem* as to the specific parcel of oats. By Blackburn, J., that it was doubtful whether the direction would bring to the minds of the jury the distinction between agreeing to take the oats under the belief that they were old, and agreeing to take them under the belief that the plaintiff contracted that they were old. And by Hannen, J., that the second question was not incorrect in its terms, but that it was likely to be misunderstood by the jury, and apparently was so misunderstood by them. And held, *per totam Curiam*, that there ought to be a new trial. *Smith v. Hughes*, 40 Law J. Rep. (n.s.) Q. B. 221; Law Rep. 6 Q. B. 597.

9.—The defendants engaged to supply shoes to the plaintiffs, to be according to sample, and to be inspected and paid for by the plaintiffs before shipment, it being known that the shoes were intended for the French army; a large quantity of shoes were inspected, approved and delivered, and a portion then sent by the plaintiffs to Lille. It was subsequently discovered by the plaintiffs that some of the shoes contained paper in the soles, which the French authorities would not allow, and after various communications the defendants engaged to take back shoes returned because they contained paper, but not a larger quantity if only a few were so defective. The French authorities rejected all, and on cutting open a large number most were found to contain paper, which was also found in the sample; the shoes both delivered and undelivered were inferior to sample, and the defect could not be discovered by any reasonable inspection. The plaintiffs gave notice that they rejected the shoes delivered and would receive no more, and brought their action:—Held, that the plaintiffs were entitled to reject the shoes delivered, and throw them back on the defendants' hands at Lille and in England respectively, to refuse to receive more, and to recover as damages the whole money paid, the expense of sending to and keeping at Lille, and the loss of profit on all shoes delivered or not. Per Bovill, C.J., and Byles, J., *dissentiente* Brett, J., the shoes could not have been thrown back on the defendants' hands at Lille but for the second engagement. *Heilbutt v. Hickson*, 41 Law J. Rep. (n.s.) C. P. 228; Law Rep. 7 C. P. 438: affirmed, on appeal, 42 Law J. Rep. (n.s.) C. P. 59; Law Rep. 8 C. P. 131.

10.—Where goods sold by sample are, when delivered, found to be not equal to sample, the purchaser has a right to reject them, and it is sufficient if he gives the seller notice that he rejects them, and that the goods are at the seller's risk, and he is not bound to return them to the seller or to offer to do so. *Grimoldby v. Wells*, 44 Law J. Rep. (n.s.) C. P. 203; Law Rep. 10 C. P. 391.

(e) *Sale by instalments.*

11.—Under a contract for the sale of merchandise a certain quantity of the goods were to be delivered in each of eleven months, payment to be

by cash fourteen days after delivery:—Held, that the true meaning of the contract was that the vendor might cease delivery in any month if the purchaser neglected to pay for the previous month's delivery. *Ex parte Chalmers; In re Edwards*, 42 Law J. Rep. (n.s.) Bankr. 2.

Delivery went on under the contract for ten months, and all the lots but the tenth were paid for. On the 22nd of December, the last month of the contract, a meeting was held of the purchaser's creditors, and he was then insolvent. On the 23rd, the vendors wrote that they refused to deliver any more goods, giving no reasons. The goods had greatly risen in value, and in January the purchaser claimed the difference in price on the December lot. In February he was adjudicated bankrupt on a declaration of insolvency. On a claim by the trustee for the difference on the December lot on account of the refusal,—Held, that the refusal was justified by the non-payment, and that the case was strengthened by the fact that the purchaser could not, at the time, make a valid payment. *Ibid.*

This decision was affirmed on appeal with costs. *Ex parte Chalmers; In re Edwards*, 42 Law J. Rep. (n.s.) Bankr. 37; Law Rep. 8 Chanc. 289.

12.—The plaintiffs agreed to take from the defendants, "say about 6,000 to 8,000 tons of coal . . . put into our waggons at the colliery; delivery to commence from the 1st of July next, and to be taken in about equal monthly quantities over the next twelve months," &c. The defendants agreed to supply the coal, "to be delivered into your waggons at our collieries, in equal monthly quantities during period of twelve months from the 1st of July next," &c. Up to the 1st of August the plaintiffs only supplied waggons sufficient to take away 158 tons of coal, whereupon the defendants gave them notice that they cancelled the agreement:—Held, in an action by the plaintiffs to recover damages in respect of the refusal by the defendants to deliver any more coal, that the defendants were not justified in cancelling the agreement in consequence of the plaintiffs' failure to send waggons in the first month sufficient to take away the quantity of coal agreed to be delivered in that month. *Hoare v. Rennie* (29 Law J. Rep. (n.s.) Exch. 73; 5 Hurl. & N. 19) questioned. *Simpson v. Crippin*, 42 Law J. Rep. (n.s.) Q. B. 28; Law Rep. 8 Q. B. 14.

13.—The defendants contracted to sell a quantity of iron to the plaintiff, to be delivered by instalments, and to be paid by cash against bills of lading. The plaintiff having neglected to take up the bill of lading for the second instalment of iron sent under the contract, the defendants, after previous notice that they would do so, sold that portion of iron. They sold it for more than the contract price, as the market for iron was a rising one, and they afterwards refused to deliver the rest of the iron contracted for, on the ground that the contract had been cancelled by the plaintiff not taking up the bill of lading. The plaintiff subsequently filed a petition for liquidation by arrangement, which ended in an agreement for a composition with his creditors, and he then brought



an action against the defendants for not delivering the remainder of the iron according to the contract. On the trial the jury found that the defendants, by reason of the plaintiff's conduct, had reasonable ground for believing, and did believe, that the plaintiff would be unable to pay for the future bills of lading to be presented under the contract, that the plaintiff had come to a determination to abandon the contract, and that he had so conducted himself as to lead the defendant to believe that he had determined to abandon the contract:—Held, that on these findings a verdict was rightly entered for the defendants, as the case was brought directly within the authority of *Withers v. Reynolds* (2 B. & Ad. 882). *Bloomer v. Bernstein*, 43 Law J. Rep. (n.s.) C. P. 375; Law Rep. 9 C. P. 588.

14.—In the beginning of February, 1872, the plaintiffs agreed to buy and the defendants agreed to sell 200 tons of iron, to be forwarded in quantities of twenty-five tons per month, the first delivery to be in April. At the time of making the contract the plaintiffs were insolvent, and upon the 12th of March they determined to suspend payment. They forthwith informed the defendants of their insolvency. Upon the 5th of April there was a meeting of the plaintiffs' creditors; the contract with the defendants was not mentioned in their written statement of affairs. The iron was not forwarded by the defendants in April or the early part of May, nor did the plaintiffs require it to be delivered, nor did they offer payment for it. The plaintiffs' creditors ultimately accepted a composition of 5s. in the pound. The plaintiffs took new partners; and upon the 13th of May they called upon the defendants to supply iron according to the contract of the preceding February; the defendants forthwith repudiated liability to fulfil the contract. The plaintiffs having sued for breach of the contract,—Held, that there was evidence upon which a jury might find that the contract had been rescinded, and could not be enforced upon the 13th of May. *Morgan v. Bain*, 44 Law J. Rep. (n.s.) C. P. 47; Law Rep. 10 C. P. 15.

15.—The defendants sold to the plaintiffs a certain number of tons of iron, "delivery in monthly quantities over 1871." During that year a correspondence passed between them, which was held to have the effect of postponing the delivery in particular months of the full monthly proportion that would otherwise have been duly delivered by the defendants. In the last month the plaintiffs gave notice requiring the whole of the residue to be delivered at the end of the year, so as to make up the total number of tons sold. The defendants, deeming this demand unreasonable, refused further delivery:—Held, reversing the decision of the Court of Exchequer, 42 Law J. Rep. (n.s.) Exch. 185; Law Rep. 8 Exch. 305, that the postponement operated only to throw the delivery which would have been made in 1871 over into months of the succeeding year, and that the plaintiffs were not entitled to call for the whole of the undelivered residue of the iron at once, but nevertheless that the unreasonable demand did

not justify the defendants in treating the contract as at an end, and in refusing to deliver such residue at all; that, therefore, the defendants were liable in damages for breach of contract. *Tyers v. The Rosedale and Ferryhill Iron Company (Lim.)* (Exch. Ch.), 44 Law J. Rep. (n.s.) Exch. 130; Law Rep. 10 Exch. 195.

16.—Neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds. *Hickman v. Haynes*, 44 Law J. Rep. (n.s.) C. P. 358; Law Rep. 10 C. P. 598.

The defendants agreed in writing to buy of the plaintiff certain iron, of which twenty-five tons were to be delivered in June. The defendants in that month verbally requested the plaintiff to allow the delivery of the twenty-five tons to stand over, to which the plaintiff verbally assented. On the 1st of August the plaintiff wrote to ask when the defendants would take delivery, and after some correspondence the defendants on the 9th asked for further time. The plaintiff waited a reasonable time before the present action was commenced:—Held, that as the delivery was postponed for the defendants' convenience, the plaintiff was entitled to treat the contract as broken by the defendants at the end of June, and to have the damages assessed with reference to the value of the iron at the expiration of a reasonable time after the 9th of August. *Ibid.*

*Breach of contract to deliver goods by instalments: measure of damages.* [See DAMAGES, 5-12.]

(f) *Rescission of contract.*

(1) *Breach of warranty.*

17.—The purchaser of a mare at an auction was induced to buy her by the description that she had been hunted with certain hounds. The conditions of sale provided that horses not answering the description must be returned before a specified time, otherwise the purchaser must keep them with all faults. The purchaser paid the price, and was casually told that the description was untrue. Nevertheless, he removed the mare to his own stables, and while being so removed, she ran away and injured herself severely, without any negligence on the plaintiff's part. The description was, in fact, untrue, and on that ground the purchaser returned her to the seller within the specified time:—Held, that since the purchaser had in removing her done no more than he was entitled to do under the contract, and since the injuries were not owing to any negligence on his part, he had not lost his right to rescind the contract, and could recover the price from the seller in an action for money had and received. *Head v. Tattersall*, 41 Law J. Rep. (n.s.) Exch. 4; Law Rep. 7 Exch. 7.

(2) *Fraud.*

18.—A. having ordered goods from the L. P.

Company in London, paid them 68*l.* in cash, and gave a bill for 135*l.*, the balance of the price, directing the goods to be sent by the defendants' railway to C., his agent at Liverpool. The railway company reported to the L. P. Company that C. was not to be found at the address given, and asked for further directions; but before any reply was received, C. claimed the goods at the station in Liverpool, and the defendants thenceforward held them as warehousemen for him. In the meantime the L. P. Company having discovered that A. was a bankrupt, directed the defendants to return the goods to London; but this direction did not reach the Liverpool station till after the transitus was at an end. The defendants being indemnified by the L. P. Company, afterwards refused to deliver the goods to C., whereupon he brought an action against them. At the trial, the jury found—First, that A. obtained the goods with the intention of not paying for them; secondly, that the plaintiff had advanced 250*l.* (including the 68*l.*) to A., but not *bonâ fide*; and thirdly, that he knew of A.'s fraudulent intention. A verdict was thereupon entered for the defendants, leave being reserved to move to enter a verdict for the plaintiff if the Court should think the defendants not entitled to the verdict, either upon the pleas as they then stood, "or upon any possible amendment of them":—Held (reversing the judgment below), that, upon the facts proved, a plea stating,—"that the goods had been sold to A., and delivered by the L. P. Company to the defendants, to be delivered to the plaintiff under a contract induced by A.'s fraud, to which the plaintiff was privy; that the L. P. Company, supposing the transitus to be still subsisting, had obtained from the defendants the re-delivery of the goods, but that afterwards, and after action brought, the L. P. Company having discovered the fraud and the plaintiff's knowledge of it, elected to rescind this contract with the plaintiff, and that they were ready to restore the 68*l.* and the bill; that this took place before any act was done by them affirming the contract or otherwise determining their election; that no interest had vested in any innocent third person, rendering it inequitable or unjust to rescind the contract; and that the plaintiff was inequitably proceeding with the suit for the purpose of obtaining damages from the defendants and the P. Company,"—would have been proved, and would have furnished a complete answer to the action on equitable if not on legal grounds. *Clough v. The London and North-Western Railway Company* (Exch. Ch.), 41 Law J. Rep. (N.S.) Exch. 17; Law Rep. 7 Exch. 26.

19.—A trader, after being served with the petition on which he was afterwards adjudicated bankrupt, purchased goods at an auction, and removed them without payment, without disclosing the fact of the bankruptcy proceedings:—Held, that this omission did not of itself amount to a misrepresentation such as to avoid the contract and entitle the vendor to a return of the goods. *Ex parte Whittaker; In re Shackleton*, 44 Law J. Rep. (N.S.) Bankr. 91; Law Rep. 10 Chanc. 446.

### (3) In other cases.

[See *supra* Nos. 11–16.]

#### (g) Transfer and vesting of property.

20.—The plaintiffs were sugar refiners in the city of London, and were in the habit of making sales by sample, each sale consisting of one or more fillings or batches of boiled sugar. Upon a sale being effected, a sale-note was delivered to the purchaser, which contained the price of the filling per cwt., and the following words—"Prompt one month. Stored goods at sellers' risk for two months." Each filling comprised a number of specified "titlers," or loaves, of sugar of a varying weight, and it was the custom to pay for the sugar on the Saturday (called "the prompt") after the expiration of one calendar month from the day of sale, but the whole or portion of the sugar often remained in the plaintiffs' warehouse after the time for payment when it suited the convenience of the customer to delay the delivery, the customer paying on the prompt an approximate sum to the price, which was only finally ascertained and settled when the sugar was weighed on delivery. The defendant, a sugar-broker, purchased four fillings or batches of sugar from the plaintiffs in the manner above stated, and paid an approximate sum to the value. Part of the sugar was removed by the defendant; but after the expiration of two months from the sale a fire occurred on the plaintiffs' premises, destroying the remainder which had never been weighed. The plaintiffs, without any agreement with the buyers, had effected floating policies upon all stock in their warehouse, making no distinction between goods and goods unsold; but the amount which they received from the insurance office was not sufficient to cover the loss which they actually sustained, exclusive of the defendant's goods:—Held, first, that the loss by the destruction of the undelivered sugar must fall on the defendant—by Cockburn, C.J., on the ground that the property had passed to the defendant, by Blackburn, J., Lush, J., and Quain, J., on the ground that whether this were the case or not, the sugar, after the lapse of two months, was, by the terms of the contract of sale, at the risk of the defendant. Secondly, that the defendant was not entitled to the benefit (by way of set-off or otherwise) of any part of the insurance money received by the plaintiffs. *Martineau v. Kitching*, 41 Law J. Rep. (N.S.) Q. B. 227; Law Rep. 7 Q. B. 436.

21.—Where by the bill of lading, goods are made deliverable to the shipper, or his order, and not to the consignee, the *jus deponendi*, or control over the property in the goods shipped, remains with the shippers, although the invoice states that the goods were shipped "on account of, and at the risk of" the consignee; such statement being not conclusive, of itself, that the right to the possession of, as well as the property in the goods was intended to be unconditionally passed to the consignee. *Shepherd v. Harrison* (H. L.), 40 Law J. (N.S.) Q. B. 148; Law Rep. 5 E. & I. App. 116.

Where the bill of lading, indorsed in blank, was sent to the consignee, accompanied by a bill of exchange drawn against the cargo, for acceptance by

him,—Held, that it was the duty of the consignee, either to approbate or reprobate the transaction *in toto*; and that he could not accept the bill of lading and the cargo, unless he also accepted the bill of exchange for its value. Also, that it was not necessary for the shipper to advise the consignee expressly that he was not to use the bill of lading unless he accepted the bill of exchange. *Ibid.*

**22.**—L., a merchant in France, contracted with the plaintiffs, merchants in London, for the sale to them of a certain quantity of potatoes to be shipped free on board a vessel at Dunkirk for London, at a certain price, payable cash against bill of lading. The plaintiffs made a part payment to L. of 30%, and sent their own sacks marked with their names thereon, into which the potatoes were put by L., who caused them to be shipped at Dunkirk under a bill of lading, which made them deliverable at London to order of shipper:—Held, that the property in the potatoes had passed to the plaintiffs at the time of the shipment, notwithstanding the provision in the contract of “cash against bill of lading.” *Ogg v. Shuter*, 44 Law J. Rep. (n.s.) C. P. 161; Law Rep. 10 C. P. 159.

Held, also, that the defendant, who had sold the potatoes, had lost his lien for the balance of the purchase-money, and the plaintiffs had a sufficient right to the possession to entitle them to maintain trover. *Ibid.*

(h) *Vendor's lien.*

**23.**—Where by the contract for sale and purchase of goods it is stipulated that payment should be made by the buyers' acceptances of the sellers' drafts, if before the time for the delivery of the goods the purchaser becomes insolvent or the acceptances are dishonoured, the vendor still has a lien for unpaid purchase-money. Difference in this respect between acceptances of the purchaser and those of a third person. *Gunn v. Bolckow, Vaughan & Co.*, 44 Law J. Rep. (n.s.) Chanc. 732; Law Rep. 10 Chanc. 491.

By a contract for the supply of iron rails, it was agreed that payment should be made by buyers' acceptance of sellers' drafts at six months' date, against inspector's certificate of approval and wharfinger's certificate of each 500 tons being stacked ready for shipment. Inspector's certificates and wharfinger's certificates were from time to time handed to the buyers in exchange for their acceptances, and were pledged with T. as security for advances made by him, it being an alleged custom of the trade to treat such certificates as delivery warrants. The buyers having become insolvent before the first acceptance became due:—Held, first, that the delivery of the acceptances did not constitute a valid payment for the rails according to the contract; and secondly, that no custom of the trade could give to the certificates the effect of warrants, and T. therefore had no lien on the rails. *Ibid.*

(i) *Right to follow money in hands of consignee.*

**24.**—T. consigned goods to N. at an invoice price. N. dealt with the goods as an owner, and sold

them at such prices and in such manner as he thought fit. He sent regular monthly statements of the goods sold, and every month paid the invoice price of the goods comprised in the previous monthly statement. N. was partner in a firm of N., J. & Co., and by an arrangement with his partners, used the partnership as his bankers in reference to the above business which he carried on for his separate benefit, and an account of the moneys paid in and drawn out was regularly kept. N., J. & Co. having executed a deed of arrangement with their creditors, at a time when the account of N. shewed a balance of 2,035*l.* 1*s.* 2*d.* in his favour, the account of N. with T. at that time shewed a balance in favour of T. of 2,052*l.* 11*s.* 8*d.* T. sought to prove against the partnership for the amount of this balance, as being trust moneys held by N. as his trustee:—Held, reversing the decision of Bacon, C.J., that the proof could not be admitted, as the nature of the business carried on between T. and N. was that of vendor and purchaser, and not principal and agent, and therefore there was no trust. *Ex parte White; In re Nevill, Jourdan & Co.*, 40 Law J. Rep. (n.s.) Bankr. 73; Law Rep. 6 Chanc. 397.

(k) *Sub-contract: recognition of rights of sub-vendee.*

**25.**—The defendant being possessed of a quantity of barley sold eighty quarters thereof to M., who afterwards, on the 27th of June, sold sixty of the eighty quarters to the plaintiff, who on the same day paid the price and forwarded M.'s delivery order for the sixty quarters to the defendant, who assented to the same on the 29th. The barley remained in bulk in the defendant's possession until the 7th of July, on which day the plaintiff sent a forwarding order to the defendant, which the latter refused to comply with on the ground that M. had in the mean time become bankrupt, and that the barley purchased by him was unpaid for:—Held, that the defendant, by assenting to the delivery order for the sixty quarters was estopped from denying the plaintiff's right thereto, notwithstanding that the price of the barley was paid to M. contemporaneously with the forwarding of the delivery order to the defendant. *Knights v. Whiffen*, 40 Law J. Rep. (n.s.) Q. B. 51; Law Rep. 5 Q. B. 660.

(B) OF LAND.

[See VENDOR AND PURCHASER.]

SALMON.

(A) SALMON FISHERY ACTS.

(B) RIGHT TO SALMON FISHING.

[Amendment of the law relating to Salmon Fisheries in England and Wales. 33 & 34 Vict. c. 33 and 36 & 37 Vict. c. 71.]

## (A) SALMON FISHERY ACTS.

1.—By the Salmon Fishery Act (24 & 25 Vict. c. 109), s. 11, no fixed engine of any description shall be placed or used for catching salmon in any inland or tidal river. By the same Act, sections 4 and 11, "fixed engines" are to include "all fixed implements for catching, or facilitating the catching of fish," and "a net that is secured by anchors, or otherwise temporarily fixed to the soil." By the subsequent statute, 28 & 29 Vict. c. 121, s. 39, the words "fixed engines" are to include "any net or other implement for taking fish, fixed to the soil, or made stationary in any other way." Upon appeal from a decision of the Salmon Fishery Commissioners it appeared that certain nets, called stop nets, are used in the following manner: The fisherman first steadies his boat athwart the current by pushing poles lashed to either end of the boat into the bed of the river in a slanting direction, and when the boat is steadied, the fisherman puts the net overboard. It is about 30 feet wide at the mouth tapering to a point. The mouth is distended by two light poles, called rames, which are about 22 feet long, tied together at the upper end with a rope, and kept extended by a cross stick or stretcher. The net is lowered overboard until the two poles rest at about 8 feet from the upper end on the side of the boat. The fisherman holds the upper end of the poles, and so keeps the net steady in the water, and when he feels a fish, he lowers the upper end with both hands, using the sides of the boat as a fulcrum, and so raises the mouth of the net out of the water, catching the fish:—Held, that the nets were "fixed engines" within the meaning of the Acts, as they were in fact made stationary by a mechanical contrivance. *Gore v. The Special Commissioners for English Fisheries*, 40 Law J. Rep. (N.S.) Q. B. 252; Law Rep. 6 Q. B. 561.

2.—By section 11 of the Salmon Fishery Act, 1861, "No fixed engine of any description shall be placed or used for catching salmon in any inland or tidal waters," and a penalty is imposed by that section. By section 39 of the Salmon Fishery Act, 1865, the words "fixed engine shall include any net or other implement for taking fish fixed to the soil, or made stationary in any other way, not being a fishing weir or fishing mill dam":—Held, that if a person uses a net which is not of itself an instrument used peculiarly for catching salmon, and which is not fixed for the purpose of catching salmon, he is not liable to the penalty imposed by the 11th section, although the net is fixed to the soil in tidal waters, and within the limits of a fishing district. *Watts v. Lucas*, 40 Law J. Rep. (N.S.) M. C. 73; Law Rep. 6 Q. B. 226.

## (B) RIGHT OF FISHING.

3.—A baronial title will be a habile foundation for a claim to salmon fishing if requisite enjoyment and user be proved. So will a title by grant *cum piscationibus*. *McDonall v. The Lord Advocate*, Law Rep. 2 Sc. App. 431.

The prescriptive forty years' enjoyment may be by net and coble, as well as stake net. *Ibid.*

[And see SCOTCH LAW, 32.]

## SALVAGE.

[See SHIPPING LAW, T.]

## SANITARY ACTS.

[Amendment and extension of the Sanitary Laws. 37 & 38 Vict. c. 89.]

Under a local Act Improvement Commissioners were appointed, with power to make rates. It enacted "that no person shall be rated in pursuance of this Act on account of any arable, meadow or pasture land exceeding two acres, . . . or the farm-houses and buildings used exclusively for farming purposes." The commissioners became an urban sanitary authority under the Sanitary Act, 1873. By section 43 of that Act, "Any limit imposed on, or in respect of any rate by any local Act of Parliament, shall not apply to any rate required to be levied for the purpose of defraying any expenses incurred by a sanitary authority for sanitary purposes:—Held, that the word "limit" did not apply to the exemption in the local Act, so as to authorise the commissioners to impose a rate for expenses incurred for sanitary purposes, on a person on account of land exceeding two acres. *The Improvement Commissioners of Walton v. Walford*, 44 Law J. Rep. (N.S.) Q. B. 74; Law Rep. 10 Q. B. 180.

## SATISFACTION.

*Satisfaction of bequest by advancement.*

[See ADVANCEMENT, 5-10.]

*Of covenant for payment of annuity.* [See ANNUITY, 13.]

*Of legacy.* [See LEGACY, 25-32.]

## SATISFIED TERMS ACT.

A., being the owner of leaseholds for a term of ninety-nine years, mortgaged the property to B. for the term, less five days, and also to G. and R. for the term, less three days. He also demised to M. for the term, less ten days, in trust for G. and R. He then acquired the fee subject to the mortgages. B.'s mortgage was paid off to his executors, who assigned the term upon which it was secured to a trustee for G. & R. Then A. became bankrupt, and he and his assigns, in consideration of a release by G. and R. of their mortgage debt by a deed to which A.'s wife was named a party, but which she refused to execute, granted the fee of the premises to them. They sold the estate and A. died. A.'s widow then filed her bill against the purchaser to enforce her right to dower out of the premises. The defendants demurred, but the demurrer was overruled by one of the Vice-Chancellors, on the ground that upon the release by G. and R. of the mortgage debt, the mortgage terms became satisfied, and were extinguished by the Satisfied Terms Act (8 & 9 Vict. c. 112), and thereby the inchoate right of A.'s widow to dower was let in. But on appeal this decision was reversed,

and it was held that the term was not satisfied within the meaning of the Act. *Anderson v. Pignet*, 42 Law J. Rep. (N.S.) Chanc. 310; Law Rep. 8 Chanc. 180.

### SCANDAL.

[See PLEADING IN EQUITY, 1, 2.]

### SCHEME OF ARRANGEMENT.

[See RAILWAY, 34–36.]

### SCHOOL.

[See PUBLIC SCHOOL.]

[Provision for the issue of 1,500,000*l.* out of the Consolidated Fund for School Board Loans. 37 & 38 Vict. c. 9.]

*As to rateability of industrial and ragged schools.* [See RATE, 21, 22.]

### SCIRE FACIAS.

*Writ of, against shareholder.* [See COMPANY, G 84.]

### SCOTCH LAW.

#### (A) HUSBAND AND WIFE.

(a) *Consensual marriage.*

(b) *Legitim.*

(c) *Divorce.*

#### (B) ALEHOUSE.

#### (C) BILL OF EXCHANGE.

#### (D) SALE BY SAMPLE.

#### (E) STATUTORY IMPROVEMENT COMMISSIONERS.

#### (F) ARBITRATION: SOCIETY OF INSPECTORS OF POOR.

#### (G) CHURCH BELLS.

#### (H) DEBTOR AND CREDITOR.

#### (I) LAW OF REAL PROPERTY.

(a) *Conveyance: "dispone."*

(b) *Setting aside deed.*

(c) *Presumption against change of destination: extrinsic evidence.*

(d) *Entails.*

(e) *Settlement: charge for younger children.*

(f) *Power of appointment.*

(g) *Minerals.*

(h) *Lease of shop.*

(i) *Agricultural lease.*

(k) *Teinds.*

(l) *Fishery.*

(m) *Inventory duty.*

#### (K) PRACTICE AND JURISDICTION.

(a) *Costs.*

(b) *Contempt of Court.*

#### (A) HUSBAND AND WIFE.

##### (a) *Consensual marriage.*

1.—Consideration of the circumstances necessary to establish a Scotch consensual marriage. A written declaration signed by both parties is conclusive. *Forster v. Forster*, Law Rep. 2 Sc. App. 244.

2.—Consideration of the evidence necessary to establish a consensual marriage. *Stewart v. Robertson*, Law Rep. 2 Sc. App. 494.

3.—Presumption of marriage arising from cohabitation and acknowledgment, held rebutted by the circumstance of the subsequent marriage of the parties after the birth of children. *Shedden v. Patrick*, Law Rep. 1 Sc. App. 470.

##### (b) *Legitim.*

4.—The wife's legitim is subject to the debts of her husband. *Learmouth v. Miller*, Law Rep. 2 Sc. App. 438.

The maxim that a man cannot deal with his property so as to deprive his creditors of his income therefrom applies in Scotch law. *Ibid.*

A provision in a voluntary post-nuptial contract that income of legitim should be "alimentary and in nowise attachable for debt,"—Held, not to exclude the husband's creditors. *Ibid.*

##### (c) *Divorce.*

5.—Divorce for desertion involves a forfeiture of all claims under a marriage settlement. So also divorce for adultery. Whether an adulterous husband is bound to restore tocher paid over to him at the time of marriage, quere? *Harvey v. Farquhar*, Law Rep. 2 Sc. App. 192.

#### (B) ALEHOUSE.

6.—Where magistrates made an order for closing all the public-houses in their burgh at ten (instead of eleven, the usual hour in Scotland),—Held, that as such order purported to extend to "a particular locality," it was *ultra vires*, under 25 & 26 Vict. c. 35. *Macbeth v. Ashley*, Law Rep. 2 Sc. App. 352.

#### (C) BILL OF EXCHANGE.

7.—Where the holder of a dishonoured bill released the acceptor, but reserved his claim against other obligants,—Held, that the indorsers were not discharged. *Muir v. Crawford*, Law Rep. 2 Sc. App. 456.

#### (D) SALE BY SAMPLE.

8.—By Scotch law where goods are sold by sample, the purchaser, even though he has accepted the goods, may return them if they are not according to sample. But the purchaser, desiring to rescind, ought to make a distinct offer to return the goods. *Couston v. Chapman*, Law Rep. 2 Sc. App. 250.

#### (E) STATUTORY IMPROVEMENT COMMISSIONERS.

9.—Where the above Commissioners had accepted an offer, they were held bound specifically to perform it, though the contract proved to

be one likely to be injurious to the public interests. *Smeaton v. The Magistrates of St. Andrews*, Law Rep. 2 Sc. App. 107.

(F) ARBITRATION: SOCIETY OF INSPECTORS OF POOR.

10.—The Society of Inspectors of Poor for Scotland are a fluctuating body, but nevertheless a reference to their arbitration is valid. *The Parish of Rathven v. The Parish of Elgin*, Law Rep. 2 Sc. App. 535.

Case in which the House of Lords rectified the decree below to suit the pleadings. *Ibid.*

(G) CHURCH BELLS.

11.—Where, on the re-erection of a parish church in Scotland, the town subscribed to the steeple upon the terms that the bells should be employed for the parish as well as the town,—Held, that the bells could not be rung for the purpose of dissenting congregations. *The Magistrate of Peebles v. The Minister and Kirk Session of Peebles*, Law Rep. 2 Sc. App. 460.

(H) DEBTOR AND CREDITOR.

12.—There is no discretion given to the Judge by 19 & 20 Vict. c. 79 (Scot.), to abstain from enforcing penalties. A creditor was held subject to the penalties (double the amount of the bribe) who, in ignorance of the law, had accepted a bribe to consent to a dividend, though he returned the bribe with interest when informed of its illegality. *Carter v. McLaren & Co.*, Law Rep. 2 Sc. App. 120.

13.—The maxim that a man cannot deal with his property, so as to deprive his creditors of the income, applies in Scotland. *Learmouth v. Miller*, Law Rep. 2 Sc. App. 438.

(I) LAW OF REAL PROPERTY.

(a) Conveyance: "dispone."

14.—The use of the word "dispone" is essential for the conveyance of heritable property in Scotland. An invalid instrument of conveyance cannot revoke a previous valid one. *Alexander v. Kirkpatrick*, 2 Sc. App. 397.

(b) Setting aside deed.

15.—A deed affecting heritage executed on a death-bed may be set aside *ex capite lecti*. *Newton v. Newton*, Law Rep. 2 Sc. App. 13.

But not so where the deed is made in execution of a faculty or power. *Ibid.*

Provisions for a widow and younger child set aside by the heir in possession under an entail. *Ibid.*

(c) Presumption against change of destination: extrinsic evidence.

16.—In Scotch law as to heritable property there is a strong presumption against change of destination once made. Construction of words of general disposition. Semble—by Scotch law extrinsic evidence of intention is admissible in construction of documents. *Glendonwyn v. Gordon*, Law Rep. 2 Sc. App. 217.

(d) Entails.

17.—Consideration of the rules of construction applicable to Scotch entails. Case in which the resolutive clause was held sufficiently to embrace and cover the cardinal prohibitions. *McDonald v. McDonald*, Law Rep. 2 Sc. App. 446.

18.—In a Scotch deed of entail a power to grant a certain number of years' rent as a provision for younger children is an ordinary power, and is introduced as an exception to the general restrictions. Meaning of "younger children." *Catton v. Mackenzie*, Law Rep. 2 Sc. App. 202.

19.—Heir of entail relieved from provisions in favour of the widow of the testator, maker of entail. *Mackintosh v. Mackintosh*, Law Rep. 2 Sc. App. 310.

20.—In construction of Scotch strict entail the whole issue, male and female, of each stirps must be exhausted before going to subsequent limitations. *Forbes v. Trefusis*, Law Rep. 2 Sc. App. 328.

21.—Under a strict entail, duly recorded, the possessor's attainder for high treason affects only himself and the heirs of his body, leaving substitutes untouched; but if the entail be not duly recorded, such attainder vests the estate in the Crown absolutely, the interests of substitutes perishing, and this although the attainted possessor may have made up no title and is merely in apparenay. *In re the Earl of Perth v. Lord Elphinstone*, Law Rep. 2 Sc. App. 139.

(e) Settlement: charge for younger children.

22.—Where a husband by ante-nuptial articles and post-nuptial settlement conveyed his estate to himself and the heir male of the marriage, and bound himself, his heirs, and successors whomsoever, to pay 16,000*l.* "to the younger child or children of the marriage":—Held, that the heir alone, taking in that capacity (and not the heir and the younger children proportionately), was bound to pay the 16,000*l.*, although the inherited estate was only worth 28,000*l.*, and the free executory or personality was only 1,500*l.* *Leslie v. Macleod*, Law Rep. 2 Sc. App. 44.

(f) Power of appointment.

23.—A father with a power of appointment under his marriage settlement amongst his children is precluded from entering into any negotiation with his children in executing the power. A power may be executed without being referred to; and may be exercised by several appointments from time to time. *Cunninghame v. Anstruther*, Law Rep. 2 Sc. App. 223.

24.—Where a valid appointment is made accompanied by directions and conditions which are beyond the power, these will not invalidate the appointment but will be simply inoperative. Nor will they bind the appointee, even though they formed the motive for the appointment. *McDonald v. McDonald*, Law Rep. 2 Sc. App. 482.

25.—Appointment by husband and wife under a power in an ante-nuptial settlement of 25,000*l.* "to be settled and belong to their eldest son, and other members of their family in succession, being

heirs in possession of their entailed estate":—Held, that the eldest son and heir-in-tail in possession took absolutely, and that the money was not within the entail statute of 1685. *McDonald v. McDonald*, Law Rep. 2 Sc. App. 482.

(g) *Minerals.*

26.—On a reservation of minerals in a feu charter the minerals and surface become separate tenements, and the proprietor of the former may make a tunnel through them for the conveyance of other minerals belonging to him; he is not obliged to use the minerals merely for the purpose of bringing them to the surface. Per Hatherley, L.C., and Lords Westbury and Colonsay; Lord Chelmsford dissenting. *The Duke of Hamilton v. Graham*, Law Rep. 2 Sc. App. 166.

27.—Feu of land reserving subjacent minerals with a stipulation that the feutor should have no claim against the superior or his tenants in respect of any damage that might arise from the working of the minerals:—Held; that the feutor was not entitled to an interdict to prohibit mineral workings from which damage had arisen. *Buchanan v. Andrew*, Law Rep. 2 Sc. App. 286.

28.—In a lease of minerals the lessee takes the risk of the failure of the minerals as to quality or value, or of their not being "workable to profit," but he is not bound if the minerals do not in fact exist. *Gowan v. Christie*, Law Rep. 2 Sc. App. 273.

(h) *Lease of shop.*

29.—In the lease of a retail shop there is not necessarily inherent a prohibition against the use of it for sales by auction. *Keith v. Reid*, Law Rep. 2 Sc. App. 39.

(i) *Agricultural lease.*

30.—An agricultural lease in Scotland, if silent as to sports, confers no right of sporting on the lessee. *Copland v. Maxwell*, Law Rep. 2 Sc. App. 103.

(k) *Teinds.*

31.—A person may be both tacksman and titular of the same teinds. *Lee v. Johnstone*, Law Rep. 1 Sc. App. 426. A valuation of teinds held binding, although the ministers were not cited, their interest being identical with that of the titulars who were parties. *Forbes v. Smith*, Law Rep. 2 Sc. App. 89.

(l) *Fishery.*

32.—Consideration of the nature of the rights, *inter se*, of proprietors on opposite banks of a river, of fishing in the stream. A base right to salmon followed by forty years' possession is unimpeachable. *Zetland v. The Glover Incorporation*, Law Rep. 2 Sc. App. 70.

(m) *Inventory duty.*

33.—Inventory duty, under 5 & 6 Vict. c. 79, s. 23, is not chargeable where the provisions in a marriage settlement constitute a debt. A debt is an obligation arising from contract. *The Lord Advocate of Scotland v. Hagarl*, Law Rep. 2 Sc. App. 217.

Digest, 1870—1875.

(K) PRACTICE AND JURISDICTION.

(a) *Costs.*

34.—Regret expressed at the costly litigation in Scotch appeals. *Fraser v. Crawford*, Law Rep. 2 Sc. App. 42.

(b) *Contempt of Court.*

35.—In cases of defiant contempt a Judge may commit the offender to prison instantly. Where an agent, notwithstanding the Judge's remonstrances, persisted in carrying off a document *in manibus Curiae*,—Held, that a process caption should issue, and that notice was unnecessary. *Watt v. Ligertwood*, Law Rep. 2 Sc. App. 361.

[And see HOUSE OF LORDS.]

SCRIP CERTIFICATES.

Scrip certificates issued by the agent of a foreign government, and entitling the bearer to a bond of the government for the amount in respect of which the certificates are issued, are negotiable instruments, so that the true owner, in fraud of whom they have been passed by delivery, has no right of action against a *bonâ fide* holder for value. *Goodwin v. Roberts*, Law Rep. 10 Exch. 76; affirmed by the Exchequer Chamber, 44 Law J. Rep. (n.s.) Exch. 157; Law Rep. 10 Exch. 337.

Semble—where the agent of a foreign Government enters into a contract, in which he is described as such, the presumption is that he is not personally liable. *Ibid.*

SEA FISHERIES.

[31 & 32 Vict. c. 45, amended. 38 & 39 Vict. c. 15.]

SECURITY FOR COSTS.

[See COSTS AT LAW, 18–20; COSTS IN EQUITY, 51–53; DIVORCE, 84, 85.]

SEDUCTION.

The plaintiff's daughter lived as governess with a Mrs. C. on the terms that she should be allowed the ordinary holidays at Christmas and Midsummer. Those holidays she spent at her mother's (plaintiff's) house, and in addition, with Mrs. C.'s permission, on one occasion left her and spent four days at her mother's house, and then returned to Mrs. C. During those four days she was seduced by the defendant. She afterwards left Mrs. C. and entered the service of another, and during the latter service the child, the result of the seduction, was born. On all the occasions when she was at her mother's house, she assisted her mother in the household duties. The plaintiff having brought

an action for seduction,—Held, that she was rightly non-suited because the relation of master and servant did not exist between the plaintiff and her daughter at the time of the seduction. And per Kelly, C.B., Martin, B., and Bramwell, B., because that relation did not exist when the daughter's child was born, and no loss of service consequent on the seduction resulted to the plaintiff. *Hedges v. Tagg*, 41 Law J. Rep. (N.S.) Exch. 169; Law Rep. 7 Exch. 283.

*Interrogatories in action for.* [See PRACTICE AT LAW, 13.]

### SEPARATION DEED.

[See BARON AND FEME, 32-34.]

### SEQUESTRATION.

[And see CHURCH AND CLERGY, 32; PRACTICE IN EQUITY, 121, 122.]

An executor had deposited at his bankers money, being part of his testator's estate, and an order had been made that the executor should pay the money into Court, and sequestration had issued against him:—Held, that an adverse order to pay the money in could not be made against the bankers, not being parties to the suit, but on their submission to the jurisdiction a directory order was made. *Manton v. Manton*, 40 Law J. Rep. (N.S.) Chanc. 93.

### SERVICE.

*In Bankruptcy.* [See BANKRUPTCY, N 26-29.]

*Of winding-up petition.* [See COMPANY, I 29.]

*In divorce.* [See DIVORCE, 55-57.]

*Of petitions under Lands Clauses Act.* [See LANDS CLAUSES CONSOLIDATION ACT, 33, 45.]

*Of process at law.* [See PRACTICE AT LAW, 1-5.]

*Of proceedings in Equity.* [See PRACTICE IN EQUITY, 125-129.]

### SERVICE OF SUMMONS.

Where the defendant, a fisherman, went to sea on the 9th of March, and a summons for an assault was taken out against him on that day, requiring him to appear on the 12th of March, and was served on the 10th by leaving it with his mother at his usual place of abode,—Held, that proof of such service was not proof that the summons "was duly served upon him a reasonable time before the time appointed for appearance" within sections 1 and 2 of 11 & 12 Vict. c. 43. *The Queen v. Smith*, Law Rep. 10 Q. B. 604.

### SESSIONS.

[See JUSTICE OF THE PEACE, 5-11.]

### SET-OFF.

(A) AT LAW.

(a) *By shareholder of company wound up under supervision.*

(b) *Plea of equitable set-off.*

(c) *Equitable defence to plea of set-off.*

(B) IN EQUITY.

(a) *Misrepresentation.*

(b) *Demand in different rights.*

(C) IN BANKRUPTCY.

(A) AT LAW.

(a) *By shareholder of company wound up under supervision.*

1.—A limited company — which was being wound up for insolvency under the Companies Act, 1862, at first by a resolution to wind up voluntarily, and afterwards by an order of the Court of Chancery that the winding up should continue subject to its supervision—sued a shareholder for a debt contracted after the order was made. The defendant pleaded as a set-off a debt from the company due before the resolution was passed:—Held, that the plea was bad: first, because the debts are not "mutual" within the meaning of the statutes of set-off, 2 Geo. 2. c. 22, s. 13, and Geo. 4. c. 24, s. 4, 5; secondly, because (on the authority of the dicta in *The Brighton Arcade Company (Lim.) v. Dowling*, 37 Law J. Rep. (N.S.) C. P. 125; Law Rep. 3 C. P. 175), such a set-off is excluded by the Companies Act, 1862; thirdly (per Bramwell, B.), because no debt can be set off, unless it can be sued for in a cross-action, and by the effect of the Companies Act, 1862, after such an order has been made, no action can be brought against the company without the leave of the Court of Chancery. *Sankey Brook Coal Company (Lim.) v. Marsh*, 40 Law J. Rep. (N.S.) Exch. 125; Law Rep. 6 Exch. 185.

(b) *Plea of equitable set-off.*

2.—Where a plaintiff is suing merely as trustee, and the defendant has a claim against the *cestui que trust*, which, but for the intervention of the trust, would have been a legal set-off, such claim can be set off in equity, and therefore, in an action at law can be set off by an equitable plea. *Thornton v. Maynard*, 44 Law J. Rep. (N.S.) C. P. 382; Law Rep. 10 C. P. 695.

The declaration contained nine counts on nine bills of exchange, of which the plaintiffs were indorsees, R. & Co. drawers, and the defendant acceptor. Plea, upon equitable grounds as to 425*l.*, parcel of the amount claimed, that the drawers liquidated their affairs by arrangement, and the plaintiffs received 425*l.* as a dividend on the amount of the bills due from the drawers to the plaintiffs as indorsees, and that, as regards the



4257., the plaintiffs sued only as trustees for the drawers' estate. The plea then alleged a set-off of a debt due to the defendant, the acceptor, from the drawers of the bills:—Held, upon demurrer, a good plea. *Ibid.*

[And see PLEADING AT LAW, 5.]

(c) *Equitable defence to plea of set-off.*

3.—Declaration upon an order of the Court of Queen's Bench in Ireland (in an action by the now defendant against the plaintiff) by which the plaintiff was dismissed and the defendant ordered to pay costs, and which order, by the Common Law Procedure Amendment Act (Ireland), 1853, had the effect of a judgment upon a nonsuit. Plea, a set-off under other Irish judgments. Replication on equitable grounds that the plaintiff retained C., an attorney, to conduct his case in the Irish Courts, and that the money ordered to be paid to the plaintiff, as in the declaration mentioned, was due to C. for costs in the action, and therefore became due to the plaintiff as a trustee for C., and that the action was brought in the name of the plaintiff for the benefit of C.:—Held, on demurrer, that the replication was bad, as the lien of the attorney did not constitute the relation of trustee and *cestui que trust* between him and his client, so as to prevent the defendant pleading a set-off, but was at most only ground for the summary interference of the Court on an application to set off cross-judgments. *Mercer v. Graves*, 41 Law J. Rep. (N.S.) Q. B. 212; Law Rep. 7 Q. B. 499.

(B) IN EQUITY.

(a) *Misrepresentation.*

4.—P., a solicitor, represented to K. and R. that he had invested on mortgage the whole of a sum of money belonging to K. and R. on a joint account, which they had placed in his hands for the purpose of being invested. Afterwards K. borrowed on his separate account a sum of money from P. P. dying insolvent, and it appearing that he had not invested the whole of the sum of money placed in his hands by K. and R., whereby a portion of the sum was lost,—Held, that the separate debt of K. to P. could not by reason of the fraud of P. be set off against the debt of P. to K. and R. *Ex parte Stephens* (11 Ves. 24) and *Vulliamy v. Noble* (3 Mer. 593) explained. *Middleton v. Pollock*; *Ex parte Knight*, 44 Law J. Rep. (N.S.) Chanc. 618; Law Rep. 20 Eq. 515.

(b) *Demands in different rights.*

5.—A demand, in the character of trustee or executor, cannot be set off against a debt due from the trustee or executor personally, although the executor give evidence to shew that he is, in fact, personally beneficially entitled to the amount which is due to him in the character of executor. The only cases in which such a set-off of claims arising in different rights can be allowed are those where the person claiming the benefit of it can shew some equitable ground (other than the mere claim of set-off) for being protected

against the legal demand. Nature of equitable set-off discussed. The dicta in *Cochran v. Green* (9 Com. B. Rep. N.S. 448; 30 Law J. Rep. (N.S.) C. P. 97) disapproved of. *Middleton v. Pollock*, 44 Law J. Rep. (N.S.) Chanc. 584; Law Rep. 20 Eq. 29.

*Set-off as between principal and agent.*

[See PRINCIPAL AND AGENT, 9, 10.]

*Advances by charterers: mortgage of freight.*

[See SHIPPING LAW, I 18.]

(C) IN BANKRUPTCY.

[See BANKRUPTCY, F; I 2.]

*Set-off against bankers of money due on executors' account against money owing on private account.* [See BANKRUPTCY, F 3.]

*Set-off of debt barred by statute.* [See LIMITATIONS, STATUTE OF, 31; ADMINISTRATION, 35.]

*Set-off in administration suit of advances by administrator.* [See ADVANCEMENT, 3.]

*Set-off in winding up of company.* [See COMPANY, G 30; 39-42.]

SETTLED ESTATES ACTS.

(A) POWER OF LEASING: EQUITABLE TENANT FOR LIFE.

(B) PRACTICE UNDER SETTLED ESTATES ACTS.

- (a) *Advertisement of petition.*
- (b) *Time between advertisements and hearing.*
- (c) *Concurrence of cestuis que trusts.*
- (d) *Persons of unsound mind.*
- (e) *Married women.*
- (f) *Sale of copyholds.*
- (g) *Interim investment.*
- (h) *Application of moneys.*
  - (1) *Permanent improvements.*
  - (2) *Payment to tenant in tail.*
  - (3) *Payment to trustees.*

(A) POWER OF LEASING: EQUITABLE TENANT FOR LIFE.

1. — The testator devised two-fifths of real and personal estate to trustees, to receive the rents and income and pay the same to his widow for life. He then, subject to annuities and legacies, gave his residuary real and personal estate to the same trustees upon trust, after defraying "ground and landlord's rent (if any), and all taxes, charges, and expenses of insurance, repairs, collections, and other necessary outlay," to pay the "net annual rents, interest, and income then left" to his widow for life, with remainder over. The will contained no power of leasing:—Held, that his widow had no power to grant leases under the 32nd section of the Leases and Sales of Settled Estates Acts. *Taylor v. Taylor*; *Ex parte Taylor*, 44 Law J. Rep. (N.S.) Chanc. 727; Law Rep. 20 Eq. 297.

The fact that the Court in its discretion might upon terms put an equitable tenant for life into possession, or take the receipt of the rents from the trustees and give them to him, does not make him a "person entitled to the possession, or to the receipt of the rents and profits," within the meaning of the 32nd section. *Ibid*.

#### (B) PRACTICE UNDER SETTLED ESTATES ACTS.

##### (a) *Advertisement of petition.*

2.—In a petition presented under the Settled Estates Act for the sale of certain devised estates, the testator was correctly described as of Gotham, in the county of "Nottingham," but in the advertisements issued under section 20 of the Act, and General Order xli. rules 14, 15, he was by mistake described as of Gotham, in the county of "Middlesex":—Held, that the error was not one likely to mislead, and that therefore the irregularity might be waived. *In re Hemsley's Settled Estates*, 43 Law J. Rep. (N.S.) Chanc. 72; Law Rep. 16 Eq. 315.

3.—Where a female petitioner under the above Acts married after the publication of advertisements but before the hearing of the petition, the Court dispensed with fresh advertisements and with her examination. *In re Marshall's Settled Estates*, Law Rep. 15 Eq. 66.

4.—In the heading of advertisements issued under General Order xli. rule 15, the title "Leases and Sales of Settled Estates Act" is a sufficient description of the Act. *In re Bicknell's Settled Estates*, Law Rep. 14 Eq. 467.

##### (b) *Time between advertisements and hearing.*

5.—To save a petition under the Leases and Sales of Settled Estates Acts from being thrown over the long vacation, the Court will order it to be heard before the expiration of the twenty-one days which, according to the General Order, should elapse from the time of the last advertisement before the hearing. *In re Taylor's Settled Estates*, 42 Law J. Rep. (N.S.) Chanc. 504; Law Rep. 14 Eq. 557.

The Court can order the examination under the Act of a married woman who concurs in the application to take place at the hearing. *Ibid*.

6.—A petition allowed to be placed in the paper for the last petition day before the long vacation; although the twenty-one days from the last advertisement would not then have expired. *In re Taylor's Settled Estates*, Law Rep. 14 Eq. 557. In a similar case, however, the Master of the Rolls refused to allow this. *In re Townsend's Settled Estates*, Law Rep. 14 Eq. 433.

##### (c) *Concurrence of cestuis que trusts.*

7.—Lands were devised to trustees in trust for a tenant for life, and after her death upon trust to sell, with power to give receipts, and to hold the proceeds on trust for all the children of the tenant for life who should be living at her death and should attain twenty-one, and the issue then living, who should attain twenty-one, of any child who should have previously died, *per stirpes*, as tenants in common. The tenant for life had six

children, one of whom, Mrs. W., was married and had infant children. Upon a petition for a sale under the Leases and Sales of Settled Estates Act, the trustee, the tenant for life, and all her children, were either represented or willing to concur, but the infant children of Mrs. W. were not represented:—Held, first, that, as a class of persons entitled to a contingent interest who could not at present be ascertained, the concurrence of the infant children of Mrs. W. was not requisite. Secondly, that the property being devised to trustees upon trust for sale, with power to give receipts, the concurrence of the *cestuis que trusts* was unnecessary. *In re Strutt's Trusts*, 43 Law J. Rep. (N.S.) Chanc. 69; Law Rep. 16 Eq. 629; and *In re Potts's Estate*, Law Rep. 16 Eq. 631, n.

##### (d) *Persons of unsound mind.*

8.—The Court cannot, under the Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120, ss. 17 and 36), appoint a guardian to consent, on behalf of a lunatic not so found by inquisition, to a sale of his estates. *In re Venner's Settled Estates* (Law Rep. 6 Eq. 249) dissented from. *In re Clough's Settled Estates*, 42 Law J. Rep. (N.S.) Chanc. 393; Law Rep. 15 Eq. 284.

9.—A notice, under section 2 of the Act 37 & 38 Vict. c. 33, of an application under the Leases and Sales of Settled Estates Act, may be given to a person of unsound mind, not so found by inquisition. *In re Crabtree's Settled Estates*, 44 Law J. Rep. (N.S.) Chanc. 261; Law Rep. 10 Chanc. 201.

##### (e) *Married women.*

10.—On a petition under the Settled Estates Act to sanction a lease of property vested in trustees without power of leasing, the lease being clearly for the benefit of all parties, the separate examination of a married woman interested in the property and resident in Australia, was dispensed with. *In re Halliday's Trusts*, 40 Law J. Rep. (N.S.) Chanc. 687; Law Rep. 12 Eq. 199.

11.—When a sale of settled estates is authorised by the Court under the powers conferred by the Leases and Sales of Settled Estates Act, 1856, the consent of an infant married woman, tenant in tail, must be obtained by her examination apart from her husband, and cannot be given by her guardian on her behalf. *In re Broadwood's Settled Estates*, 41 Law J. Rep. (N.S.) Chanc. 349; Law Rep. 7 Chanc. 323.

##### (f) *Sale of copyholds.*

12.—Upon a petition under the Settled Estates Act for the sale of certain settled real estate, partly freehold and partly copyhold, the Court directed the copyholds to be enfranchised, the whole to be sold as freehold, and the costs of enfranchisement to be paid out of the proceeds of sale. *In re Adair's Settled Estates*, 42 Law J. Rep. (N.S.) Chanc. 841; Law Rep. 16 Eq. 124.

##### (g) *Interim investment.*

13.—Notwithstanding that the Leases and

Sales of Settled Estates Act directs purchase money to be invested in Consols or Exchequer Bills, the Court may make an order authorising an investment in any manner in which cash under its control might be invested. *In re Cook's Settled Estates*, 40 Law J. Rep. (N.S.) Chanc. 400; Law Rep. 12 Eq. 12.

14.—The purchase-moneys of settled estates paid into Court under the Settled Estates Act are "cash under the control of the Court" within the meaning of the 23 & 24 Vict. ss. 10 & 11, so as to empower the Court to order them to be invested in any manner in which cash under its control may be invested, notwithstanding that the Settled Estates Act has directed such moneys to be invested in Exchequer Bills or Consols. *In re Thorold's Settled Estates*, 41 Law J. Rep. (N.S.) Chanc. 780; Law Rep. 14 Eq. 31.

15.—Purchase-moneys in Court arising from a sale under the Settled Estates Act are "cash under the control of the Court," within the 23 & 24 Vict. c. 38, ss. 10, 11, so as to empower the Court to order them to be invested as such. *In re Taddy's Settled Estates*, 43 Law J. Rep. (N.S.) Chanc. 191; Law Rep. 16 Eq. 532.

16.—Interim investments of purchase-money of estates sold under the above Act must be made in the manner prescribed by section 23. *In re Cook's Settled Estates* (40 Law J. Rep. (N.S.) Chanc. 400) not followed. *In re Shaw's Settled Estates*, 41 Law J. Rep. (N.S.) Chanc. 166; Law Rep. 14 Eq. 9.

17.—Money in Court, proceeds of a sale under the Leases and Sales of Settled Estates Act, is not a fund under the control of the Court within the meaning of section 10 of 23 & 24 Vict. c. 38, but can only be applied or invested as directed by sections 23 and 25 of the Leases and Sales of Settled Estates Act. *In re Boyd's Settled Estates*, 42 Law J. Rep. (N.S.) Chanc. 506.

(h) Application of money.

(1) Permanent improvements.

18.—Under section 23 of the Leases and Sales of Settled Estates Act the Court has power to direct that money arising from a sale under the Act be laid out in permanent improvements of the remainder of the settled estate, such as the erection of new farm buildings. *In re Newman's Settled Estates*, 43 Law J. Rep. (N.S.) Chanc. 702; Law Rep. 9 Chanc. 681.

(2) Payment to tenant in tail.

19.—Per Malins, V.C. — On payment out to tenant in tail under the Leases and Sales of Settled Estates, no disentailing deed is necessary. *In re Wood's Settled Estates*, Law Rep. 20 Eq. 372.

[And see PRACTICE IN EQUITY, 93, 94.]

(3) Payment to trustees.

20.—A will contained a trust for sale and division of the proceeds, but the trust not being immediately exercisable by the trustees, a sale was ordered under the Settled Estates Act:—Held, that the proceeds might be paid to the trustees, instead

of being applied as directed by section 23. *In re Morgan's Settled Estates* (Law Rep. 9 Eq. 587) followed. *In re Hemsley's Settled Estates*, 43 Law J. Rep. (N.S.) Chanc. 72; Law Rep. 16 Eq. 315.

## SEWERS.

(A) RATE.

(a) Exemption.

(b) Sewage Utilisation Act.

(B) ORDER OF SECRETARY OF STATE.

(A) RATE.

(a) Exemption.

1.—The appellants were rated to a sewers' rate under the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), in respect of a bridge and its approaches. It appeared that the bridge crossed the Thames, and drained directly into the river, no part of it draining into any sewer, and that the roads or approaches to the bridge were drained by a sewer vested in the district board of works, though this was not necessary, as the drainage provided by the appellants before the construction of the sewers was sufficient:—Held, by the majority of the Court (Blackburn, J., and Hannen, J.), that under the Act 18 & 19 Vict. c. 120, s. 164, the bridge was not property which, at the date of the latter Act, was, according to the old law of sewers, entitled to exemption from sewers' rate, for although the bridge derived no direct or immediate benefit from the sewer, yet it derived "the general benefit and advantage of being accessible, and of its approaches and neighbouring public ways being properly drained and cleansed," according to the rule in *Soady v. Wilson* (3 Ad. & E. 248), and was therefore liable to the rate. By Cockburn, C.J., without differing from this view of the law, that there was upon the facts no evidence of any such benefit. *The Hammersmith Bridge Company v. The Overseers of Hammersmith*, 40 Law J. Rep. (N.S.) M. C. 79; Law Rep. 6 Q. B. 230.

(b) Sewage Utilisation Act.

2.—The appellants, a water company, held land in the parish of L. as follows:—No. 1. Land occupied by a canal with banks, and used by them for the purpose of conveying water to the reservoirs or other apparatus of the company for filtering the same. No. 2. Land occupied by filter beds, or reservoirs with pipes and apparatus thereto fixed, and used solely for the purpose of filtering water. The beds were covered with sand or gravel, and were used practically for the purpose of storing water. No. 3. Land adjoining to the filter beds, and forming the banks to them. No. 4. Land, part of the public roads, footpaths, and other ways, occupied by the iron pipes, mains, and service pipes of the appellants. By section 17 of the Sewage Utilisation Act, 1867, for the purpose of defraying any expenses in carrying

the Act into effect, the occupier of any land covered with water, or used only as a canal or towing path for the same, shall pay as a rate in respect of such property one-fourth part only of the rate in the pound payable in respect of houses and other property:—Held, that as to the land above described, and numbered 1 and 2, the appellants were within the protection afforded by the above section, and were only liable to pay in respect of such land one-fourth of the rate in the pound payable in respect of houses and other property; but that in respect of the other land, numbered 3 and 4, they were liable to be assessed in the usual manner. *The East London Waterworks Company v. Leyton Sewer Authority*, 40 Law J. Rep. (n.s.) M. C. 190; Law Rep. 6 Q. B. 669.

*New street: apportionment of sewers rate.*  
[See METROPOLIS, 16.]

#### (B) ORDER OF SECRETARY OF STATE.

3.—By the Sanitary Act, 1866 (29 & 30 Vict. c. 90), s. 49, power is given to a Secretary of State, upon complaint that a sewer authority or local board of health has made default in providing its district with sufficient sewers, or in the maintenance of existing sewers, to make an order, limiting a time for the performance of its duty in the matter of the complaint; and if the duty is not performed by the time limited in the order, to appoint some person to perform it, and by order direct that the expenses of performing the same, &c., be paid by the authority in default:—Held, that an order under this section, reciting that a sewer authority "had made default in providing a proper system of main drainage," and ordering the authority to "do its duty, and begin to set about the works for the purpose, within one month from the date of the order, and proceed therewith until completion," was good, and that a second order, made after default in complying with the first, appointing a person to "perform the duty of the sewer authority in respect to sewerage, as he should be directed by the Secretary of State," was also good. *The Queen v. Cockerell*, 40 Law J. Rep. (n.s.) M. C. 153; Law Rep. 6 Q. B. 252.

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#### SEXTON.

[See BURIAL, 6.]

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#### SHARES.

[See COMPANY.]

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#### SHELLEY'S CASE.

[See DEED, 9; WILL, CONSTRUCTION, I 19, 20.]

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#### SHERIFF.

##### *Action against sheriff for false return.*

1.—A return of reserve to a writ of *capias ad respondendum* is not traversable, but if a sheriff makes a false return, an action will lie against the sheriff at the suit of a party injured thereby, though such return was not made maliciously. *Brasyer v. Maclean*, 44 Law J. Rep. (n.s.) P. C. 79; Law Rep. 6 P. C. 398.

2.—In an action against the defendant as sheriff for a false return, it appeared that the plaintiff had issued a *fi. fa.* against the goods of one F., and that the defendant, upon being ruled to return the writ, returned that he had seized the goods and chattels of F., and kept them in his possession until ordered to withdraw by the plaintiff. At the trial the statement in the return was not proved, but the defendant shewed that the plaintiff had sustained no actual damage, as the goods upon the premises of F. had been already assigned under a bill of sale, and could not be taken under an execution:—Held, that the defendant was entitled to the verdict, and was not precluded from shewing that his return was inaccurate. *Mildmay v. Smith* (2 Wms. Saund. 343) and *Clerk v. Withers* (2 Ld. Raym. 1075) explained. *Stimson v. Farnham*, 41 Law J. Rep. (n.s.) Q. B. 52; Law Rep. 7 Q. B. 175.

##### *Action for not levying.*

3.—In an action against the sheriff for not levying and for making a false return of *nulla bona*, it appeared that there were goods of the execution debtor to the value of 50*l.* which were never seized by the defendant, but that two writs of *fi. fa.* for a greater amount had been lodged with him before the plaintiff's writ was issued. The jury found that these writs were fraudulent, but it did not appear that the defendant had notice of the fraud:—Held, notwithstanding, that he was liable for the value of the goods, inasmuch as if he had executed the writs according to their priority, the plaintiff might have contested those prior to his own, and established his right to the proceeds of the sale. *Dennis v. Whetham*, 43 Law J. Rep. (n.s.) Q. B. 129; Law Rep. 9 Q. B. 345.

##### *Wrongful seizure of goods.*

*Seizure of goods after expiration of tenancy: liability of sheriff to action.*  
[See LANDLORD AND TENANT, 14.]

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#### SHIFTING CLAUSE.

[See TRUST, A 7.]

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#### SHIPPING LAW.

(A) ASSIGNMENT OF SHIP.

(B) BILL OF LADING.

(a) Construction.

- (1) *Excepted perils.*
- (2) *Carriage by steamship.*
- (3) *"Value, &c., unknown."*
- (4) *Delivery of goods: custom of port.*
- (b) *Title to goods.*
  - (1) *Notice.*
  - (2) *Short delivery: constructive notice.*
  - (3) *Appropriation.*
- (C) **BOTTOMRY.**
  - (a) *Necessity.*
  - (b) *Future freight.*
  - (c) *Notice to owner: authority of master.*
  - (d) *Master's wages.*
- (D) **CARGO.**
- (E) **CHARTER-PARTY.**
  - (a) *Loading of cargo.*
    - (1) *What circumstances justify neglect to load.*
    - (2) *Right to damages.*
    - (3) *Refusal to load: condition precedent.*
    - (4) *Delay in loading.*
  - (b) *Excepted perils.*
    - (1) *Dangers of seas.*
    - (2) *Restraint of princes: delay.*
  - (c) *Deviation.*
  - (d) *Warranty: words of expectancy.*
  - (e) *"Full and complete cargo."*
  - (f) *Difference between quantity signed for and quantity shipped.*
  - (g) *Commission: "inwards and outwards."*
  - (h) *Illegal voyage.*
- (F) **COLLISION AND DAMAGE.**
  - (a) *International law: Khedive of Egypt.*
  - (b) *Steam vessels.*
  - (c) *Tug and tow: governing power.*
  - (d) *Crossing vessels.*
  - (e) *Vessel overtaking another.*
  - (f) *Ironclad ship: with ram.*
  - (g) *Foul berth.*
  - (h) *Moorage.*
  - (i) *Launch.*
  - (k) *Lights.*
  - (l) *Limitation of liability.*
  - (m) *Infringement of regulations under the Merchant Shipping Act, 1873.*
  - (n) *Inevitable accident.*
  - (o) *Contributory negligence.*
  - (p) *Loss of life.*
  - (q) *Consequential loss.*
  - (r) *Ballast lighter: Thames Conservancy.*
  - (s) *Damage without collision.*
  - (t) *Arrest of freight.*
- (G) **DELIVERY AND DISCHARGE OF CARGO.**
- (H) **DEMURRAGE.**
  - (a) *Detention at port of lading.*
  - (b) *Delay in loading.*
  - (c) *Loading in usual manner.*
  - (d) *Fraction of a day.*
- (I) **FREIGHT.**
  - (a) *Payment in advance.*
  - (b) *Right to freight.*
    - (1) *Shipowner reserving freight of his own goods.*
    - (2) *Mutual mistake.*
- (3) *Performance unlawful by reason of war.*
- (4) *Dangerous cargo.*
  - (a) *Lump freight.*
  - (d) *Dead freight.*
  - (e) *Lien for freight.*
  - (f) *Rights of mortgagee.*
  - (g) *Derelict: cargo sold by order of Court.*
  - (h) *Insurance.*
- (K) **FOREIGN SHIP.**
- (L) **GENERAL AVERAGE.**
- (M) **MASTER.**
  - (a) *Authority.*
  - (b) *Duty of, to check damage caused to goods by excepted perils.*
  - (c) *Wages.*
- (N) **MEASUREMENT OF TONNAGE.**
- (O) **MORTGAGE AND LIEN.**
  - (a) *Lien for freight.*
  - (b) *Priority: solicitor's lien, &c.*
  - (c) *Ship "carried into any port."*
  - (d) *Mortgagee: possession.*
  - (e) *Rights of mortgagee to freight.*
- (P) **NECESSARIES.**
- (Q) **OFFENCES.**
- (R) **PILOTAGE.**
  - (a) *When compulsory.*
  - (b) *Liability of pilot.*
- (S) **POLICY OF INSURANCE.**
- (T) **SALVAGE.**
  - (a) *Salvage agreement.*
  - (b) *Towage.*
  - (c) *Who may be salvors.*
  - (d) *Right to salvage reward.*
  - (e) *Distribution of salvage reward.*
  - (f) *Life salvage.*
  - (g) *Wreck: what is.*
  - (h) *Liability of salvaging ship for damage.*
- (U) **SEAMAN'S SERVICE.**
- (V) **WAGES.**

[Shipping dues. Amendment of 30 & 31 Vict. c. 15; repeal of 32 & 33 Vict. c. 52. 33 & 34 Vict. c. 50.]

[The Merchant and Shipping Acts amended. 34 & 35 Vict. c. 110, and 35 & 36 Vict. c. 73.]

[Rules of Court of Admiralty as to proceedings for damage by collision at sea, where both ships in fault, to prevail, as from November 2, 1874, over rules of Courts of law, 36 & 37 Vict. c. 66, s. 25.]

## (A) ASSIGNMENT OF SHIP.

1.—Whether a ship not yet finished and therefore incapable of registration under the Merchant Shipping Acts, be properly called a ship or not, it is a thing capable of assignment by certificate in the usual way. *Ex parte Winter*; *In re Softley*, 44 Law J. Rep. (N.S.) Bankr. 107; Law Rep. 20 Eq. 746 nom. *Ex parte Hodgkin*.

## (B) BILL OF LADING.

## (a) Construction.

(1) *Excepted perils.*

[And see *infra*, E 6-11.]

1.—The plaintiffs shipped diamonds on board

the defendants' vessel under bills of lading, containing the exceptions "thieves, barratry of master and mariners. . . . The shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance." One box of the diamonds was stolen during the voyage, but there was no evidence to shew whether it was stolen by one of the crew, or by a passenger, or by some person from the shore after the vessel's arrival in port:—Held, first, that the term "thieves" in the exception applied to strangers, and not to persons belonging to the vessel; secondly, that assuming theft by one of the crew to be "barratry," the defendants must bring the case within the exception by positive proof, which they had failed to do; thirdly, that the words "damage to any goods" were confined to cases where the goods receive damage from a peril insured against, but not to cases where there has been not damage to the goods but a total abstraction of them. *Taylor v. the Liverpool and Great Western Steam Company*, 43 Law J. Rep. (N.S.) Q. B. 205; Law Rep. 9 Q. B. 546.

2.—The right of suing upon a contract under a bill of lading follows the property in the goods specified therein, that is, the legal title to the goods as against the endorser. Where the bill of lading excepted "dangers of the sea."—Held, that damage to oilcake caused by the nature and collocation of a cargo of animal, vegetable, and, to some extent, putrescible matter, from sea-damage done to a portion of the cargo and from want of ventilation, was not within the exception. *The Freedom*, Law Rep. 3 P. C. 594.

3.—Where an association of steamship owners entered into an agreement to indemnify each other for loss or damage which, "by reason of improper navigation," might be caused to any goods, &c., on board a steamship:—Held, that damage to the cargo from water, caused by the bilge-cock and sea-cock being negligently left open, was damage from "improper navigation." *Good v. the London Steamship Owner's Mutual Protecting Association*, Law Rep. 6 C. P. 563.

4.—"Accidents from machinery" (among the accepted perils in a bill of lading), include salvage services rendered necessary by the sudden breaking of the crank shaft of an engine. *The Miranda*, 41 Law J. Rep. (N.S.) Adm. 82; Law Rep. 3 Adm. & Ecc. 561.

#### (2) Carriage by steamship.

5.—Goods were shipped under a bill of lading which commenced, "Shipped in the steamship *Hibernia* . . . with liberty to call at any ports, in or out of the route, to receive and discharge coals, &c., and to tranship the goods by any other steamer." The vessel had only an auxiliary screw, and was propelled by steam during a small part of the voyage only, which lasted for about double the time which would have been taken by an ordinary steamer. In an action for delay in delivering the goods, the judge refused to direct the jury that the contract in the bill of lading was for a voyage by steam, but left to them the question whether the voyage was performed in a

reasonable time, having regard to the fact that the vessel had only an auxiliary screw:—Held, that the jury had been misdirected, as it was an implied term of the bill of lading that the voyage should be wholly or principally by steam. *Fraser v. The Telegraph Construction and Maintenance Company*, 41 Law J. Rep. (N.S.) Q. B. 249; Law Rep. 7 Q. B. 566.

#### (3) "Value, &c., unknown."

6.—Where, on a closed package being shipped for carriage, a bill of lading containing an innocent misdescription of its contents is presented to the master of the ship, and he, without asking questions or examination, stamps thereon "weight, value and contents unknown," there is a contract to carry the package whatever its contents may be. What is the measure of damages for loss of the contents seems doubtful. *Lebeau v. The General Steam Navigation Company*, 42 Law J. Rep. (N.S.) C. P. 1; Law Rep. 8 C. P. 88.

7.—A charter-party, under which a ship was chartered for a grain cargo from the Danube to the United Kingdom for certain freight "per imperial quarter delivered," contained a provision that in the event of the cargo, or any part thereof, being delivered in a damaged or heated condition, the freight should be payable on the invoice quantity taken on board, as per bill of lading, or half-freight upon the damaged or heated portion, at the captain's option. The bill of lading stated that 1,021 kilos. were shipped on board; but the master added at the end of the bill of lading, before signing it, the words, "quantity and quality unknown." The cargo having become heated on the voyage, the master claimed to exercise his option, and to be paid freight upon the invoice quantity, as per bill of lading:—Held, that the addition of the words "quantity and quality unknown" to the bill of lading by the master did not take away his right to be paid freight upon the invoiced quantity in the bill of lading, and that the object and effect of that memorandum was merely to protect the captain against any mistake that might occur in the invoice quantity in the bill of lading, in case of alleged short delivery or deterioration not caused by his default. *Tully v. Terry*, 42 Law J. Rep. (N.S.) C. P. 240; Law Rep. 8 C. P. 679.

#### (4) Delivery of goods: custom of port.

8.—The plaintiffs shipped several bales on board the defendant's steam vessel at Calcutta, under a bill of lading, by which the goods were to be delivered to the plaintiffs or their assigns at the port of London, the bill of lading containing the terms that the goods were "to be delivered in the like good order and condition from the ship's deck where the ship's responsibility shall cease." The custom of the port of London was proved to be for steamers coming from a foreign port to discharge their cargo on a quay of one of the docks, and for the Dock Company to afterwards put the goods into the lighters of the consignees free of charge, if the consignees send for them within a certain limited time, but if they send after that

time the consignees have to pay the dock charges. The defendant's vessel duly arrived with the plaintiffs' goods at the port of London, and according to the custom landed the goods on one of the quays of the Victoria Dock, and the dock company loaded the plaintiffs' lighter. It was proved that although all the plaintiffs' bales were landed on the quay one of them was lost and was never put into the plaintiffs' lighter:—Held, that by the terms of the bill of lading the defendant's liability ceased when the goods left the ship's deck, and that he was therefore not liable for the non-delivery of the missing bale. *Petrocchino v. Bott*, 43 Law J. Rep. (N.S.) C. P. 214; Law Rep. 9 C. P. 355.

*As to law applicable in case of English bills of lading signed by master of foreign ship.* [See *infra* K.]

(b) *Title to goods.*

(1) *Notice.*

9.—H. & Co. at Manchester consigned goods for sale to L. & Co. at Hong Kong upon the terms that the proceeds should be remitted to H. & Co. to meet the acceptances of L. & Co. L. & Co. endorsed the bill of lading for consideration to their bankers, and on the arrival of the goods they were delivered to the bankers. The bill of lading omitted the words "or order or assigns:"—Held, that the omission of these words did not operate as notice of the agreement between H. & Co. and L. & Co., and that the bankers had a good legal and equitable title to the goods. *Henderson & Co. v. the Comptoir D'Escompte de Paris*, 42 Law J. Rep. (N.S.) P. C. 60; Law Rep. 5 P. C. 253.

10.—Brokers delivered goods on board a ship, and took mate's receipts in the name of their principals, who afterwards endorsed the receipts to the brokers. The captain signed bills of lading without notice of the endorsement:—Held, that the holders of the bills of lading were entitled to the goods, that the captain was justified in signing the bills of lading, and that the brokers had no claim for indemnity from the owners. *Hathesing v. Laing*, 43 Law J. Rep. (N.S.) Chanc. 233; Law Rep. 17 Eq. 92.

Notice to the captain would not have affected holders of the bills of lading for value without notice. *Ibid.*

A local custom making mate's receipts negotiable would not bind the goods elsewhere. *Ibid.*

11.—Where A., owing money to B., and being under obligation to secure the debt by depositing shipping documents, induced B. to forego the obligation by depositing with him a bill of lading of certain goods, which was accordingly endorsed to him:—Held, that there was valuable consideration given and that the legal interest passed by the endorsement of the bill of lading:—Held, also, that B. was not bound by a trust of which he had no notice, under which the proceeds of the bill of lading were to be specifically applied in payment of the vendor of the goods to A. *The Chartered Bank of India, Australia, and China v. Henderson*, Law Rep. 5 P. C. 501.

Digest, 1870-1875.

(2) *Short delivery: constructive notice.*

12.—By the *Marsey Dock Acts* the cargo of any ship from a foreign or colonial port using certain ports must be received, weighed and loaded off by one set of porters under the direction of a master porter:—Held, that these Acts relate to the possibility of injury in the receiving, weighing and loading off the goods, and do not alter the legal liability prior to their delivery to the master porter. *The Emilian Marie*, 44 Law J. Rep. (N.S.) Adm. 9.

An indorsee of a bill of lading has the same rights and liabilities as if the original contract had been made with him. *Ibid.*

When a ship is sub-chartered the Court generally will not conclude that the master has signed as agent for the sub-charterers, unless he signs in terms as agent for them or gives notice of the sub-charter. *Ibid.*

An allegation of fraud should, if relied upon, be distinctly pleaded. *Ibid.*

A. & Co. endorsed bill of lading (C) of 40 kernels of palm oil to P. L. & Co., who endorsed to the plaintiffs. A. & Co. also endorsed bill of lading (A) of 60 kernels to C. L. C. & Co., and bill of lading (B) of 40 kernels to S. R. S. The whole shipment consisted of 103 kernels only, out of which the claims under (A) and (B) were satisfied. The plaintiffs sued the ship for short delivery of cargo specified in (C):—Held, that under the circumstances the plaintiffs were not bound to enquire whether it had been agreed that (A) and (B) should be satisfied before (C), and that therefore the plaintiffs were entitled to recover:—Held, also, that the other part-owners were, in respect of their shares in the ship, liable with the master, also a part-owner. *Ibid.*

The doctrine of constructive notice reviewed. *Ibid.*

(3) *Appropriation.*

13.—The plaintiffs were indorsees for value of bills of lading indorsed to them for value by one M. under the following circumstances: the defendants had agreed to buy of M. all the ore of a certain mine, the ore to be shipped at a Spanish port by him, f. v. b. on vessels chartered by the defendants or by him, and to be paid for by bills of exchange against bills of lading on the execution of a charter, and on a certificate that there was enough iron in dock to load the vessel chartered. On being so paid for, the ore was to be the property of the defendants. Some cargoes of the ore having been taken, and all of it paid for, the *Troubridge*, a vessel chartered by the defendants, was loaded with ore by M., who had, however, no intention to ship it for them, and previously informed them thereof. He then presented to the captain the bills of lading, which stated that the shipment was by one S., and made the cargo deliverable to the order of S.; but no such person as S. existed. The captain being bound by the charter to sign bills of lading as presented, signed the bills. M. endorsed the name of S. and his own name on the bills of lading, and then pledged them to the plaintiffs:—Held, that the plaintiffs were

entitled to the ore represented by such bills. *Gabarrow v. Kreeft*; *Kreeft v. Thompson*, 44 Law J. Rep. (N.S.) Exch. 238; Law Rep. 10 Exch. 274.

Another vessel, the *Macedonia*, having been also sent by the purchasers of the ore, under a charter-party by which the shipowner agreed to deliver the cargo to the freighters or assignees, but which did not authorise the captain to sign bills of lading as presented, she was loaded by M., who at the commencement of the loading intended that it should be in fulfilment of his contract. He, however, obtained bills of lading as in the former case, and endorsed them to a third person, to whom the cargo was delivered. In an action by the purchasers of the ore against the shipowner for non-delivery of the cargo to them, according to the charter-party,—Held (by Bramwell, B., and Cleasby, B.; Kelly, C.B., *dissentiente*), that as the cargo had been delivered according to the bills of lading, the defendant was not liable. *Ibid*.

Per Kelly, C.B.—The ore had become the property of the plaintiffs at the time of shipment, and the captain was bound by the terms of the charter-party to deliver it to them. *Ibid*.

#### (C) BOTTOMRY.

##### (a) Necessity.

1.—A master of a chartered ship having sold a part of the cargo to pay expenses of demurrage, the ship was in the course of a subsequent voyage arrested in a foreign port at the suit of the charterer. The charterer's claim was, with the sanction of the consul, compromised for a sum of money, and a bond given to the charterer in payment of the sum:—Held, that the bond was invalid. *The Ida*, 41 Law J. Rep. (N.S.) Adm. 542; Law Rep. 3 Adm. & Ecc. 542.

##### (b) Future freight.

2.—The ship *S.* being mortgaged to one G., sailed on a voyage to Melbourne and back. On her arrival at Melbourne she required necessary repair, and the agents having refused to make further advances upon credit, the master entered into a bottomry bond, hypothecating the ship and her freight to Melbourne and back, and drew bills on G. for the amount secured by bottomry. The respondents became the holders of the bond and bills. Before the bills arrived in England G. died, and the respondents failing to obtain either acceptance or payment, took proceedings on the bond:—Held, that the respondents having failed in obtaining acceptance or payment of the bills, were entitled to sue upon the bond, but that the bond could not validly hypothecate freight which had not been earned at the time the bond was payable. *Smith v. The Bank of New South Wales; The Staffordshire*, 41 Law J. Rep. (N.S.) Adm. 49; Law Rep. 4 P. C. 194.

##### (c) Notice to owner: authority of master.

3.—The *O.* put into Port Louis in the Mauritius, in distress and need of repairs. On the 30th of June, H. & Co., agents of the ship, wrote to the

owners stating that they would advance the necessary funds upon a bottomry bond as collateral security. H. & Co. also on the 1st of July wrote to Glasgow to the defendants, owners of cargo, stating the condition of the vessel, but omitting the information from which it might be inferred that bottomry would be necessary. The first notice the defendants received from H. & Co. of their intention to take a bond was by letter of the 25th of August, which reached Glasgow on the 5th of September. The *O.* left the Mauritius on the 15th of October. As against the defendants, the owners of the cargo,—Held, that the agents of the ship being also the lenders of the money, had not given proper notice of the bond, and that therefore it was invalid. *The Onward*, 42 Law J. Rep. (N.S.) Adm. 61; Law Rep. 4 Adm. & Ecc. 38.

The foundation of the master's authority to bottomry the cargo is the prospect of benefit direct or indirect to the owner of it. *Ibid*.

##### (d) Master's wages.

4.—The principle established in the *Edward Oliver* (36 Law J. Rep. (N.S.) Adm. 13; Law Rep. 1 Adm. & Ecc. 279), that, where the master of the ship makes himself as well as the ship freight and cargo liable on a bottomry bond, his priority on ship and freight for wages is thereby lost only as against the bondholder, and not as against the owners of the cargo, applies to a case where the owners of the cargo have bought up the bond. In such a case, therefore, the master is entitled to payment out of proceeds of ship and freight, where the cargo is sufficient to pay the balance of the bottomry bond. *The Eugenie*, Law Rep. 4 Adm. & Ecc. 123.

*Practice in bottomry suits.* [See AD MIRALTY, 45.]

#### (D) CARGO.

*Damage to cargo by perils excepted by bill of lading.* [See supra B 1-4.]  
*Loading of cargo.* [See infra E 1-5.]

#### (E) CHARTER-PARTY.

##### (a) Loading of cargo.

##### (1) What circumstances justify neglect to load.

1.—To a declaration in an action by the shipowner against the charterers for not loading a cargo of coals pursuant to charter-party, by the terms of which the vessel was to proceed to a certain dock, and there load in the usual and customary manner at any one of the collieries the defendants might name, the defendants pleaded that they had not any notice of the ship having proceeded to and arrived at the said dock, and of her being ready to receive cargo, "wherefore the defendants did not nor could load her:—Held, on demurrer, after verdict for the defendants on the issues in fact, that the plea meant that, by reason of the want of notice, the defendants were prevented loading the vessel, and that, therefore, the plea was good. *Stanton v. Austin*, 41 Law J. Rep. (N.S.) C. P. 218; Law Rep. 7 C. P. 651.



2.—Where the charterer of a specified ship was entitled under the charter-party to ship wet sugar, and provided a reasonable cargo of that commodity, but the ship, in consequence of her pumps not being able to meet the requirements of such cargo, was not reasonably fit to carry it, and the defect as to the pumps could only have been remedied after such a lapse of time as would have frustrated the object of the venture,—Held (affirming the judgment of the Court of Common Pleas, 41 Law J. Rep. (N.S.) C.P. 180; Law Rep. 7 C.P. 421), that the charterer was entitled to refuse to ship the cargo, and to recover damages for the unfitness of the ship. *Richardson v. Stanton*; *Stanton v. Richardson* (Exch. Ch.). 43 Law J. Rep. (N.S.) C.P. 230; Law Rep. 9 C.P. 390.

(2) *Right to damages.*

3.—Where the defendant, the freighter of a ship's cargo, refused to name a wharf for the delivery of the cargo by the plaintiff, a shipowner, with intent to refuse the cargo,—Held, that the plaintiff was entitled to recover as damages the amount he would have received as freight if the cargo had been duly delivered. *Stewart v. Rogerson*, Law Rep. 6 C.P. 424.

4.—A charterer who has, through the ship-owners' default in not being ready to load at the time agreed upon, been compelled not only to pay increased freight, but also to pay a higher price for the article to be shipped, is—in the absence of evidence that he will be able to sell at a corresponding increased price at the port of delivery, or of other evidence that he will not be a loser—entitled to recover as damages the additional price paid as well as the difference in freight. *Featherston v. Wilkinson*, 42 Law J. Rep. (N.S.) Exch. 78; Law Rep. 8 Exch. 122.

(3) *Refusal to load: condition precedent.*

5.—A charter-party provided that the defendant's ship should proceed to B. and continue to load cargoes there for delivery at D. from May, 1871, till March, 1872, loading at B. with either of the charterers' factors there, X. or Y., till the end of September at the captain's option, but after September with the charterers' factor, Y. In September the master elected to load with X., but the charterers refused to load the ship from X., whereupon the defendant refused to go on any longer under the charter-party:—Held, that the charterers' refusal to load from X. justified the defendant in treating the charter-party as at an end. *Bradford v. Williams*, 41 Law J. Rep. (N.S.) Exch. 164; Law Rep. 7 Exch. 259.

(4) *Delay in loading.*

[See *infra* H.]

(b) *Excepted perils.*

(1) *Dangers of seas.*

6.—By a charter-party dated the 28th of December, the plaintiffs' ship was to "forthwith" proceed from England to B., an island in the West

Indies, and having there loaded a cargo of sugar for the defendants, to return to England. The vessel was to be allowed to take an outward cargo of coals to specified places, and the charter-party contained a clause excusing the performance thereof if it could not be complied with owing to perils of the seas. At the time of entering upon the charter-party, the ship was undergoing repairs, but she came out of dock upon the 6th of January, and having taken on board a cargo of coals for R., one of the specified places, she sailed on the 8th of February. Delay on her voyage outwards was occasioned by unfavourable winds, and she was injured by a collision with a steamer, which rendered necessary further repairs. She finally sailed for R. on the 9th of March, and reached R. on the 26th of May: having there discharged the cargo of coals, she started on the 1st of July, and reached B. on the 28th of July. The season for exporting sugar from B. begins with the month of April and ends with July in every year, and the agents of the defendants declined to provide a cargo of sugar for the plaintiffs' vessel on the ground that she had arrived at B. too late in the season. They offered to provide a cargo of sugar if the plaintiffs' vessel would go under protest to V., an island ninety miles off. The captain refused this offer, and remained at B., insisting upon the performance of the charter-party by the defendants' agent. The captain at last agreed with other parties for a charter, and left B. on the 14th of October. The plaintiffs having sued for a breach of the charter-party in refusing to load a cargo at B., the Judge at the trial directed the jury that if the vessel sailed without unreasonable delay, she proceeded "forthwith" within the meaning of the charter-party; that the clause excusing performance thereof, on the ground of perils of the seas, applied to the preliminary voyage to R., and that the captain might reasonably think that if he shipped a cargo elsewhere than at B., he might put an end to the original charter-party:—Held, a right direction. *Hudson v. Hill*, 43 Law J. Rep. (N.S.) C.P. 273.

7.—A cargo of wheat was damaged by holes feloniously bored in the ship's side by some of the crew:—Held, that this was not within the excepted perils, "dangers of the seas," and that, therefore, the ship was liable for the damage. *The Chasca*, 44 Law J. Rep. (N.S.) Adm. 17; Law Rep. 4 Adm. & Ecc. 446.

8.—The master signed bills of lading to deliver at Hamburg, "dangers of the seas only excepted":—Held, that though the charter-party contained other exceptions, the master was the agent of the owner as well as the charterer, and that, therefore, the terms of the bill of lading were binding. *The Patria*, 41 Law J. Rep. (N.S.) Adm. 23; Law Rep. 3 Adm. & Ecc. 436.

The ship arrived at Falmouth on the 23rd of August, during the war between France and Germany. Hamburg was blockaded till the 18th of September. The consignees offered to take their cargo at Falmouth, and pay full freight, but were refused. The suit was commenced on the 1st of November:—Held, that whether the

contract should be construed according to the general maritime law, or English, or German law, the master was bound to have delivered the cargo at Hamburg or at Falmouth. *Ibid.*

(2) *Restraint of princes ; delay.*

9.—Where a German vessel was under orders as per charter-party to proceed from Falmouth to Leith (the act of God, the Queen's enemies, restraint of princes and rulers, &c., being excepted) and there being war between France and Germany, the vessel was liable to be captured by French cruisers if caught out of neutral waters:—Held, that the master was justified in delaying at Falmouth for a wind which would give him a good chance of escaping the French cruisers. *The Heinrich*, Law Rep. 3 Adm. & Ecc. 424.

10.—In an action for breach of a charter-party, by which it was agreed that the defendants' vessel should proceed to a port of loading, and after loading a cargo convey it to a foreign port, the act of God, Queen's enemies, restraints of princes and rulers, fire, and all and every other dangers and accidents of the seas . . . during the voyage excepted, it was pleaded that before breach there was a war between the country of the port of destination and another country, so that the performance of the charter-party became illegal, and the defendants refused to perform it:—Held, that the plea was good, as the blockade was, within the meaning of the exception, "restraints of princes," and that the defendants were not bound to have proceeded to the port of loading, or to have waited in anticipation of the removal of the blockade, in the absence of anything to lead to the inference that it would be removed within a reasonable time. *Geipel v. Smith*, 41 Law J. Rep. (n.s.) Q. B. 153; Law Rep. 7 Q. B. 404.

11.—In an action by the consignees of a cargo for damage to cargo by delay caused by an apprehension by the master of perils arising by reason of war,—Held, that an apprehension of capture, founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment and experience, will justify delay. *Anderson v. the Owners of the "San Roman"*, 42 Law J. Rep. (n.s.) Adm. 46; Law Rep. 5 P. C. 301.

[And see MARINE INSURANCE, 22, 26, 27.]

(c) *Deviation.*

12.—A charter-party made between English merchants at Valparaiso and the owners of a Prussian ship, provided that the ship should proceed and deliver cargo at a port to be named by the charterers in Great Britain or on the Continent between Havre and Hamburg. The charterer named Dunkirk. On the arrival of the ship off Dunkirk, the master was informed by a pilot that war had commenced between Prussia and France. The master thereupon took the ship into Dover, and refused to deliver the cargo without payment of full freight. War was not in fact declared until three days afterwards:—Held, in an action for breach of the charter-party, first, that the master was entitled to a reasonable time to make

enquiries as to the war, and that the time taken was not unreasonable; secondly, that as the port named by the charterer was an unsafe port, and as Dover was a port which might have been named within the terms of the charter-party, the owners were entitled to full freight. *Duncan v. Köster; The Teutonia*, 41 Law J. Rep. (n.s.) Adm. 57; Law Rep. 4 P. C. 171.

(d) *Warranty : words of expectancy.*

13.—In a charter-party, dated the 14th of November, 1871, the defendants' ship was chartered to the plaintiff as follows: "It is this day mutually agreed between Messrs. M. & S., of the good British steamship *Ceres*, of the measurement, &c., whereof, &c., is master, expected to be at Alexandria about the 15th of December, and the plaintiff," &c., &c. The declaration setting out the charter-party alleged as a breach that the ship was not then expected to be at Alexandria about that day, but was then in such part of the world and under such engagements that the ship could not perform her said engagements and arrive at Alexandria about the said day:—Held, on demurrer, that the statement in the charter-party was a warranty or condition that the ship was then in such a place and under such engagement as that she might reasonably be expected to be at Alexandria about the day mentioned, and that the breach was well assigned. *Corkling v. Massey*, 42 Law J. Rep. (n.s.) C. P. 153; Law Rep. 8 C. P. 395.

A plea to the above declaration set out the position in which and certain engagements under which the ship then was, and alleged notice thereof to the plaintiff, and that the charter-party was made subject to the condition that the said vessel should with all convenient speed fulfil her said engagements, and then sail and proceed to Alexandria, and averred performance of the said condition:—Held, that the plea was a good plea, upon the authority of *Young v. Austen* (38 Law J. Rep. (n.s.) C. P. 233; Law Rep. 4 C. P. 553). *Ibid.*

(e) "Full and complete cargo."

14.—A charterer agreed to load at Archangel a full and complete cargo of oats or other lawful merchandise, which the shipowners were to deliver "on being paid freight at the rate of 4s. 6d. per 320 lbs. for oats, and if any other cargo be shipped in full and fair proportion thereto, according to the London Baltic printed rates." The cargo shipped consisted of flax and other light articles (all mentioned in the London Baltic rates), i.e. of as much as the ship could safely carry of such light articles; which rendered the shipment of 120 tons of ballast necessary:—Held (affirming the judgment below, see 28 Law J. Rep. (n.s.) Exch. 54; Law Rep. 4 Exch. 73), that the charterer had a right, in the absence of any stipulation to the contrary expressed or implied, to ship a full and complete cargo of any one or more of the articles constituting lawful merchandise within the meaning of the charter-party, and that when he had supplied a full and complete cargo, it was

the shipowner's duty to procure the ballast necessary for that cargo; that in this case no stipulation to the contrary was expressed by the words "in full and fair proportion" in the charter-party, nor was any such stipulation implied by law; so that the shipowner, not being protected from the extreme use by the charterer of his privilege, could not recover from him more than the freight payable according to the London Baltic rates on the quantities of the several articles actually shipped. *The Southampton Steam Collier, &c., Company (Lim.) v. Clarke* (Exch. Ch.), 40 Law J. Rep. (n.s.) Exch. 8; Law Rep. 6 Exch. 53.

(f) *Difference between quantity signed for and quantity shipped.*

15.—Declaration, that it was agreed between the plaintiffs and the defendants that the plaintiffs' ship should take a cargo of coals from C. to B., "the master of the ship to sign bills of lading for weight of cargo put on board, as presented to him by the defendants, without prejudice to the tenor of the charter-party;" that 573 tons of coal were shipped; that the defendants caused the master to sign bills of lading for 605 tons, whereby the plaintiffs were forced to pay the consignees at B. 31*l.* for the value of the difference between 605 tons and 573 tons, and 13*l.* for dues:—Held, on demurrer, that the declaration was bad. *Brown v. The Powell Duffryn Steam Coal Company (Lim.)*, 44 Law J. Rep. (n.s.) C.P. 289; Law Rep. 10 C.P. 562.

(g) *Commission: "inwards and outwards."*

16.—By a charter-party made between the plaintiffs and the defendant, master of an Italian vessel, it was agreed that the ship should load a cargo at Glasgow and proceed therewith to San Francisco, where she should be consigned to the charterers' agents "inwards and outwards, paying the usual commissions," . . . and so end the voyage. A final printed clause contained a stipulation that the plaintiffs' Glasgow agents should report the ship at the Custom House "on her return to her port of discharge in the United Kingdom." The vessel was duly consigned to the charterers' agents at San Francisco, who, on her arrival there, transacted the "inwards" business, and received the usual commission on the "inwards" freight. They tendered to the defendant a homeward cargo which he declined, but he offered to take a cargo to the Mexican coast, whither he was going in order to fulfil another charter. A cargo for that destination, however, could not be obtained, and the ship sailed in ballast to Mexico and carried thence a cargo to Europe in pursuance of the other charter-party, with which the plaintiffs had no concern. The plaintiffs having brought an action for breach of contract to recover, as damages, the outwards commission which would have been earned if the defendant had accepted a homeward cargo at San Francisco, and brought it to Europe, as the plaintiffs contended he was bound to do,—Held, that no such obligation was created by the above-mentioned clauses of the charter-party, which

merely amounted to a proviso that, if the ship were engaged on a voyage "outwards," then the agents should be further employed, and should be paid commission on the "outwards" freight. *Cross v. Pagliano*, 40 Law J. Rep. (n.s.) Exch. 18; Law Rep. 6 Exch. 9.

(h) *Illegal voyage.*

17.—A charter-party was made in France, by which it was stipulated that the ship should proceed to Trouville, a port in France, and should there load a cargo of hay, and proceed therewith direct to London; all cargo to be brought and taken from the ship alongside. The agent of the defendant, the charterer, told the master that the consignors would require the hay to be delivered at a particular wharf in Deptford Creek, and that he should proceed there on his arrival in London, which he promised to do. On arriving in the Thames, he was informed that by an Order in Council made under the Contagious Diseases (Animals) Act, 1869, it was illegal to land in Great Britain hay brought from France. The Order in Council was in existence when the charter-party was entered into, but neither of the parties knew of it, nor did the shipowner contemplate any violation of the law. The defendant after a time exported the hay, and the shipowner brought an action against him to recover damages in respect of the detention of the ship:—Held, that under these circumstances, the defendant could not set up as a defence that the voyage was illegal. *Wauagh v. Morris*, 42 Law J. Rep. (n.s.) Q.B. 57; Law Rep. 8 Q.B. 202.

*As to law applicable in case of foreign vessels.* [See *infra* K.]

(F) COLLISION AND DAMAGE.

(a) *International law: Khedive of Egypt.*

1.—The C. belonging to the Khedive of Egypt, and usually employed in carrying mails and passengers, came to England with merchandise and for repairs. Having completed her repairs, and while on a trial trip down the Thames she came into collision with the B. On arrest of the C. by the owners of the B.,—Held, first, that his Highness the Khedive is not entitled to the privileges of a sovereign prince. Secondly, that even the privileges of a sovereign prince would not extend to immunity from arrest in a suit for damage by collision. Thirdly, that if the privileges did extend to such an immunity, they would have been waived in this case by the employment of the ship at the time as a trader. *The Charkieh*, 42 Law J. Rep. (n.s.) Adm. 17; Law Rep. 4 Adm. 59.

Proceedings *in rem* may in some cases be instituted without any violation of international law, though the owner of the *res* be in the category of persons privileged from personal suit. *Ibid.*

Semble—within the ebb and flow of the sea in the case of salvage, the *obligatio ex quasi contractu* attaches *jure gentium* upon the ship to which the service has been rendered, and in the case of collision, the *obligatio ex quasi delicto* attaches

*jure gentium* upon the ship which is the wrongdoer whatever be her character, public or private. *Ibid.*

In considering the international status of the Khedive of Egypt.—Held, that the Court may enquire into the general history of the government of Egypt, the firmans of the Porte and European treaties concerning the relations between Egypt and the Porte, and that the Court may also obtain direct information from the Foreign Office. *Ibid.*

(b) *Steam vessels.*

2.—A steam tug with a vessel in tow is bound under Art. 15 of the Sailing Rules (under 25 & 26 Vict. c. 63, s. 25) to keep out of the way of a sailing vessel. The fact that the steam tug was towing a heavily laden ship in the open sea against a strong head wind, was held not to justify a departure from the ordinary rule, under Art. 19. *The Warrior*, Law Rep. 3 Adm. & Ecc. 553.

3.—Where two steamships are meeting end on "so as to involve risk of collision" (Art. 13), if one of them at a proper distance ports her helm sufficiently to carry her clear of the other, the risk is determined, and such steamship is not bound to slacken speed as directed in Art. 16. *The Jesmond and the Earl of Elgin*, Law Rep. 4 P. C. 1.

4.—A steamship meeting three barges was compelled to starboard to avoid the first barge. By starboarding, the steamship came into collision with all three barges:—Held, that the first barge was liable for the damage done to the other barges. *The Thames; The Sisters*, 44 Law J. Rep. (n.s.) Adm. 23.

5.—A steam-tug hove to in the fair way of a channel is bound to be ready to get out of the way of other ships. *The Jennie S. Barker; The Spindrift*, 44 Law J. Rep. (n.s.) Adm. 20; Law Rep. 4 Adm. & Ecc. 456.

6.—A steamship, navigating in a fog at a moderate speed, being warned that another steamship is so near to her, that if both vessels stopped they would be within hailing distance, is bound not only to stop her engines, but to reverse them. *Morton v. Hutchinson; The Frankland and the Kestrel*, Law Rep. 4 P. C. 529.

7.—In a dense fog a steam vessel is bound to anchor as soon as possible; she ought not to proceed even at a moderate speed. *The Otter*, Law Rep. 4 Adm. & Ecc. 203.

8.—A steam ferry-boat crossing a navigable river in a dense fog, and where there are vessels anchored near her track, will be liable for damage by collision. *The Lancashire*, Law Rep. 4 Adm. & Ecc. 198.

(c) *Tug and tow: governing power.*

9.—The master of a steamship, finding another steamship belonging to the same owners disabled, took her in tow without remuneration. In the course of the voyage the tug collided a ship, no blame being due to the tow:—Held, by the Privy Council (varying the decision below, 43 Law J. Rep. (n.s.) Adm. 25; Law Rep. 4 Adm. &

Ecc. 226), that as the tug was the governing power, the tow was not liable. *The Union Steamship Company, Owners of the American and the Syria, v. The Owners of the Aracan* (P.C.), 43 Law J. Rep. (n.s.) Adm. 30; Law Rep. 6 P. C. 127.

(d) *Crossing vessels.*

10.—Ships rounding a bend in the river Thames, the one proceeding up and the other down stream,—Held, not crossing vessels within rule 14. *Malcolmson v. The General Steam Navigation Company; The Ranger and the Cologne*, Law Rep. 4 P. C. 519.

11.—Collision between two steamships whilst rounding a bend of a river. The respondents' vessel, coming up stream and seeing the appellants' vessel rounding the point put her helm hard a-port, in order to cross the river; the appellants' vessel stopped, reversed her engines, and put her helm hard a-starboard, the result being a collision:—Held, that without determining whether the vessels were crossing vessels under the steering and sailing rules, art. 14, the appellants' vessel was solely to blame, and the appeal was dismissed. *The Esk and the Niord*, Law Rep. 2 P. C. 436.

(e) *One vessel overtaking another.*

12.—When a *prima facie* case has been made that the defendant's ship was overtaking the plaintiff's ship, the burden, as in the case of a ship at anchor, is cast upon the defendants to shew excuse for the collision. When one ship is overtaking another, it would rarely be the duty of the ship that is being overtaken to warn the other by whistling or exhibiting an extra light. *The Chanorry; and the Leverington*, 42 Law J. Rep. (n.s.) Adm. 58.

The C. was steered W. by N., and going faster than the L., which was steered W.N.W. The night was not dark, and the C. was going at full speed:—Held, that the C. was overtaking the L., and that, under the circumstances, the L. was not bound to whistle or shew a light over the stern or otherwise. *Ibid.*

(f) *Ironclad ship: with ram.*

13.—The B., an armour-plated ship with a ram projecting under water about fourteen feet from her stem, was lying hove to when the F., in trying to speak her, came in contact with the ram and was sunk:—Held, that there was no obligation on those on board the B. to give notice of the ram or that she was a leeward ship. *The Bellrophon*, 44 Law J. Rep. (n.s.) Adm. 7.

(g) *Foul berth.*

14.—If one ship has given another a foul berth, the owners of the ship giving the foul berth have no right to demand that extraordinary precautions should be taken on board the other ship to avoid a collision. The *Victor* gave the *Fivid* a foul berth, and the *Fivid* in swinging, came into collision with and damaged the *Victor*. It having been proved that the usual and ordinary precautions had been taken on board the *Fivid*,

—Held, that the *Vivid* was not responsible for the collision. *The Vivid*, 42 Law J. Rep. (N.S.) Adm. 57.

(h) *Moorage.*

15.—Collision in a harbour caused by the breaking of a mooring buoy to which a vessel was moored, and the use of which was sanctioned by the authorities of the harbour:—Held, that the collision was caused by inevitable accident. A storm being imminent, the master of the vessel kept the anchor ready to be let go:—Held, that he was not guilty of contributory negligence because he did not actually drop the anchor. *Doward v. Lindsay*; *The William Lindsay*, Law Rep. 5 P. C. 338.

(i) *Launch.*

16.—Before a launch takes place, it is the duty of those conducting it to give a sufficient notice according to the usages of the place. *The Glengarry*, 43 Law J. Rep. (N.S.) Adm. 37.

If in the course of a launch a collision takes place, the burden of proof is upon those engaged in the launch to shew that sufficient notice had been given of the intended launch. *Ibid.*

In a cause of damage by collision with a launch, sufficient notice having been given of the intended launch, the other ship held to blame for not having kept out of the way. *Ibid.*

17.—Where a steamship, in coming alongside a pier, struck, and did damage to a mooring dolphin, it was held, the contact being slight, that the dolphin ought to have been strong enough to resist the pressure, and the suit against the steamship was dismissed with costs. *The Albert Edward*, 44 Law J. Rep. (N.S.) Adm. 49.

(k) *Lights.*

18.—In a cause of damage by collision, if the side lights of a ship are defective or not properly placed or screened, her owners will not be debarred from recovering unless the defect or fault contributed to the collision. *The Eugenie, the Magnet, the Duke of Sutherland, the Maggie Trimble, the Fanny M. Carvill*, 44 Law J. Rep. (N.S.) Adm. 1; Law Rep. 4 Adm. & Ecc. 417.

Instructions as to lights issued by the Board of Trade to their surveyors are not, except so far as they are authorised by statute, binding upon the owners of either British or foreign ships. *Ibid.*

19.—In a cause of damage by collision in the river Thames a dumb barge held not bound to have exhibited a light. *The Owen Wallis*, 43 Law J. Rep. (N.S.) Adm. 36; Law Rep. 4 Adm. & Ecc. 175.

20.—Even by the general maritime law those in charge of a vessel aground at night in the fairway of a navigable channel are bound to take proper means to warn others of her position. *The Industry*, 40 Law J. Rep. (N.S.) Adm. 26; Law Rep. 3 Adm. & Ecc. 303.

21.—The G. was from justifiable causes across the river Thames unable to alter her position, and with her lights not visible down the river, when the lights of the J. F. were seen coming up the river. Those on board the G. blew their whistle, hailed,

and shewed an ordinary lantern, such as is used for lighting the deck and hatchways:—Held, that those on board the G. were to blame for not having exhibited the very best light they had on board. *The John Fenwick*, 41 Law J. Rep. (N.S.) Adm. 38; Law Rep. 3 Adm. & Ecc. 500.

22.—Where a sailing vessel under weigh, shewing regulation lights, but not a light over her stern, was run down by a steamer overtaking her, —Held, that the sailing vessel was not to blame. *The Earl Spencer*, Law Rep. 4 Adm. & Ecc. 431.

(l) *Limitation of liability.*

23.—The ship R. came into collision with the ship W. D. and then with the A. that was about to take the W. D. in tow:—Held, that this was in effect only one collision, and that the owners of the R. were not liable beyond the aggregate amount of 8*l.* per ton of her tonnage. *The Rajah*, 41 Law J. Rep. (N.S.) Adm. 97; Law Rep. 3 Adm. & Ecc. 539.

24.—A railway company being common carriers and also shipowners were in the habit of carrying passengers and goods from London to Southampton by rail, and thence in their own ships to Guernsey and Jersey. One of the ships carrying passengers and goods, booked through from London to Guernsey, came into collision, without the actual fault or privity of the owners, with another vessel and sank, whereby several passengers lost their lives, the luggage and cargo were totally lost and the other ship damaged. Several actions having been commenced against the company for damages in respect of delay, loss of luggage, loss of goods, damage to the ship run into and (under Lord Campbell's Act, 9 & 10 Vict. c. 93) loss of life, they filed their bill under the Merchant Shipping Act, 1854, sec. 504, for the purpose of determining the amount of their liability, and of distributing such amount rateably among the several claimants, and claiming to be entitled to the benefit of the Merchant Shipping Act Amendment Act, 1862, s. 54, limiting such liability to 15*l.* per ton of their ship's tonnage:—Held, reversing the decision of the Master of the Rolls, that they were entitled to injunctions restraining the several actions. *The London and South-Western Railway Company v. James*, 42 Law J. Rep. (N.S.) Chanc. 337; Law Rep. 8 Chanc. 211.

(m) *Infringement of regulations under the Merchant Shipping Act, 1873.*

25.—The Merchant Shipping Act, 1873, by section 17, provides that "if in any case of collision it is proved to the Court before whom the case is tried, that any of the regulations for preventing collisions contained in or made under the Merchant Shipping Acts, 1854 to 1873, have been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it be shewn to the satisfaction of the Court that the circumstances of the case made a departure from the regulations necessary:—Held (by the Privy Council, affirming the decision below, 44 Law

J. Rep. (n.s.) Adm. 1), that although it is not incumbent on a plaintiff since the passing of the above statute to prove that an infringement of a regulation by a defendant in fact contributed to a collision, yet that the infringement charged must be one having some connection with the collision. *Owners of the Fanny M. Carvill v. Owners of the Peru; The Fanny M. Carvill*, 44 Law J. Rep. (n.s.) Adm. 34.

(n) *Inevitable accident.*

26.—Inevitable accident is that which could not possibly be prevented by the exercise of ordinary care, caution and maritime skill. Where the defence of inevitable accident is raised, the onus lies on the parties bringing the suit and seeking to be indemnified, and does not attach to the vessel proceeded against until a *prima facie* case of negligence is shewn. Where such defence is successful, no order will be made as to costs, unless it be shewn that the suit was unreasonably brought. *The Marpesia*, Law Rep. 4 P. C. 212.

(o) *Contributory negligence.*

27.—Where a vessel was in tow during a thick fog and those on board her, knowing there was danger, did not order the tug to stop, and the vessel ran aground,—Held, that they were guilty of contributory negligence. *Smith v. The St. Lawrence Tow Boat Company*, Law Rep. 5 P. C. 308.

28.—Collision between a steamship and a sailing ship caused by the steamship, which saw the sailing ship at a distance of two or three miles, taking a course which would carry her across the bows of the sailing ship. The circumstance that the lights of the sailing ship were invisible was held not to prove contributory negligence on her part; nor yet the circumstance that she had made an erroneous manœuvre too late to affect the collision. *Beal v. Marchais; The Bougainville and the James C. Stevenson*, Law Rep. 5 P. C. 316.

29.—Where, in a collision between a brig and a bark, the main rigging of the bark was carried away, and shortly afterwards her fore and main masts went by the board, and the wind having increased, the bark was about twenty-one hours afterwards driven on shore, and some of the crew drowned,—Held, that the loss of life was caused by the collision. *The George and Richard*, Law Rep. 3 Adm. & Ecc. 466.

(p) *Loss of life.*

30.—The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), by s. 2, defines the word "ship" to include every description of vessel used in navigation not propelled by oars; by s. 242 gives power to the Board of Trade to suspend the certificate of a master or mate, if on an investigation under part 8 of the statute it is reported that the loss or serious damage to any ship or loss of life was caused by his wrongful act or default; by (part 8), s. 432, directs enquiries to be instituted by persons appointed by the Board of Trade, whenever any ship causes loss to another ship on or near the coast, or whenever, by reason of any casualty happening to or on board of any ship on

or near the coast, loss of life ensues; and by (part 8) s. 433, enacts that if it appear to such person that a formal investigation is requisite, or the Board direct, he may apply to two magistrates to hear the case. The Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63), by s. 23, transfers the power of cancelling or suspending the certificate of the master or mate under 17 & 18 Vict. c. 104, s. 242, to the magistrates; and enacts by s. 33, that in every case of collision between two ships, it shall be the duty of the person in charge of each ship, so far as he can without damage to his own ship and crew, to render to the other ship, her master, crew, and passengers (if any), such assistance as may be practicable and as may be necessary, in order to save them from any danger caused by the collision, and if he fails to do so, and has no excuse, the collision shall be deemed caused by his wrongful act, neglect, or default, and such failure to do so shall, if proved upon any investigation held under the 8th part of the Act of 1854, be deemed to be an act of misconduct or a default, for which his certificate (if any) may be cancelled or suspended. A collision took place between a steamship and a fishing coble. The coble sank, and three men on board were lost. The coble was of ten tons burthen, twenty-four feet in length, decked forward only, with two moveable masts, and a sail for each. She was accustomed to go twenty miles out to sea, and to remain out for some hours at a time, and was usually under sail, but was sometimes propelled by oars when convenient. An inquest was held on the body of one of the men who was lost, and a solicitor appointed by the Board of Trade took notes of the evidence, and forwarded them to the Board, who applied to two justices to hold an enquiry into the collision. The justices held the enquiry, decided that the coble was a seagoing ship, that there was a collision between two ships, and that the master and mate of the steamer did not duly render assistance to save life, and ordered that the certificates of the master and mate of the steamer should be suspended for three months:—Held, first, that if the coble were a ship, one ship had caused loss to another, and even if she were not, there was a casualty to the steamship, and therefore there was a case for investigation by the magistrates under 17 & 18 Vict. c. 104, s. 433; and, secondly, that the word "ship" applied to all craft which substantially went to sea and only used oars as an auxiliary power, and that there had been a collision between two ships within the meaning of 25 & 26 Vict. c. 63, s. 33, and that therefore the order was good. *Ex parte Ferguson and Hutchinson*, 40 Law J. Rep. (n.s.) Q. B. 105; Law Rep. 6 Q. B. 280.

(q) *Consequential loss.*

31.—In a cause of damage the defendant will not be liable for any consequential damage, which the plaintiff might have averted by the exercise of ordinary skill and courage. And semble—the burden of proving that the loss could not have been averted by such skill and courage lies upon the plaintiff. *The Thuringia*, 41 Law J. Rep. (n.s.) Adm. 44.

On appeal from a report of the registrar disallowing a claim for total loss in a cause of damage by collision,—Held, that the master of the plaintiff's vessel was not justified in abandoning her after the collision. Report confirmed with costs. *Ibid.*

(r) *Ballast lighter: Thames Conservancy.*

**32.**—The regulations for preventing collisions at sea issued under 25 & 26 Vict. c. 63 and Order in Council of 9th January, 1863, do not apply to a ballast lighter which, though at times navigated under sail, never goes to sea, but is wholly employed within the jurisdiction of the Thames Conservancy. *The C. S. Butler*, Law Rep. 4 Adm. & Ecc. 238.

Where such a vessel has been injured in a collision her owners will not, in the absence of any bye-law of the Thames Conservancy, be held disentitled to recover damages in a collision cause on the ground that she contributed to the collision by being under weigh before sunrise without having any lights exhibited. *Ibid.*

(s) *Damage without collision.*

**33.**—If through the negligence or misconduct of those on board a vessel another vessel receives or does damage, the owners of the wrong-doing vessel would be liable in the Court of Admiralty for the damage, even though there was no collision between the two vessels. *The Industry*, 40 Law J. Rep. (N.S.) Adm. 26; Law Rep. 3 Adm. & Ecc. 303.

(t) *Arrest of freight.*

**34.**—A vessel under charter-party as to both her outward and homeward cargo, whilst on the outward voyage came into collision with another vessel:—Held, that the freight for the homeward voyage was liable to arrest for the damage. *The Orpheus*, 40 Law J. Rep. (N.S.) Adm. 24; Law Rep. 3 Adm. & Ecc. 308.

*Jurisdiction of Court of Admiralty in cases of damage and collision.* [See ADMIRALTY, 14–18.]

*Practice and procedure.* [See ADMIRALTY, 21, 23, 29, 34–38.]

(G) DELIVERY AND DISCHARGE OF CARGO.

**1.**—The Merchant Shipping Act Amendment Act, 1862, s. 67, provides that where the owner of goods imported “fails to land and take delivery thereof,” the shipowner may land and unship the said goods and warehouse them:—Held, that the word “fails” need not imply a wilful default in the cargo owner, and that the shipowner may land goods whenever the delivery to the owner within the proper time has been prevented by circumstances, whether the latter is to blame or not. *Miedbrodt v. Fitzsimon*; *The Energie* (P.C.) 44 Law J. Rep. (N.S.) Adm. 25; Law Rep. 6 P. C. 307.

Section 68 provides that, “if the shipowner gives to the warehouse owner notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the shipowner

to an amount to be mentioned in such notice, the goods so landed shall, in the hands of the warehouse owner, continue liable to the same lien, if any, for such charges as they were subject to before the landing thereof:”—Held, that a master who wilfully inserts in a notice a sum in excess of that for which he has a lien, is guilty of a wrongful detention of goods, and is liable in an action for a breach of duty. *Ibid.*

**2.**—Case in which a shipowner was not held bound to deliver the amount of goods specified in the bill of lading signed by the master, but only the smaller amount actually put on board. *M'Lean and Hope v. Fleming*, Law Rep. Sc. App. 128.

*Custom of port of delivery.* [See supra B 8.]

*Short delivery of cargo.* [See supra B 12.]

(H) DEMURRAGE.

(a) *Detention at port of lading.*

**1.**—By a charter-party it was agreed that the ship should go to a certain port and there load from the charterer a cargo “in the customary manner,” and proceed therewith to another port and deliver the same. . . . “The cargo to be discharged in ten working days, commencing from the day after the ship has got into her proper discharging berth. Demurrage at 2*l.* per 100 tons register per day. . . . The ship to have an absolute lien on cargo for freight and demurrage, the charterer's liability to any clauses in the charter ceasing when he has delivered the cargo alongside ship:”—Held, that the demurrage and the lien and exemption clauses did not apply to damages by undue detention of the vessel at the port of lading. *Lockhart v. Falk*, 44 Law J. Rep. (N.S.) Exch. 105; Law Rep. 10 Exch. 132.

**2.**—By a charter-party, it was agreed between the plaintiff (a shipowner) and a merchant that the plaintiff's ship should proceed to Sulina, . . . and there load as customary from the factors of the . . . freighter a full and complete cargo of staves, &c., “which the . . . merchant bound himself to ship, . . . and . . . therewith proceed to London, and deliver the same on being paid freight at specified rates. . . . The freight to be paid in cash on . . . right delivery of cargo. . . . Fifty running days . . . to be allowed for loading . . . and ten days on demurrage, over and above the laying days . . . at 8*l.* per day. . . . The owners to have an absolute lien on the cargo for all freight, dead freight, demurrage, and average; and the charterer's responsibilities to cease on shipment of the cargo, provided it be of sufficient value to cover the freight and charges on arrival at port of discharge. . . .” The ship proceeded to Sulina and, after a delay of eighteen days beyond the ten demurrage days, loaded a short cargo. A printed bill of lading was then signed by the captain for 283,682 staves, to be delivered “at the port of discharge, as per charter-party unto order, or . . . assigns, he or they paying freight and all other conditions (these words being inserted in writing) or demurrage (if any

should be incurred) for the said goods as per charter-party." Upon the arrival of the ship in London the plaintiff claimed from the defendants, who had become consignees of the bill of lading, a lien on the goods mentioned in the bill of lading for cargo short shipped (claimed as dead freight) for demurrage proper, in respect of the ship being detained ten days at the port of loading, and for damages in the nature of demurrage for a detention beyond the demurrage days. The defendants had no notice, until the arrival of the ship in London, of this claim, but they had received a copy of the charter-party with the bill of lading:—Held, first, by the Exchequer Chamber, unanimously affirming the decision of the Queen's Bench, that the plaintiff had no lien for damages in the nature of demurrage; secondly, by the majority of the Exchequer Chamber, Kelly, C.B., Bramwell, B., Channell, B., and Cleasby, B., affirming the decision of the Queen's Bench, that the plaintiffs had a lien for demurrage proper, as such a lien was given by the charter-party, and this lien was incorporated in the bill of lading—Willes, J., and Brett, J., dissenting on the ground that, even if such a lien were given by the charter-party, the bill of lading did not incorporate such a liability incurred at the port of loading; thirdly, by the majority of the Court, Kelly, C.B., Willes, J., Channell, B., and Brett, J., affirming the decision of the Queen's Bench, that the plaintiff had no lien for "dead freight," as the claim was not "dead freight" within the meaning of the charter-party and bill of lading, and further (by Willes, J., and Brett, J.) that the bill of lading did not incorporate such a claim incurred at the port of lading—Bramwell, B., and Cleasby, B., dissenting on the ground that such claim was dead freight within the charter-party, and was transferred by the bill of lading. *Gray v. Carr* (Exch. Ch.), 40 Law J. Rep. (n.s.) Q. B. 257; Law Rep. 6 Q. B. 522.

(b) *Delay in loading.*

3.—Declaration on a charter-party, by which it was agreed that the defendant should load the plaintiff's ship in regular turn, and that the ship when loaded should proceed to her port of destination, and there deliver the cargo to the freighter or his assigns, on being paid freight, and that the charter-party being concluded by the defendant on behalf of another party resident abroad, "all liability by the defendant should cease as soon as he had shipped the cargo." Breach, that the ship was not loaded in regular turn. Plea, that the defendant, before action, shipped the agreed cargo under the charter-party, whereby his liability ceased:—Held, on demurrer, that the plea was bad, as upon the true construction of the charter-party the defendant, although not liable for anything that occurred after he had shipped the cargo, remained liable for any delay or default before it was so shipped. *Christoffersen v. Hansen*, 41 Law J. Rep. (n.s.) Q. B. 217; Law Rep. 7 Q. B. 509.

4.—By a charter-party it was agreed as follows: "cargo to be loaded in thirteen clear work-

ing days from the day written notice is given that all ballast or inward cargo is discharged. Cargo to be discharged, weather permitting, at not less than 35 tons per working day, time to commence on ship's being ready to deliver. Ten days on demurrage for all like days above the said days, to be paid at the rate of fourpence per register ton per day. Charterer's liability to cease when the ship is loaded, the captain or owner having a lien on cargo for freight and demurrage." The charterer, having occupied five days beyond the thirteen days allowed for loading, was, after a full cargo had been loaded, sued by the shipowner for demurrage:—Held, affirming the judgment of the Court of Queen's Bench, that the charterer was protected from liability under the last clause of the charter-party. *Kish v. Cory* (Exch. Ch.), 44 Law J. Rep. (n.s.) Q. B. 205; Law Rep. 10 Q. B. 553.

5.—It was agreed by charter-party that a ship should load a full cargo at Liverpool in fifteen working days and when loaded proceed to Genoa, there "to be discharged, weather permitting, at the rate of not less than thirty-five tons per working day from the time of her being ready to unload. And ten days on demurrage over and above her said laying days at 8*l.* per day. Charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage." The charterer having occupied more than twenty-five days in loading, the shipowner, after a full cargo had been loaded, sued the charterer for the demurrage in respect of some of the ten days:—Held, that the charterer was protected by the last clause of the charter-party. *Francesco v. Massey*, 42 Law J. Rep. (n.s.) Exch. 75; Law Rep. 8 Exch. 101.

(c) *Loading in usual manner.*

6.—By a charter-party it was agreed that the vessel should "proceed direct to any Liverpool or Birkenhead dock as ordered by charterers, and there load in the usual and customary manner a full and complete cargo of coals;" that the vessel should be "loaded at the rate of 100 tons per working day," and that loading should not commence before the 1st of July. On the 3rd of July the vessel was ready to go to the Wellington Dock, which was the Liverpool Dock ordered by the charterers, but she was not admitted into such dock until the 11th of July, because the coal agent employed by the charterers to supply the cargo had then three vessels in that dock and two others booked to come in, and the dock regulations did not allow a coal supplier to have more than three vessels in dock at the same time. Coal agents were usually employed to supply cargoes, and it did not appear that the charterers had made an unreasonable selection of the coal agent they so employed. The vessel entered the dock on the 11th of July, but her turn to go to the spout to receive the coals did not arrive sooner than the 23rd of July, and her loading was not begun until after that day. It was the usual practice to load coal at the spout, but it was also not unusual to load from lighters:—Held, that the lay-days



did not begin until the vessel had entered the dock to which she had been so ordered by the charterers, but that they begun from that time, and were not postponed until the vessel's turn had arrived to go to the spout. *Tapscott v. Balfour*, 42 Law J. Rep. (N.S.) C. P. 16; Law Rep. 8 C. P. 46.

7.—By a charter-party, the master of the plaintiff's ship engaged to receive on board a full cargo of coal and deliver, &c., "to be loaded with the usual despatch of the port, . . . or if longer detained to be paid 40s. per day demurrage." The defendants engaged to load her "on the above terms." By a memorandum at the foot of the charter-party she was to load in the B. or W. Docks, by a regulation of which coal agents were not to have more than three vessels loading and to load at the same time. The plaintiff's ship would have been loaded without delay had it not been for the fact, unknown to the plaintiff, that the defendants acted as their own coal agents, and that they had three ships loading in the docks, and ten other charters in their books which had priority over the plaintiff's ship. By reason of the incapacity under which the defendants had so placed themselves, the loading could not be commenced until thirty days after the ship was ready:—Held, in an action for demurrage, that the defendants had contracted that they would load with the usual despatch, and that it was no answer that they were unable to do so, or that the plaintiff knew it. *Ashcroft v. The Crow Orchard Colliery Company*, 43 Law J. Rep. (N.S.) Q. B. 194; Law Rep. 9 Q. B. 540.

(d) *Fraction of a day.*

8.—Where, by a charter-party, a specified sum is to be paid for each day over and above the lying days, that sum is payable in respect of a fraction of a day during which the ship is detained, *The Commercial Steamship Company v. Boulton*, 44 Law J. Rep. (N.S.) Q. B. 219; Law Rep. 10 Q. B. 346.

(I) FREIGHT.

(a) *Payment in advance.*

1.—By a charter-party, under which the plaintiff's vessel was chartered to carry a cargo of coal from Greenock to Bombay, freight was to be paid on the right delivery of the cargo at a certain rate per ton on the quantity delivered, and such freight was to be half in cash on signing bills of lading, and the remainder on the right delivery of the cargo. The vessel left Greenock with her chartered cargo, and was wrecked on the voyage. Half her cargo was totally lost, but half was saved and delivered at Bombay; but as the freight in respect of such half was less than the freight which had been paid in advance on signing the bills of lading, the plaintiff received no freight on the delivery of such half, but totally lost the same:—Held (per Cockburn, C.J., Mellor, J., and Amphlett, B.), reversing the decision of the Court of Common Pleas (42 Law J. Rep. (N.S.) C. P. 334), Cleasby, B., and Pollock, B., *dissentientibus*, that the freight which the plaintiff so lost was not

recoverable as a total loss under an insurance of freight to be earned by the plaintiff's vessel on the said voyage, which he effected after the charter-party. *Allison v. The Bristol Marine Insurance Company*, 43 Law J. Rep. (N.S.) C. P. 311; Law Rep. 9 C. P. 559.

2.—A ship was chartered for a homeward voyage from Calcutta, with an option to the charterers to send her on an intermediate voyage, "freight to be paid as follows: 1,200*l.* to be advanced to the master, and to be deducted, together with 1½ per cent. commission on the amount advanced and cost of insurance, from freight on settlement thereof, and the remainder on right delivery at port of discharge." The master was also "to sign bills of lading at any current rate of freight required, without prejudice to the charter-party, but not under the chartered rates, unless the difference be paid in cash." The charterers elected to send the vessel on an intermediate voyage, and paid the 1,200*l.*, and required the master to sign bills of lading below the chartered rates. The difference, amounting to 737*l.*, was demanded from them by the master, but they refused to pay it, claiming to set off against it the advances made on account of the vessel. The vessel was lost on her way to the intermediate port:—Held (affirming the judgment of the Court of Exchequer, 40 Law J. Rep. (N.S.) Exch. 40; Law Rep. 6 C. P. 20), that a payment in advance on account of freight cannot be recovered, even though the voyage fail; and that according to the terms of the charter-party the payment of the difference was to be a payment in the nature of freight, so that if the defendants had paid the difference in advance, they would not have been entitled to recover it; and that therefore the shipowner was entitled to recover the amount from them, notwithstanding the failure of the voyage. *Byrne v. Schiller* (Exch. Ch.), 40 Law J. Rep. (N.S.) Exch. 177; Law Rep. 6 Exch. 319.

(b) *Right to freight.*

(1) *Shipowner reserving freight of his own goods.*

3.—H., a shipowner, obtained from T. B. & Co., merchants and brokers, a letter of credit for his account in favour of H. B. & Co., for a quantity of rice to be shipped from India or China to England in H.'s own vessels. T. B. & Co., in their letter of credit to H. B. & Co., stipulated that the drafts to be forwarded for their acceptance should be covered by shipping documents. It was assumed that H. B. & Co. were agents for H. They purchased the rice and shipped it in the *Java*, one of H.'s vessels, and drew on T. B. & Co. for the amount, accompanying their drafts with bills of lading of the rice. These bills of lading described the rice as shipped by H. B. & Co. to T. B. & Co. or their assigns, "freight for the said rice, 4*l.* 6*s.* per ton," and they bore an endorsement by the captain, "Received from H. B. & Co. 250*l.*, being the amount of ship's disbursements at Akyab, the amount to be deducted from the freight on this bill of lading." T. B. & Co., on receipt of this, accepted the drafts, which they paid at maturity. In the meantime H. had given

C. P. & Co. a charge on the freight then being earned by the *Java*, as security for money advanced. The *Java* arrived in port, and C. P. & Co. put a stop on the cargo for the freight, and gave T. B. & Co. notice of their claim:—Held, that whatever might have been the original impression of T. B. & Co., as to the rice being freight free, the contract was that they would make the advance on shipping documents; that having accepted the bills of lading as such shipping documents, they were bound by the terms of those bills, and that C. P. & Co. were entitled to claim and receive the freight from them, less the amount of ship's disbursements paid to the captain, there being no rule in law to prevent a shipowner from reserving freight in bills of lading of his own goods when carried in his own vessels or from dealing with the freight when so reserved, or from consigning the goods subject to such freight. *Weguelin v. Cellier* (H.L.), 42 Law J. Rep. (n.s.) Chanc. 758; Law Rep. 6 E. & I. App. 286.

#### (2) *Mutual mistake.*

4.—The plaintiff, as master of a ship lying in London, entered into a charter-party with L., a shipbroker, to carry a quantity of iron at a tonnage freight. By the charter-party, freight was to be paid in London on signing bills of lading, the owner to have an absolute lien for freight. On the same day L. re-chartered the ship to the defendants to carry the same quantity of iron at an increased freight, with similar provisions as to payment of and lien for freight, and with this clause—"The brokerage of five per cent. is due on the execution of this charter to L., by whom the vessel is to be entered and cleared at the port of loading." L. had, however, no authority to act as broker for the plaintiff, or to receive the freight. Neither the plaintiff nor the defendants knew of the charter-party entered into by the other. The iron was shipped by the defendants, and the master signed and the defendants received bills of lading, by which the iron (stated to be shipped by the defendants) was to be delivered to consignees or assigns, "paying freight for the said goods as per charter-party." The plaintiff did not claim the freight on signing the bills of lading, and delivered the cargo without insisting upon his lien. L. in the meantime obtained the freight due from the defendants, and, having stopped payment, the freight due under his charter was not paid to the plaintiff:—Held, that the plaintiff was not entitled to recover freight from the defendants as shippers of the iron, inasmuch as both parties made a mistake as to the charter-party referred to in the bills of lading, and were consequently never *ad idem*. No contract could therefore be implied on the part of the defendants to pay freight to the plaintiff. *Schmidt v. Tiden*, 43 Law J. Rep. (n.s.) Q. B. 199; Law Rep. 9 Q. B. 446, *nom. Smidt v. Tiden*.

#### (3) *Performance unlawful by reason of war.*

5.—The master of the T. having agreed to carry cargo to the port of Dunkirk, arrived off that port on the 16th of July, when war was imminent between

France and Prussia. Being from other causes unable to enter the port till the 17th, he brought the ship to the Downs, where she remained till the 19th, when war was formally declared:—Held, that the interval between the 17th and 19th was only a reasonable time which the master was entitled to take to make enquiries as to the danger, and that after that time had elapsed, the contract could not, by reason of the war, have been executed. Also, that the master was not bound to deliver the cargo at Dover without receiving some payment for carrying the cargo thus far. *The Teutonia*, 41 Law J. Rep. (n.s.) Adm. 4; Law Rep. 3 Adm. & Ecc. 394.

#### (4) *Dangerous cargo.*

6.—A cargo of petroleum was shipped in London for Havre, to be delivered to the order of the shippers, or their assigns. The bill of lading provided, "The goods to be taken out within twenty-four hours after arrival, or pay 10*l.* 10*s.* a day demurrage." On her arrival at Havre the ship was not allowed to remain in harbour, on account of her dangerous cargo, and the master took her to Honfleur and Trouville, but being unable to remain in those ports for the same reason, he returned to Havre, and was allowed to remain in the outer harbour, where the goods might have been discharged. No bill of lading was presented, nor was any request made to deliver the goods. After waiting four days, the master carried the goods back to London:—Held, first, that the freight to Havre had been earned; secondly, that the master had authority under the circumstances to carry the goods back to London; and that the shipowners were entitled to homeward freight and to expenses at Havre, but not to demurrage or expenses incurred in attempting to enter the ports of Honfleur and Trouville. *The Cargo ex Argos*, 42 Law J. Rep. (n.s.) Adm. 49; Law Rep. 4 Adm. & Ecc. 13; 5 P.C. 135.

#### (c) *Lump freight.*

7.—By charter-party, the ship was to be loaded with a full cargo, and to have a deck cargo, and being so loaded was to proceed to London, and "deliver the same on being paid freight as follows: a lump sum of 315*l.* . . . the freight to be paid in cash, half on arrival, and remainder on unloading and right delivery of the cargo." The ship arrived in London with the whole of the cargo, with which the charterer had loaded her, with the exception of the deck load, which had been lost during the voyage by one of the excepted perils in the charter-party, and without any default on the part of the master or crew:—Held, that the shipowner was entitled to the whole of the lump freight without deducting the proportion of freight payable in respect of the deck load which had been lost. *Robinson v. Knights*, 42 Law J. Rep. (n.s.) C. P. 211; Law Rep. 8 C. P. 465, and *The Merchant Shipping Company v. Armitage*, Law Rep. 8 C. P. 469 n.

8.—By a charter-party between the defendants and the master of the plaintiffs' ship it was agreed that "the ship should load at Colombo, or proceed

to Cochin, and if ordered to Cochin, there load from the charterers . . . a full and complete lading of legal merchandise, &c., and therewith proceed to London into the East or West India Docks, and discharge there as customary, the act of God, restraints of princes, &c., excepted. A lump freight of 5,000*l.* to be paid after entire discharge and right delivery of the cargo in cash two months after the date of the ship's report inwards at the Custom House, or under discount at five per cent. The master to sign bills of lading at any rate of freight required without prejudice to this charter-party, but, should the aggregate freight by bills of lading amount to less than the lump sum of 5,000*l.* already stipulated for, the difference to be deducted from the amount to be drawn for disbursements, and the balance, if any, to be paid in cash at the rate of exchange for sight bills existing at the time of the ship's clearing in Colombo. The owners of the ship to have an absolute lien on the cargo for the amount of freight stipulated for, except as to the captain's draft for disbursements and commission as before mentioned, in case of default. The charterers to furnish cash for the disbursements of the ship at port of loading at current rate of exchange, not exceeding 750*l.* free of interest, but subject to a commission of 2½ per cent., and cost of insurance, for the due appropriation of which the charterers are not to be held responsible, and for which, and agency commission, the master shall give his draft on the owners payable in London at sixty days' sight, and in the event of the bill not being accepted or paid at maturity, the amount to be deducted from freight at settlement thereof," &c. The ship proceeded to Cochin, was there put up by the defendants as a general ship, and loaded with a full cargo under bills of lading. The total amount of the bill of lading freight was estimated by the charterers at 4,995*l.* 10*s.* 6*d.*, and was payable in London on delivery of the goods there. The ship sailed with her cargo for London, and while at sea a fire broke out, and part of the cargo was so injured by fire and water that it became necessary to sell it. The remainder of the cargo was brought to London, and reported inwards at the Custom House. The bill of lading freight received by the plaintiffs amounted to 3,482*l.* 7*s.* 10*d.*, and the defendants advanced to the master at Cochin 364*l.* 14*s.* 1*d.* for disbursements of the ship, making together 3,847*l.* 1*s.* 11*d.*:—Held, first, affirming the cases of *The Norway* (3 Moo. P. C. n.s. 245), and *Robinson v. Knights* (42 Law J. Rep. (n.s.) C. P. 211; Law Rep. 8 C. P. 465), that the plaintiffs were entitled to the balance of the lump sum of 5,000*l.* after giving credit for the 3,847*l.* 1*s.* 11*d.* received by them, as the 5,000*l.* was to be payable on the delivery, not of the entire cargo which had been put on board, but of that which had not been lost by the excepted perils; secondly, that the plaintiffs were not entitled to interest on the balance in question, as it could not be regarded as a sum payable on a day certain. *The Merchant Shipping Company v. Armistage* (Exch. Ch.), 43 Law J. Rep. (n.s.) Q. B. 24; Law Rep. 9 Q. B. 99.

9.—Declaration, for lump freight payable under a bill of lading in respect of a cargo of pit-wood carried from L'Orient to Cardiff. Plea, first (except as to 217 tons, portion of the cargo), setting out a bill of lading made by the plaintiff, master of the ship, at the port of L'Orient, whereby he acknowledged to have received of the shipper a specified weight of wood, to be carried and delivered to the bearer or his order on payment for freight of the sum of 172*l.* 1*s.* Averment, that the plaintiff did not carry and deliver the goods in the bill of lading, but a portion of the same only, to wit, 217 tons. Second plea, payment into Court in respect of those tons. Replication—third, that the plaintiff carried the whole delivered to him, and that the goods described in the bill of lading as weighing more than 217 tons, in fact weighed 217 tons and no more, and that the weight mentioned in the bill of lading was a mere misdescription, without fraud or default on the part of the plaintiff; fourth, that the bill of lading was made in France, and that according to the law of France the whole of the freight was payable, notwithstanding that the said part only of the goods was carried and delivered; fifth (repeating the third, and adding), that the bill of lading was made in France, and that according to the law of France the whole of the freight was payable. On demurrer to the first plea and to the replications,—Held, that even if the plea, which was ambiguous, were treated as good, the replications, being good also, sufficiently answered it. *Blanchet v. Powell's Llantwit Colliery Company*, 43 Law J. Rep. (n.s.) Exch. 50; Law Rep. 9 Exch. 75.

(d) *Dead freight.*

10.—Dead freight is an uncertain sum recoverable by the shipowner from the freighter for deficiency of cargo. The shipowner's lien for dead freight attaches only by express stipulation. *M'Lean and Hope v. Fleming*, Law Rep. 2 Sc. App. 128.

*Lien for dead freight.* [See *supra* H 2.]

(e) *Lien for freight.*

11.—A firm of brokers, having chartered a ship, advertised her as about to sail, and invited shippers to send their goods by her. Under the charter-party, the captain was to have an absolute lien on the cargo for freight, dead freight, and demurrage. The plaintiffs, who had no notice of the charter-party, dealing with the charterers only, sent some tea on board, to be carried at a rate of freight agreed upon between themselves and the charterers. Afterwards the charterers proved unable to fill the ship, and so to carry out their contract with the owner, and the ship accordingly did not sail. No bills of lading for the tea had been signed, and the captain refused to sign them unless they were expressly made subject to the charter-party. The owner claimed a lien on the tea, for the expenses incurred by him through his dealings with the charterers:—Held, that he had no such lien, the plaintiffs having had no notice of the charter-party, and there being nothing to

put them on their enquiry; and the tea was ordered to be given up to them, the intended carriage thereof having failed. *Peek v. Larsen*, 40 Law J. Rep. (n.s.) Chanc. 763; Law Rep. 12 Eq. 378.

12.—The defendants shipped goods on board a vessel, chartered by the plaintiffs on a voyage to a foreign port, under a bill of lading, which stated that the goods were to be landed at the expense and risk of the consignee. On the arrival at the port of destination there was no consignee ready to receive the goods, and the vessel was thereby detained there for a considerable time. An action for unliquidated damages for such detention was brought against the plaintiffs by the owners of the vessel, and the plaintiffs defended the action, after giving notice thereof to the defendants, who refused to have anything to do with it. The plaintiffs afterwards sought to recover from the defendants not only the sum awarded in that action for such detention, but also the costs incurred in defending it. At the trial the Judge left it to the jury to say whether it was reasonable in the present plaintiffs to have defended that action, and whether they defended it in a reasonable way. The Judge also told the jury that the captain would lose his lien for freight by landing the goods, as it did not appear that there was any warehouse at such foreign port similar to those under the English warehousing statutes. The jury having found for the plaintiffs for the amount claimed,—Held, that the question was rightly left to the jury as to the liability of the defendants to the costs of the action brought against the plaintiffs. Also, that the direction of the Judge that the captain could not land the goods without losing his lien for freight was wrong, as being too general in its terms, since he might land them and yet preserve his lien for freight if he kept them entirely within his own exclusive control. *Mors le Blanch v. Wilson*, 42 Law J. Rep. (n.s.) C. P. 70; Law Rep. 8 C. P. 227.

Quære—whether the captain would not lose such lien if the goods when landed were placed in the hands of an independent person, who would have a lien on his own behalf, even though he should undertake to the captain not to deliver the goods to the consignee without being paid the claim for freight. *Ibid.*

13.—The addition by the master to the bill of lading of the words “quantity and quality unknown” were held not to take away his right, under the charter-party, to be paid freight upon the invoiced quantity in the bill of lading. *Tully v. Terry*, 42 Law J. Rep. (n.s.) C. P. 240; Law Rep. 8 C. P. 670.

14.—It was provided by a charter-party that 250*l.*, part of the freight, should be advanced in cash on signing bills of lading and clearing at the Custom House, and that for the security and payment of all freight, dead freight, demurrage, and other charges, the master or owners should have an absolute lien and charge on the cargo. The ship was loaded and cleared at the Custom House, but the 250*l.* was not paid, and consequently the captain did not sign bills of lading, and the ship

never started on her voyage. The charterer having become insolvent, his trustee in liquidation gave notice to the owner that he disclaimed all interest under the charter-party. The owner claimed a lien on the cargo for the 250*l.* as freight, but it was held, affirming the decision of the Chief Judge in Bankruptcy, that the ship never having earned or commenced to earn freight, no lien arose. *Ex parte Nyholm; In re Child*, 43 Law J. Rep. (n.s.) Bankr. 21.

15.—When money for the carriage of goods by sea is payable at the port of destination, “ship lost or not lost,” and the ship is wrecked upon the voyage, the shipowner has no lien upon the goods, although the money to be paid for the carriage thereof is described as “freight” in the bills of lading. *Nelson v. The Association for the Protection of Commercial Interests as respects Wrecked and Damaged Property*, 43 Law J. Rep. (n.s.) C. P. 218.

Goods were shipped on board the plaintiffs' vessel to be carried to L. under bills of lading, whereby the “freight” was to be paid at L. “ship lost or not lost.” Upon the voyage the plaintiffs' vessel was totally wrecked, and they thereupon abandoned the adventure and took no steps to save either ship or cargo. The defendants, under the instructions of the underwriters, saved a portion of the goods mentioned in the bills of lading, and forwarded them to L. A dispute having arisen as to whether the plaintiffs were entitled to a lien for the “freight” mentioned in the bill of lading, a memorandum was drawn up between the plaintiffs and the defendants stating that the plaintiffs having claimed a lien “for the original freight” upon the goods saved “without allowance for the forwarding freight and expenses,” the defendants, “the owners of such cargo,” had agreed to deposit the amount of the plaintiffs' claim to abide the event of an action. A special case having been stated for the opinion of the Court,—Held, that upon the agreement the only question to be argued was whether the plaintiffs could lawfully claim a lien, that they were entitled to no lien, and that judgment must be given for the defendants. *Ibid.*

Quære—whether under the circumstances which had happened the plaintiffs were entitled to recover the amount of the “freight” from the parties to the bill of lading. *Ibid.*

#### (f) *Rights of mortgagee.*

[And see supra I 4.]

16.—The owner of a British ship assigned by deed all freight then or thereafter to be earned by her to A. as security for an advance. This assignment not being within the Merchant Shipping Acts, was not registered. The owner subsequently mortgaged the ship to B. without notice of A.'s rights. The mortgage to B. was duly registered. Freight subsequently became payable on the arrival of the ship at Marseilles by certain consignees there. Before the ship arrived at Marseilles B. took possession of her, and also gave notice of his rights to the consignees:—Held, that he was entitled to receive the freight. *Wil-*

*son v. Wilson*, 41 Law J. Rep. (N.S.) Chanc. 423; Law Rep. 14 Eq. 32.

Semble—B. would equally have been entitled to the freight, although he had not taken possession of the ship, so long as he gave notice of his rights to the consignees before they paid the money. *Ibid.*

Observations on the position of the registered mortgagee of a ship. *Lindsay v. Gibbs* (28 Law J. Rep. (N.S.) Chanc. 692) commented on. *Ibid.*

17.—A mortgagee of a ship, upon taking possession, becomes legally entitled to all freight which becomes due after taking such possession, in priority to mortgagees of the freight. Having such legal title, he is entitled, as against a mesne incumbrance of which he has notice, to tack a subsequent incumbrance on the freight. As between him and other mortgagees of the freight, any notice of this mesne incumbrance given to the charterers by the other mortgagees is immaterial. *The Liverpool Marine Credit Company v. Wilson*, 41 Law J. Rep. (N.S.) Chanc. 798; Law Rep. 7 Chanc. 507.

18.—Charterers of a ship made advances to the owner which were applied in ship's disbursements. The ship was in mortgage; before the freight became due under the charter-party, the mortgagee took possession:—Held, that the charterers had no right to deduct the advances from the freight payable to the mortgagee. *Tanner v. Phillips*, 42 Law J. Rep. (N.S.) Chanc. 125.

(g) *Derelict: cargo sold by order of Court.*

19.—A ship damaged by collision was abandoned by her crew, and afterwards saved and brought into a port in this country. The shipowner offered to take the cargo to Bremen, its destined port, but the Court ordered a sale here:—Held, that neither party was prejudiced by the sale, and that the contract between the shipowner and owner of cargo was put an end to by the abandonment, and that the shipowner was not entitled to any freight. *The Kathleen*, 43 Law J. Rep. (N.S.) Adm. 39; Law Rep. 4 Adm. & Ecc. 269.

(h) *Insurance.*

[See also I 1 supra.]

20.—Charter-party with following obligation on charterers, "sufficient cash for ship; ordinary disbursements to be advanced the master against freight, subject to interest, insurance, and 2½ per cent. commission, and the master to indorse the amount so advanced upon his bills of lading":—Held, that the charterer had the right to insure at the expense of the shipowner, and that having neglected to do so he had no claim for repayment on the occasion of the total loss of the ship. *Watson & Co. v. Shankland*, Law Rep. 2 Sc. App. 304.

Meaning of term "freight." [See MARINE INSURANCE, 20, 21.]

Insurance on chartered freight: loss of freight where no total loss of ship. [See MARINE INSURANCE, 12.]

(K) FOREIGN SHIP.

1.—A German master of a German ship chartered by German charterers signed bills of lading which were in the English language, and stipulated for payment of freight in English money by English consignees of goods to be carried to a German port:—Held, that the contract must be construed by reference to the following rules—

1. That the rights and obligations of the parties are to be determined by the law which they have declared themselves to intend.

2. That where there is no express declaration of intention, the presumption as to the law contemplated must be gathered from the circumstances of the case.

3. That where the contract is plain in its language, that language must receive the ordinary and natural construction, and does not admit the introduction of a law *dehors* the contract.

4. That the contract must be executed according to its terms, or abandoned, with due compensation to the party injured, unless supervening unforeseen circumstances have rendered the execution legally impossible.

5. That the happening of such circumstances may justify a reasonable delay in the execution of the contract though not an abandonment of it. *The Patria*, 41 Law J. Rep. (N.S.) Adm. 23.

The master signed bills of lading to deliver at Hamburg, "dangers of the seas excepted":—Held, that though the charter-party contained other exceptions, the master was the agent of the owner, as well as the charterer, and that, therefore, the terms of the bill of lading were binding. *Ibid.*

The ship arrived at Falmouth on the 23rd of August, during the war between France and Germany. Hamburg was blockaded till the 18th of September. The consignees offered to take their cargo at Falmouth and pay full freight, but were refused. The suit was commenced on the 1st of November:—Held, that whether the contract should be construed according to the general maritime law, or English, or German law, the master was bound to have delivered the cargo at Hamburg or Falmouth. *Ibid.*

2.—The master of a German ship while at Constantinople, by a charter-party, partly in English and partly in German, and entered into with Germans, chartered his ship to take a cargo from Taganrog to England, Havre, or Hamburg:—Held, that the contract must be construed according to German law. *The Express*, 41 Law J. Rep. (N.S.) Adm. 79; Law Rep. 3 Adm. & Ecc. 597.

Detention of the vessel at Gibraltar from the 18th of August, 1870, to the 2nd of February, 1871, during the war between France and Germany, held under the circumstances to be justifiable. *Ibid.*

By German law, if a vessel is liable to risk of capture, either party may withdraw from the contract of affreightment, but the master is not obliged to part with the cargo or to tranship, unless distance freight, as well as all other claims of the shipowner and the contributions due from the cargo for general average, &c., have been paid

or secured:—Held, that a demand upon the master to tranship at his own risk and expense, was not such a compliance with the German law as obliged him to tranship. *Ibid*.

3.—A German ship while in a German port, was chartered by a charter-party in the English language by English charterers, and the ports of call for orders and of final delivery of cargo were English. On a question of delay in delivery of cargo,—Held, that the contract must be governed by English law. *The San Roman*, 41 Law J. Rep. (n.s.) Adm. 72; Law Rep. 3 Adm. & Ecc. 583.

The excepted perils mentioned in the charter-party were more numerous than those in the bill of lading:—Held, that, under the circumstances, both instruments together contained the contract. *Ibid*.

The S. R., a German ship with an English cargo, being in need of repairs, put into V. in the month of August, and then ascertained the existence of the war between France and Germany. The repairs were completed on the 21st of September, but the master, under the advice of his consul, did not set sail till the 23rd of December:—Held, that under the circumstances, the risk of capture was such that the delay was justifiable. *Ibid*.

According to both English and German law, an apprehension of capture, founded upon circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, would justify delay. *Ibid*.

#### (L) GENERAL AVERAGE.

A sailing ship sailed from Melbourne, bound for London, properly fitted and manned, and seaworthy for the voyage, with coal enough for an ordinary voyage. She had on board, as is usual for such ships on that voyage, a donkey engine equivalent, for the purposes of pumping and working the ship, to ten men. Without the engine ten more men would have been required. On the voyage severe weather caused the ship to spring a leak, which could only be kept down by constantly working the engine at the pumps. When the engine had thus consumed all the coal except one and a half ton, the captain, acting prudently for the preservation of the ship, cut up and used with the coal some spare spars and wood, part of the ship's stores, not intended to be used as fuel. There was no sudden emergency which rendered the cutting up of the spars and wood necessary, and the ship was exposed to no serious risk from the water she made while there was sufficient fuel on board to work the engine, but it would have been impossible to have kept the ship afloat with the crew alone without working the engine. The captain afterwards bought coal from another vessel, and also in a port into which he ran for that purpose, just enough coal to enable the vessel to reach London in safety. Without the aid of the engine the vessel could not have continued her voyage. The shipowner having sued a shipper of cargo for a general average contribution in respect of the cost of the spare spars and wood, and also of the bought coal,—Held, first, that the cost of the bought coal could not be charged to general

average. Secondly (per Kelly, C.B., and Bramwell, B., *dissentientibus* Martin, B., and Cleasby, B.), that the cost of the spars and wood could be charged to general average. *Harrison v. The Bank of Australasia*, 41 Law J. Rep. (n.s.) Exch. 36; Law Rep. 7 Exch. 39.

[See MARINE INSURANCE, 40-43.]

#### (M) MASTER.

##### (a) Authority.

1.—The master of a ship has no power to pledge the owner's credit for requisite supplies to her in a foreign port at which a solvent agent for her has been appointed; and a ship-chandler who, in ignorance of there being an agent at the port, furnishes goods or advances money for the ship's use upon an order given by the master without the owner's authority, cannot recover the price of the goods or the amount of the loan from the owner, if at the time of supplying the goods or advancing the money he had the means of knowing that an agent able and willing to furnish what was requisite for the ship had been appointed by the owner to act at the foreign port. *Gunn v. Roberts*, 43 Law J. Rep. (n.s.) C.P. 233; Law Rep. 9 C.P. 331.

Quære—whether a merchant, who being in “invincible ignorance” of the appointment of an agent, furnishes requisite supplies to a ship upon an order given by the master without the owner's sanction, can recover the price thereof from the owner. *Semble*—that he cannot. *Ibid*.

2.—In order to justify a master in selling the goods of an absent owner, he must establish—first, a necessity for the sale, and secondly, an inability to communicate with the owner, so as to obtain an answer before the sale. There is a necessity for the sale if it is the best and most prudent thing to do in the interest of the owner. *The Australian Steam Navigation Company v. Morse*, Law Rep. 4 P.C. 222.

3.—The master of a stranded or damaged vessel may sell her, so as to affect the insurers only in a case of stringent necessity. The necessity must be such as would leave no alternative to a skilful and prudent man acting for the best interests of all. *The Cobequid Marine Insurance Company v. Barteaux*, Law Rep. 6 P.C. 319.

4.—When a ship is sub-chartered the Court generally will not conclude that the master has signed as agent for the sub-charterers, unless he signs in terms as agent for them, or gives notice of the sub-charter. *The Emilian Marie*, 44 Law J. Rep. (n.s.) Adm. 9.

*As to authority of master to give bottomry bond, and his liabilities and rights as affected thereby.* [See *supra* (C) BOTTOMRY.]

##### (b) Duty of, to check damages caused to goods by excepted perils.

5.—There is a duty upon the master of a ship, as representing the owners, to take active measures to check and arrest the injurious consequences of damage done to the cargo by perils

excepted in the bill of lading. *Notara v. Henderson* (Exch. Ch.), 41 Law J. Rep. (N.S.) Q. B. 158; Law Rep. 7 Q. B. 225.

In an action by a shipper against a shipowner it appeared that beans were shipped under a bill of lading, containing the usual exception of perils of the sea (including collision). The vessel sustained damage by collision, and put into a port for repairs. The beans having become wetted by salt water the shippers, through their agent, offered to receive the cargo, and pay *pro rata* freight. The master refused to deliver the cargo, except upon receipt of the whole freight, and proceeded with his vessel to the port of discharge. Upon its arrival it was found that the damage to the beans by the collision had been materially enhanced by their detention on board after they had been saturated with salt water. The increased damage would have been avoided if the beans had been unshipped, dried and re-shipped at the port of refuge, the cost of which might have been charged to the cargo as particular average:—Held, affirming the judgment of the Court of Queen's Bench (39 Law J. Rep. (N.S.) Q. B. 167; Law Rep. 5 Q. B. 346), that assuming that the precautions above mentioned would not have unreasonably delayed the voyage, the defendant was liable for the additional damage to the plaintiff. *Ibid.*

(c) *Wages.*

[See supra (C) BOTTOMRY.]

(N) MEASUREMENT OF TONNAGE.

Where there was a covering or awning over the main deck of a ship, open at the sides, and unfit for the carriage of cargo, passengers or crew:—Held (affirming a decision of the Court of Session of Scotland), that tonnage was not chargeable in respect of such covering or awning as if it were a third deck. *The Lord Advocate v. The Clyde Steam Navigation Company*, Law Rep. 2 Sc. App. 409.

(O) MORTGAGE AND LIEN.

(a) *Lien for freight.*

[See supra I 11–15.]

(b) *Priority: solicitor's lien, &c.*

1.—The freight and proceeds of sale of a ship were insufficient to pay the following claims:—first, solicitor's costs of successfully defending the ship in the first action—for breach of contract; second, necessities supplied before and after the first suit; third, money advanced to pay harbour dues, &c.; fourth, wages of master, also part-owner:—Held, that the solicitor's lien had priority to the necessities supplied after, but not to those furnished before, the institution of the first suit, and to the claim for wages, but not to the claim for moneys advanced for harbour dues, &c. *The Heinrich*, 41 Law J. Rep. (N.S.) Adm. 68; Law Rep. 3 Adm. & Ecc. 505.

(c) *Ship "carried into any port."*

2.—The Admiralty Court Act, 1861, by section 6 provides "that the High Court of Admiralty

Digest, 1870–1875.

shall have jurisdiction over any claim by any owner, &c., of any goods carried into any port in England or Wales, in any ship, for damage done to the goods, &c., by the negligence, &c., on the part of the owner, &c."—Held, that this Act does not confer a maritime lien. *Daputo v. Wyllie. "The Pieve-Superieure"* (P. C.), 43 Law J. Rep. (N.S.) Adm. 20; Law Rep. 5 P. C. 482.

A ship under charter to proceed to certain ports in England, for orders to discharge at a port in England or on the Continent, entered Falmouth with her cargo for orders, and was ordered to discharge at Bremen, where she did discharge her cargo. She then sailed for Cardiff, where she was arrested by process of the Admiralty Court:—Held (affirming the decision below, 43 Law J. Rep. (N.S.) Adm. 1; Law Rep. 4 Adm. & Ecc. 170), that, inasmuch as the cargo was deliverable at a port in England, and as the ship with her cargo had entered such a port for orders, the cargo had been "carried into a port" in England within the meaning of the above section. *Ibid.*

(d) *Mortgage: possession.*

3.—G., sole owner, mortgaged a ship to B, and died intestate and insolvent. B., under the power of sale, sold to W., but by mistake endorsed upon the original mortgage a discharge, which was recorded at the Custom House. Subsequently, the registrar refused to register W.'s bill of sale, as the property in the ship appeared by the papers to be in G.'s representatives. The Court, without requiring administration to G., ordered possession of the ship to be given to W. *The Rose*, 42 Law J. Rep. (N.S.) Adm. 11; Law Rep. 4 Adm. & Ecc. 6.

(e) *Rights of mortgagee to freight.*

[See supra I 16–18.]

(P) NECESSARIES.

1.—A transferee of a mortgage of a ship, though the transfer has not been registered, may intervene in a suit against the ship for necessities. *The Two Ellens*, 40 Law J. Rep. (N.S.) Adm. 11; Law Rep. 3 Adm. & Ecc. 345.

A person who has supplied in this country necessities to a British colonial ship, has not a maritime lien against the ship. *Ibid.*

The plaintiffs, without the knowledge or sanction of the mortgagee, supplied necessities to a vessel which was then mortgaged:—Held, that the mortgage must take precedence of the claim for necessities. *Ibid.*

2.—There is no distinction between necessities for the ship and necessities for the voyage. "Whatever is fit and proper for the service upon which a ship is engaged, whatever the owner as a prudent man would, if present, have ordered as fit and proper for such service, comes within the meaning of the term necessities." Moneys paid for insurance of freight and charges for brokerage are necessities. *The Riga*, 41 Law J. Rep. (N.S.) Adm. 39; Law Rep. 3 Adm. & Ecc. 516.

3.—The Admiralty Court Act, 1861, by section 5, does not create a maritime lien for necessities

at the time the necessities are supplied, and a ship does not become chargeable with a debt for necessities until a suit is actually instituted. All valid charges on the ship to which any person other than the owner is liable are entitled to take precedence of such debt. *Johnson v. Black; The Two Ellens* (P.C.) 41 Law J. Rep. (N.S.) Adm. 33; Law Rep. 4 P. C. 161.

*As to order in priority of lien for necessities.* [See supra O 1.]

#### (Q) OFFENCES.

[See FOREIGN ENLISTMENT ACT.]

#### (R) PILOTAGE.

##### (a) When compulsory.

1.—The Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. 92), by section 139, provides that, "In case the master of any vessel being outward bound, &c., shall proceed to sea, and shall refuse to take on board or to employ a pilot, he shall pay to the pilot who shall first offer himself to pilot the same the full pilotage rate that would have been payable for such vessel if such pilot had actually piloted the same into or out, as the case may be, of the said port of Liverpool." The ship C, being outward bound, left the docks at night in charge of a pilot, and proceeded into the river Mersey, where she was anchored for the night, in order that she might proceed on her voyage on the following morning. During the night she collided another ship through the fault of her pilot:—Held (affirming the judgment below, 43 Law J. Rep. (N.S.) Adm. 6; Law Rep. 4 Adm. & Ecc. 161), that the ship C was "proceeding to sea" within the meaning of the above section, and that her owners were exempt from liability by reason of the provisions of 17 & 18 Vict. c. 104, s. 388. *Wood v. Smith; The City of Camuridge* (P.C.), 43 Law J. Rep. (N.S.) Adm. 72; Law Rep. 5 P. C. 451.

2.—When a statute inflicts a penalty for not doing an act, the penalty implies that there is a legal compulsion to do the act, and this principle is not affected by the fact that the penalty has a particular destination. *Redpath v. Allen; The Hibernian* (P.C.), 42 Law J. Rep. (N.S.) Adm. 8; Law Rep. 4 P. C. 511.

The 27 & 28 Vict. c. 13 (Canadian Statute), by section 14 provides that "no owner or master of any ship shall be answerable to any person whatever, for any loss or damage occasioned by the fault or incapacity of any qualified pilot, acting in charge of such ship, within any place where the employment of such pilot is compulsory by law." The 27 & 28 Vict. c. 58 (Canadian Statute), by section 10, provides that "the master or person in charge of each vessel over 125 tons, leaving the port of Montreal for a port out of this Province, shall take on board a branch pilot, for and above the harbour of Quebec, to conduct such vessel, under a penalty equal in amount to the pilotage of such vessel:—Held, first, that these statutes are of binding authority in every case to which they are applicable, as well in the Vice-

Admiralty Court of Canada, as in the High Court of Admiralty, and on appeal; secondly, that the two statutes are to be read and construed together, as being *in pari materia*, and that the owner of a ship navigating Canadian waters, under the direction of a pilot, in compliance with the provisions of the above statutes, is exonerated from liability for damage caused in consequence of the orders of the pilot. *Ibid.*

3.—By the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 370, Trinity House Out-port Districts comprise any pilotage district, for the appointment of pilots within which no particular provision is made by any Act of Parliament or Charter. By 6 Geo. 4. c. 125, s. 5, the Corporation of Trinity House are required to appoint, as sub-commissioners to examine pilots, "proper and competent persons at such ports or places in England as they may think requisite," and the section describes the number to be appointed and their duties. The Ipswich Dock Act, 1852 (15 Vict. c. cxvi.), s. 3, repeals a former Act by which special provisions were made for the appointment of examiners, and by section 91 enacts that it shall be lawful for the Corporation of Trinity House to appoint "proper and competent persons resident within the port of Ipswich" to act as commissioners. In all other respects the powers given by the local Act with regard to appointment of pilots are identical with those given by the general Act:—Held, that the provisions of the local Act were not "particular provisions" within section 370 of the Merchant Shipping Act, 1854, and the port of Ipswich was therefore a Trinity House Out-port District. *Hadgraft v. Hewith*, 44 Law J. Rep. (N.S.) M. C. 140; Law Rep. 10 Q. B. 350.

##### (b) Liability of pilot.

4.—As between a shipowner and a pilot whom he is compelled to employ, there is no implied contract that the pilot shall take upon himself the risk of injury from negligence of the shipowner's servant. The ordinary rule exempting a master from liability to his servant for injury from his fellow servant employed with him for a common object does not apply in such a case. *Smith v. Steele*, 44 Law J. Rep. (N.S.) Q. B. 60; Law Rep. 10 Q. B. 125.

#### (S) POLICY OF INSURANCE.

[See MARINE INSURANCE.]

#### (T) SALVAGE.

##### (a) Salvage agreement.

1.—An agreement by the officers of a ship belonging to the Bombay Government to render salvage upon being paid half the nett value of the property saved by them is, under the circumstances, not so inequitable as to require the Court to modify or set it aside. *The Cargo ex Woosung*, 44 Law J. Rep. (N.S.) Adm. 45.

2.—The master of the L. agreed for 400*l.* to tow the W. into Lisbon, about twenty-five miles. The weather, which was bad at the time of the



agreement, subsequently became worse, and much difficulty was experienced in performing the salvage. In a suit for salvage, the owners of the *W.* tendered the sum of 400*l.* the amount agreed upon for salvage, and 123*l.* 11*s.* 8*d.* for quarantine expenses and consequent detention of the *L.* :—Held, that the agreement was equitable at the time when it was made, and was therefore valid notwithstanding the subsequent circumstances. *The Waverley*, 40 Law J. Rep. (N.S.) Adm. 42; Law Rep. 3 Adm. & Ecc. 369.

Held, also, that the agreement was not affected by the tender of the amount of the extra expenses. Tender pronounced for, with costs from the time of making the tender. *Ibid.*

(b) *Towage.*

3.—To convert towage into salvage there must supervene an element of serious danger, not in contemplation when the contract for towage was made. And whether towage has become salvage depends upon whether circumstances have arisen which would justify the tug in abandoning the contract to tow. *The J. C. Potter*, 40 Law J. Rep. (N.S.) Adm. 9; Law Rep. 3 Adm. & Ecc. 292.

A steam-tug took a ship in tow, under an agreement to tow her to Liverpool for 45*l.* The weather was then moderate, but afterwards increased to a heavy gale. The steam-tug never let go the ship's hawser, and, after much danger to both ship and steam-tug, brought the ship to Liverpool :—Held, that a service had been performed beyond the scope of the agreement to tow, and that the tug and her crew were entitled to salvage. *Ibid.*

(c) *Who may be salvors.*

4.—Although seamen cannot recover salvage remuneration for services which by their contract they are bound to perform, yet when salvage services are performed by one ship to another, and both ships belong to the same owner, the crew of the ship which has performed the salvage service is entitled to salvage remuneration, provided such service is rendered as a moral duty, and not by reason of any contract with their owner. *The Owners of the Steamship Sappho v. Denton*, 40 Law J. Rep. (N.S.) Adm. 47; Law Rep. 3 P.C. 690.

5.—Under ordinary circumstances the crew of a salvaged vessel cannot claim as salvors against their own ship, but they may be so placed by the acts of their master that their contract with the ship is at an end. They would then, if they performed salvage services, be entitled to salvage reward. *The Lejonet*, 41 Law J. Rep. (N.S.) Adm. 95; Law Rep. 3 Adm. & Ecc. 556.

The bark *L.* was so damaged by collision that her master, and all the crew but the mate, got on board the ship that did the damage. The mate remained alone, and the bark was saved by his services and those of the steamship *C.* and her crew :—Held, that the mate would be entitled to salvage. *Ibid.*

6.—The exceptions to the general rule that a pilot cannot claim as a salvor, ought to be few and well defined. The services of a pilot cannot

easily be converted into those of a salvor. The same rule of law applies to a licensed waterman when acting as a pilot. *The Æolus*, 42 Law J. Rep. (N.S.) Adm. 14; Law Rep. 4 Adm. & Ecc. 29.

(d) *Right to salvage reward.*

7.—Two suits afterwards consolidated were brought, one by the owner and the other by the charterer of the salving ship, for salvage to a ship also chartered to the same charterer :—Held, that as under the terms of the charter-party the charterer of the salving ship was for the time being the owner, he, and not the owner, was entitled to institute the suit. Also, that the right to salvage was not affected by the fact, that both the salving ship and the ship to which the services were rendered were chartered to the same person. *The Scout*, 41 Law J. Rep. (N.S.) Adm. 42; Law Rep. 3 Adm. & Ecc. 512.

8.—The owners of a ship cannot recover salvage reward for services rendered necessary by the misconduct of those on board of her. *The Glengaber*, 41 Law J. Rep. (N.S.) Adm. 84; Law Rep. 3 Adm. & Ecc. 534.

The owners of a ship are not disentitled to salvage merely because they are also owners of the ship that caused the mischief. *Ibid.*

9.—The owner, master and crew of a vessel, which sent two of its men on board a brig which was in distress for want of hands, —Held, entitled to share in salvage reward, the vessel having been exposed to danger through want of the two men, and the rest of the crew having had to do extra work. *The Charles*, Law Rep. 3 Adm. & Ecc. 536.

10.—The ship *R.* rendered salvage services to the ship *M.* and her cargo. Both ships belonged to the same owner :—Held, that the owners of the *R.* were nevertheless entitled to salvage reward from the owners of cargo. *The Miranda*, 41 Law J. Rep. (N.S.) Adm. 82; Law Rep. 3 Adm. & Ecc. 561.

(e) *Distribution of salvage reward.*

11.—A transport ship hired by Government, and performing, by the orders of the officer of a Queen's ship, salvage services not within the terms of the charter-party, is entitled to a share of the amount awarded as salvage. *The Nile*, 44 Law J. Rep. (N.S.) Adm. 38; Law Rep. 4 Adm. & Ecc. 449.

An officer of a Queen's ship, by whose orders some of his crew and a transport ship effected salvage, is entitled to a share of the award. *Ibid.*

(f) *Life salvage.*

12.—A ship having been damaged by collision, ten of her crew, without orders from the master, got into one of the ship's boats, and left the ship, and were afterwards saved by a fishing smack and crew :—Held, that the owners of the smack and her crew were entitled to claim for life salvage. *The Cairo*, 43 Law J. Rep. (N.S.) Adm. 33; Law Rep. 4 Adm. & Ecc. 184.

13.—The wearing apparel and other personal articles of passengers are privileged from arrest in a salvage suit. Where lives were saved by a

foreign vessel without British waters, and the persons were thence transferred at their request to another vessel by which they were conveyed within British waters and to a British port:—Held, that this was not a salvage of life by a foreign ship or boat, “where the services had been rendered wholly or in part in British waters” within the meaning of section 9 of the Admiralty Court Act, 1861. *The Willem III.*, Law Rep. 3 Adm. & Ecc. 487.

14.—A ship was wrecked in the Red Sea, off an island which was uninhabited and without water. The C. took the passengers and crew on board, and brought them to England:—Held, that the service was not life-salvage. *The Cargo ex Woosung*, 44 Law J. Rep. (n.s.) Adm. 45.

(g) *Wreck: what is.*

15.—Salvors found a barge with no one on board in Blackwall Reach, and moored her at Northumberland Wharf:—Held, that she was not wreck within the terms of the 450th section of the Merchant Shipping Act, 1854. *The Zeta*, 44 Law J. Rep. (n.s.) Adm. 22; Law Rep. 4 Adm. & Ecc. 460.

(h) *Liability of salvaging ship for damage.*

16.—In rendering salvage services the salvor's ship came into collision with the other ship. The salvors subsequently completed the salvage:—Held, that the collision was caused by the gross negligence of the salvors, and that the salvors' ship was therefore liable for the damage; but that the salvors were nevertheless entitled to salvage. *The C. S. Butler*; *The Baltic*, 43 Law J. Rep. (n.s.) Adm. 17; Law Rep. 4 Adm. & Ecc. 178.

*Jurisdiction of Court of Admiralty.* [See ADMIRALTY, 19, 20.]  
*Practice and procedure.* [See ADMIRALTY, 22, 39–44.]

(U) SEAMAN'S SERVICE.

*Naval service: Foreign Enlistment Act.*  
[See FOREIGN ENLISTMENT ACT.]

(V) WAGES.

1.—Against an insufficient fund the master also part-owner, claimed for his wages and disbursements, and material men for necessities:—Held, that the claim of the material men was entitled to priority. *The Jenny Lind*, 41 Law J. Rep. (n.s.) Adm. 63; Law Rep. 3 Adm. & Ecc. 529.

2.—The arrest of a ship in a cause of wages, after the company to which the ship belonged was ordered to be wound up.—Held, a sequestration within the meaning of the 163rd section of the Companies Act, 1862, and consequently void. *In re the Australian Direct Steam Navigation Company*; *Ex parte Baker*, 44 Law J. Rep. (n.s.) Chanc. 676; Law Rep. 20 Eq. 525.

*Pleading in suit for wages.* [See ADMIRALTY, 24.]

SHORE.

[See FORESHORE.]

SIMONY.

[See CHURCH AND CLERGY, 5.]

SLANDER.

1.—It is not actionable to say of a stonemason that he is the ringleader of the nine hours' system, and that he has ruined a town by bringing about the nine hours' system, and he has stopped several good jobs from being carried out by being the ringleader of the nine hours' system; nor is it material that the person alluded to has suffered special damage, if such damage is not intended as a consequence when the words are uttered. *Miller v. David*, 43 Law J. Rep. (n.s.) C. P. 84; Law Rep. 9 C. P. 118.

2.—Declaration, by husband and wife, for maliciously speaking and publishing of the female plaintiff the words following: “I can prove that J. D.'s wife (the female plaintiff) had connection with a man named L. two years ago, but I would rather have the tongue cut out of my mouth than separate man and wife.” Special damage, that the female plaintiff was thereby injured in her character and reputation, and became alienated from, and deprived of, the cohabitation of her husband, and lost, and was deprived of, the companionship, and ceased to receive the hospitality, of divers friends, and especially of her husband, and that D., T. and M. had, by reason of the premises, withdrawn from the companionship of, and ceased to be hospitable to, or be friendly with, the female plaintiff:—Held, on demurrer, first, that the loss of the hospitality of friends was a sufficient special damage to make the slander actionable; secondly, that the wife was properly joined in the action. *Davies v. Solomon*, 41 Law J. Rep. (n.s.) Q. B. 10; Law Rep. 7 Q. B. 112.

*Pleading in action for malicious prosecution and slander.* [See MALICIOUS PROSECUTION, 1.]

SLAUGHTER HOUSES.

[See TOWNS POLICE ACT, 3.]

SMOKE.

(See NUISANCE, 3–5.)

SOLICITOR.

[See ATTORNEY.]

## SPECIAL CASE.

[See PRACTICE IN EQUITY, 132-136.]

## SPECIAL CONSTABLE.

Under 1 & 2 Will. 4. c. 41, justices of the peace may appoint special constables, if it is made to appear to them upon oath of any credible witness that a tumult or riot may be reasonably apprehended, and if they are of opinion that the ordinary officers appointed for preserving the peace are not sufficient. Under 1 & 2 Vict. c. 80, justices are empowered, upon being satisfied upon the oaths of the three credible witnesses, that the appointment of such special constables was occasioned by the behaviour, and reasonable apprehension of the behaviour, of persons employed upon railway works, to make an order for the payment of such special constables upon the treasurer or other officer having the control of the funds of any company carrying on such works:—Held, that before such last-mentioned order is made an opportunity must be afforded to the persons upon whom it is proposed to be made to be heard against it. *The Queen v. The Cheshire Lines Committee*, 42 Law J. Rep. (N.S.) M. C. 100; Law Rep. 8 Q. B. 344.

## SPECIFIC APPROPRIATION.

*As between principal, surety and creditor: appropriation of payment by creditor: presumption of payment by principal debtor.* [See PRINCIPAL AND SURETY, 15-19.]

*Of bills, &c., in hands of bankers to answer acceptances.* [See BANKER, 12, 13.]

*Of remittances to cover bills.* [See BILL OF EXCHANGE, 23-27.]

[And see ESTOPPEL, 11.]

## SPECIAL DAMAGE.

[See DAMAGES, 23; NUISANCE, 2; SLANDER, 2; TROVER, 8.]

## SPECIFIC PERFORMANCE.

## (A) WHAT AGREEMENTS WILL AND WILL NOT BE ENFORCED.

## (a) Uncertainty.

(1) *Reservation of "necessary land for making a railway."*

(2) *Agreement to build railway station.*

(b) *Agreement to make railway siding.*

(c) *Agreement to alter ship: whole contract not enforceable.*

(d) *Money demand: incomplete contract.*

(e) *Public-house: license in name of dead man.*

(f) *Agreement to execute mortgage.*

(g) *Agreement varied by parol stipulation.*

(h) *Agreement for lease: part performance.*

(i) *Agreement for compromise.*

(k) *Death of arbitrator.*

(l) *Agreement to transfer shares.*

(m) *Foreign contract.*

(n) *Rights of sub-contractor under one of two concurrent contracts.*

(o) *In general.*

## (B) GROUNDS FOR REFUSING SPECIFIC PERFORMANCE.

(a) *Misrepresentation and concealment.*

(b) *Misdescription.*

(c) *Doubtful title.*

(d) *Voluntary settlement by vendor.*

(e) *No title as to moiety.*

## (C) RIGHT TO SPECIFIC PERFORMANCE WITH ABATEMENT.

## (D) PRACTICE.

(a) *Reference as to title.*

(b) *Sale of fixtures: mandatory order.*

(c) *Declaration as to voluntary settlement.*

(d) *Abandoning defendant.*

(1) *Rescission of contract after decree.*

(2) *Vesting order.*

(e) *Costs.*

## (A) WHAT AGREEMENTS WILL AND WILL NOT BE ENFORCED.

## (a) Uncertainty.

## (1) Reservation of "necessary land for making a railway."

1.—By a contract T. Watts agreed to sell an estate to a purchaser with the following reservation—T. Watts "reserves the necessary land for making a railway through the estate to Prince Town:—Held, on suit for specific performance by the purchaser, that the contract was too uncertain for the Court to make a decree for specific performance of it. The vendor might have raised the defence by demurrer, which he had not done. But held, that, notwithstanding, he was entitled to full costs, and the bill was dismissed with costs. *Pearce v. Watts*, 44 Law J. Rep. (N.S.) Chanc. 492; Law Rep. 20 Eq. 492.

## (2) Agreement to build railway station.

2.—A contract entered into by a railway company with a landowner to build a railway station at a particular spot, nothing being said as to the user of the station, or the degree of convenience and accommodation to be afforded by it, is too vague and indefinite to be enforced by decree for specific performance; but the Court will give damages for the breach of such contract, and in assessing those damages will give the landowner the benefit of all such presumptions as, according to the rules of law, are made against wrongdoers. *Wilson v. The Northampton and Banbury Junction Railway Company*, 43 Law J. Rep. (N.S.) Chanc. 503; Law Rep. 9 Chanc. 279.

*(b) Agreement to make railway siding.*

3.—A railway company having contracted to make a siding for the plaintiff on the plaintiff's land, specific performance of the agreement was decreed. *Greene v. The West Cheshire Railway Company*, 41 Law J. Rep. (n.s.) Chanc. 17; Law Rep. 13 Eq. 44.

*(c) Agreement to alter ship: whole contract not enforceable.*

4.—A firm of ship-builders having agreed to make certain alterations in the plaintiff's ship, or in case of their default to allow the plaintiff to enter upon their dockyard with workmen and use it and the machinery in making the alterations, took the ship into the dockyard, cut it in two, and then became bankrupt. The defendant (their trustee in bankruptcy) being about to sell the dockyard, a bill was filed praying for an injunction to restrain him from dealing therewith so as to interfere with the plaintiff's right to enter and make the alterations:—Held, on demurrer, that as the Court could not enforce the performance of the whole agreement, it would not interfere. Also that the Court of Chancery had concurrent jurisdiction. *The Merchants' Trading Company v. Banner*, 40 Law J. Rep. (n.s.) Chanc. 515; Law Rep. 12 Eq. 18.

*(d) Money demand: incomplete contract.*

5.—The Court will not entertain a bill for specific performance of a contract to pay a sum of money, either on the ground of part performance, or on the ground that for want of formality the contract is not enforceable at law, nor in such a case can the Court give damages in lieu of specific performance under the 21 & 22 Vict. c. 27. *Crampton v. The Varna Railway Company*, 41 Law J. Rep. (n.s.) Chanc. 817; Law Rep. 7 Chanc. 562.

By the constitution of the V. Railway Company all contracts above the value of 500*l.* were required to be under seal. By an agreement not under seal made between the duly authorised agent of the company and the contractor for the line, it was agreed that if the contractor would erect and leave upon the company's land substantial cottages, the company would pay him a rent of 500*l.* or a lump sum of 5,000*l.* at their option. The contractor having performed his part of the agreement, filed his bill against the company for payment of the money or for damages in lieu of specific performance, alleging that for want of a seal the contract was not enforceable at law. Demurrer allowed, affirming the decision of the Master of the Rolls. *Ibid.*

*(e) Public-house: license in name of dead man.*

6.—G. R., the owner and licensee of an inn, died on the 13th of July, 1870, having devised the inn to the plaintiffs on trust for sale. His license expired on the 10th of October in the same year. On the 26th of August, 1870, at the annual general licensing meeting, the plaintiffs procured a new license in the testator's name. On the 12th

of October they contracted to sell the inn to the defendant. On the 16th of November the meeting took place to effect the change, but the defendant then objected that the plaintiffs could not transfer the license to him, and refused to complete:—Held (reversing the decision of the Master of the Rolls, 40 Law J. Rep. (n.s.) Chanc. 492), that the license taken out in the name of a dead man was invalid, and, therefore, that the plaintiffs being unable on the 16th of November to transfer a valid license under which the business could be lawfully carried on, could not enforce the contract against the purchaser. *Day v. Luhke* (37 Law J. Rep. (n.s.) Chanc. 330; Law Rep. 5 Eq. 336) approved of. *Cowles v. Gale*, 41 Law J. Rep. (n.s.) Chanc. 14; Law Rep. 7 Chanc. 12.

*(f) Agreement to execute mortgage.*

7.—The Court will decree specific performance of an agreement to execute a mortgage with immediate power of sale. *Herman v. Hodges*, 43 Law J. Rep. (n.s.) Chanc. 192; Law Rep. 16 Eq. 18.

8.—If money has been actually advanced to a mortgagor on the faith of his agreement to execute a mortgage, the Court will compel him specifically to perform his contract. *Ashton v. Corrigan*, 41 Law J. Rep. (n.s.) Chanc. 96; Law Rep. 13 Eq. 76.

*(g) Agreement varied by parol stipulation.*

9.—G. T. agreed in writing to take an underlease of two houses, subject to existing tenancies, the covenants to be similar to those in the original lease. G. T. died before the underlease was executed, but there was some evidence to shew that he had seen and approved of the draft of the underlease which contained a covenant, not in the original lease, against carrying on the business of a grocer in either of the houses. The tenant of one of the houses had an agreement for a lease to contain the restrictive covenant. On bill filed against G. T.'s administrator for specific performance of the agreement, and a declaration that G. T. had accepted the underlease in the form of the draft,—Held, that the administrator could not be compelled to accept an underlease containing the restrictive covenant. *Snelling v. Thomas*, 43 Law J. Rep. (n.s.) Chanc. 596; Law Rep. 17 Eq. 303.

*(h) Agreement for lease: part performance.*

10.—W. being in possession of premises under an old lease agreed to take a new lease of the premises at the same rent, and to pay a premium of 600*l.*, and if the premium was not paid on the day fixed for completion, to pay interest on the amount at five per cent. W. retained possession of the premises and continued to pay the rent, and a draft lease was drawn and sent to him for approval but never returned, and nothing more was done in the matter. The lessor died fifteen years after, and her surviving executor filed his bill of specific performance and payment of the premiums and interest:—Held, that the plaintiff was entitled to a decree for specific performance,

and to payment of the premium with interest from the date of the agreement, and to the costs of the suit. *Shepherd v. Walker*, 44 Law J. Rep. (N.S.) Chanc. 648; Law Rep. 20 Eq. 659.

(i) *Agreement for compromise.*

11.—Upon an interlocutory application by the defendant in a suit for redemption of a mortgage, an order was made by one of the Vice-Chancellors that the plaintiff should specifically perform an agreement for the compromise of the suit upon terms which could not have been enforced in the suit, or in default that the bill should be dismissed. But on appeal it was held, that the Court had no jurisdiction to make the order. *Pryer v. Gribble*, 44 Law J. Rep. (N.S.) Chanc. 676; Law Rep. 10 Chanc. 535.

(k) *Death of arbitrator.*

12.—A contract for sale of land to a railway company provided that certain specified roads should be provided by the company. This original contract was varied by an agreement, which provided that an estimate of the cost of making one of the roads should be made by A., agent of one party, and submitted to B., agent of the other, for approval and in case of difference the amount settled by C., and that the company should pay the price to the landowner. B. died before A. submitted any estimate. Specific performance of the original contract was decreed at the suit of the landowner. *Firth v. The Midland Railway Company*, 44 Law J. Rep. (N.S.) Chanc. 313; Law Rep. 20 Eq. 100.

(l) *Agreement to transfer shares.*

13.—The Court has no jurisdiction under the 35th section of the Companies Act of 1862, to grant specific performance of an agreement to transfer shares or to enforce against the company an equitable claim to be registered as a shareholder, but where an applicant has a legal title, the Court will compel the company to enter his name on the register, although his title is disputed by the person registered as holder. In such case the Court has no jurisdiction to make such person disputing the title pay the costs of the summons rendered necessary by his opposition. *In re The Tahiti Cotton and Coffee Plantation Company (Lim.)*; *Ex parte Sargent*, 43 Law J. Rep. (N.S.) Chanc. 425; Law Rep. 17 Eq. 273.

The pledgee of shares with transfers executed by the pledgor with the date and name or transferee in blank has, and also his transferee has, implied power to fill up the blanks. Such transfers, although executed as deeds by the original pledgor, will not operate as deeds, and if the regulations of the company require a deed will only confer an equitable interest and operate as contracts to transfer, but where the articles of association did not require a deed and the blanks had been filled up by the transferee of the pledgor,—Held, that they operated as valid transfers and conferred on him a right to be registered as a shareholder, which the Court would enforce on summons under the 35th section. *Ibid.*

(m) *Foreign contract.*

14.—The Court will specifically enforce against a foreigner a contract of sale made abroad, if the subject-matter of the contract is within its jurisdiction. And, therefore, where a contract was made abroad for the sale of a foreign vessel to be delivered in this country, the Court granted an *interim* injunction to restrain the removal of the ship from an English port, allowing substituted service of the notice of motion on the captain. *Hart v. Herwig*, 42 Law J. Rep. (N.S.) Chanc. 457; Law Rep. 8 Chanc. 860.

(n) *Rights of sub-contractor under one of two concurrent contracts.*

15.—P., in 1867, agreed to sell to M. a plot of land, the purchase to be completed in five years or earlier at M.'s option. P. had previously agreed to sell an adjoining plot to M. The plaintiff was employed by M. to build on the first plot, and M. became indebted to him on that account. M. then agreed to sell the first plot to the plaintiff. P. then told the plaintiff that both contracts must be completed together, and no offer having been made by the plaintiff to complete both contracts P. and M. sold and conveyed both plots to H.:—Held, that the plaintiff had no equity to have his sub-contract performed. *Crabtree v. Poole*, 40 Law J. Rep. (N.S.) Chanc. 468; Law Rep. 12 Eq. 13.

(o) *In general.*

*Of contract to take the whole of premises required under the Lands Clauses Consolidation Act.* [See LANDS CLAUSES CONSOLIDATION ACT, 7.]

*Contract shewn by letters.* [See FRAUDS, STATUTE OF, 9.]

*Contract for sale of goods: special article.* [See SALE, 7.]

*Marriage articles: non-performance by one party.* [See MARRIAGE SETTLEMENT, 4.]

*Contract for sale of land: whether vendor's name appears by sufficient description.* [See FRAUDS, STATUTE OF, 6-8.]

(B) GROUNDS FOR REFUSING SPECIFIC PERFORMANCE.

(a) *Misrepresentation and concealment.*

16.—Misrepresentation whereby one has been induced to enter into an agreement, may afford a good defence to a suit for specific performance of the agreement, although it be not such a clear and direct misrepresentation as would afford a good ground for a suit to set the agreement aside or for an action for damages upon it. *Lamare v. Dixon* (H. L.), 43 Law J. Rep. (N.S.) Chanc. 203; Law Rep. 6 E. & I. App. 414.

If the plaintiff in a suit for specific performance has delayed for a length of time to enforce the agreement, acquiescence in a breach of the agreement, or in a misrepresentation on the faith of

which the defendant entered into the agreement, will not be imputed to the defendant by reason of a similar delay on his part in repudiating it, though accompanied by possession. *Ibid.*

D., a builder, agreed in writing, to construct certain cellars, and to execute a lease of them to L., a wine merchant, who agreed to accept the lease and to pay D. 100*l.* on completion. The agreement provided that the walls and floor should be of concrete, but it made no further mention of or provision for dryness in the cellars, but D. knew that L. wanted the cellars only for the purpose of his business as a wine merchant, and L. swore that he told D. that it would be necessary that the cellars should be dry, and that D. assured him that the concrete provided for in the agreement would keep the cellars dry. L. also swore that he was induced by this representation to execute the agreement and to enter into possession. D. however denied this. L. entered into possession before the cellars were finished. Finding that they were too wet for his business, he remonstrated with D. But D. refused to do anything more than he had done towards making the cellars dry. L. then threatened to do the necessary works himself and to charge D. with the cost. He did not do this, but after having continued in possession two years, paying his rent under protest, he abandoned the cellars altogether. L. never paid the 100*l.* mentioned in the agreement, nor did he execute the lease, and D., though he sent him a draft lease for approval, never demanded the return of the draft or the payment of the 100*l.* D. having filed his bill against L. for specific performance,—Held, that D. was affected with knowledge not only as to the purpose for which the cellars were required, but also that for this purpose it was necessary that they should be dry; that there was evidence that it was on the faith of D.'s representations as to the effect of the concrete, that L. signed the agreement and entered into possession; that as the cellars were wet L. was entitled at the first to repudiate the contract, and that this right to repudiate was not affected by the lapse of two years during which L. had refrained from exercising it, because D. had also during the same time delayed in enforcing the contract; nor by the occupation of the premises by L. during that period, he paying rent under protest, for such payments were to be considered as for use and occupation rather than as rent; nor by L.'s threat to do the necessary works himself. For considering the loss and inconvenience L. would have suffered if D. had persisted in neglecting his part of the agreement L. was justified in making the threat with a view to compelling D. to do what he ought to have done. *Ibid.*

As there had been delay on both sides, the plaintiff's bill was dismissed without costs. *Ibid.*

17.—The Court refused to enforce a contract for the purchase of lands at the suit of the purchasers who had concealed the fact that they had, without authority, taken a quantity of coal from under the lands. *Phillips v. Homfray. Fothergill v. Phillips*, Law Rep. 6 Chanc. 770.

[And see VENDOR AND PURCHASER, 2.]

#### (b) *Misdescription.*

18.—Specific performance of a contract for sale refused where the plan was calculated to mislead and did mislead the purchaser as to the boundaries of the property. The difference between the apparent and true boundaries of a property ought to be clearly shewn by the sale plan and particulars. Decision of Malins, V.C., reversed. *Denny v. Hancock*, Law Rep. 6 Chanc. 1.

[And see VENDOR AND PURCHASER, 1.]

#### (c) *Doubtful title.*

19.—The trustees of a settlement of real estate having power to sell the fee at the request of the tenant for life can, by an exercise of the power upon his request, after he has alienated his particular estate, and with the consent of his alienee, make a good title in fee to a purchaser. *Alexander v. Mills*, 40 Law J. Rep. (n.s.) Chanc. 73; Law Rep. 6 Chanc. 124.

*Sugden on Powers*, 8th edit. p. 70, commented on and disapproved. *Ibid.*

When a question of title involves a question of general law applicable to all similar cases, the Court of Appeal is bound to say one way or another what the law is, and cannot escape from that duty by saying that the decision of the Court below in taking one view makes the other view, if held by the Court of Appeal, so doubtful that the latter will not force such a title on a purchaser. *Ibid.*

20.—A devise of real estate to trustees for an unmarried woman for life for her separate use, and after her death to convey to her husband, with a gift over in the event of her dying "unmarried," vests the remainder in fee in the first person she may marry, and a title accruing under such a devise will be forced on an unwilling purchaser—reversing the decision of Wickens, V.C., 40 Law J. Rep. (n.s.) Chanc. 84; Law Rep. 12 Eq. 105. *Radford v. Willis*, 41 Law J. Rep. (n.s.) Chanc. 19; Law Rep. 7 Chanc. 7.

21.—It is the duty of the Court to decide doubtful questions of title, and when so decided they can no longer be considered as doubtful, so as to entitle purchasers to resist specific performance. *Bell v. Holtby*, 42 Law J. Rep. (n.s.) Chanc. 266; Law Rep. 15 Eq. 178.

#### (d) *Voluntary settlement by vendor.*

22.—Where, in a specific performance suit, the defendant, the purchaser, who had been let into possession and paid part of the purchase-money, and had paid off a mortgage, and so got the legal estate and title deeds, set up a voluntary settlement as an objection to the title, but stated his willingness to complete on having a good title:—Held, that notwithstanding the settlement, the plaintiff was entitled to a decree. *Smith v. Garland* (2 Mer. 123) distinguished. *Peter v. Nichols*, Law Rep. 11 Eq. 391.

*Requisition on title: right to rescind.* [See VENDOR AND PURCHASER, 3.]

(e) *No title as to moiety.*

**23.**—Where vendors having agreed to sell the entirety of property could make a title to one moiety only, it was held that the purchaser was entitled to have such moiety conveyed to him on payment of one moiety of the purchase-money. *Bailey v. Piper*, 43 Law J. Rep. (N.S.) Chanc. 704; Law Rep. 18 Eq. 683.

## (C) RIGHT TO SPECIFIC PERFORMANCE WITH ABATEMENT.

**24.**—Where vendors of colliery works had largely overstated the income,—Held, that in estimating the abatement of purchase-money in a specific performance suit by the purchasers, the latter were entitled to a deduction bearing the same proportion to the whole purchase-money as the excess to the income stated. The purchasers having failed as to part of their case, which was one of misrepresentation, on the original hearing, but the abatement being considerable,—Held, that the vendor could not, on further consideration, be relieved from any part of the costs. *Powell v. Elliot*, Law Rep. 10 Chanc. 424.

## (D) PRACTICE.

(a) *Reference as to title.*

**25.**—When in a suit between vendor and purchaser a decree has been made for specific performance of a contract, subject to the usual reference as to whether a good title can be made, the words "good title" mean not an absolutely good title, but a good title having regard to the terms of the contract, although the latter words are not inserted in the decree. *Upperton v. Nicholson*, 40 Law J. Rep. (N.S.) Chanc. 401; Law Rep. 6 Chanc. 436.

If a vendor, the plaintiff in such a suit, wishes to prevent the defendant raising objections in chambers on the reference for title on the ground that they have been waived before the suit, he must guard himself by insisting at the hearing on a special decree based on such waiver. *Ibid.*

In a contract for sale the vendor stipulated to deliver the abstract within twenty-eight days, and all objections were to be taken within a similar period; no abstract was delivered until long after the twenty-eight days had expired, and then only an imperfect one; after much negotiation, the purchaser declined to complete, and the vendor having filed a bill for specific performance obtained a decree subject to the usual enquiry as to whether a good title could be made. The defendant for the first time in chambers took an objection to the title which appeared on the face of the imperfect abstract:—Held (reversing the decision below), that as the vendor had not himself complied with the conditions of sale with regard to the delivery of the abstract, the purchaser was not estopped by the lapse of time from taking the objection, and that as the objection was a valid one, the bill must be dismissed, but under the circumstances without costs. *Ibid.*

**26.**—In suits for specific performance where the  
DIGEST, 1870-1875.

contract is not disputed, it is in almost every case the duty of the vendor to obtain an immediate reference for title so as to save unnecessary costs. *Phillipson v. Gibbon*, 40 Law J. Rep. (N.S.) Chanc. 406; Law Rep. 6 Chanc. 428.

A vendor, the plaintiff in such a suit, refused to take an order for reference for title by consent, but brought the suit to a hearing when he obtained the ordinary decree only, subject to the usual enquiry as to title. The defendant took certain specific objections to the title by his answer, which were overruled by the Court; while the matter was in chambers, another and important defect, which did not appear on the abstract, was discovered by the defendant on inspection of the property. This defect was only cured by the plaintiff shortly before the cause came on for further consideration:—Held, that although the plaintiff was entitled to a decree, no costs should, under the circumstances, be given to either party, except that the plaintiff should pay the costs of the original hearing occasioned by his refusal to take the reference for title by consent. *Ibid.*

Principles on which costs are given in suits for specific performance stated. *Ibid.*

(b) *Sale of fixtures: mandatory order.*

**27.**—The defendant agreed to sell to the plaintiff the lease and goodwill of a public-house, with a proviso that the defendant should sell the fixtures and furniture at a fair valuation to be made by a person named in the contract. The defendant afterwards refusing to perform the contract, and preventing the valuer from proceeding, he was ordered, on motion, to permit the valuer and his clerks at all reasonable times, and on proper notice, to enter on the premises for the purposes of the valuation. *Smith v. Peters*, 44 Law J. Rep. (N.S.) Chanc. 613; Law Rep. 20 Eq. 511.

(c) *Declaration as to voluntary settlement.*

**28.**—In a suit for specific performance against a vendor and those claiming under a voluntary settlement made by him previous to the contract for sale, the Court refused to declare that the settlement was void under statute 27 Eliz. c. 4. *Daking v. Whimper* (26 Beav. 568) not followed on this point. *Fletcher v. Kettelman*, 40 Law J. Rep. (N.S.) Chanc. 624.

(d) *Absconding defendant.*(1) *Rescission of contract after decree.*

**29.**—The plaintiff in a specific performance suit may obtain a rescission of the contract on the defendant's default to obey the decree. *Watson v. Cox*, 42 Law J. Rep. (N.S.) Chanc. 279; Law Rep. 15 Eq. 219.

A decree was made for specific performance of an agreement to take a lease of a house, and an order on further consideration for payment of a sum of money by the defendant, and thereupon for the execution of the lease. The defendant having made default and absconded, an order was made on the plaintiff's motion for rescission of the con-

tract, and the stay of all proceedings in the suit, except as to the plaintiff's costs and damages. *Ibid.*

(2) *Vesting order.*

**30.**—Where the defendants to a bill for specific performance cannot be found, the plaintiff, after entering an appearance and filing replication, may, by advertisement in the "London Gazette," give him notice of a subpoena to hear judgment, and if he fail to appear, the Court at the hearing will, on proof of the case made by the bill, make a decree and an order vesting the estate in the plaintiff. *Murphy v. Vincent*, 40 Law J. Rep. (N.S.) Chanc. 378.

(e) *Costs.*

[See COSTS IN EQUITY, 28, and supra No. 25.]

SPECIFICATION.

[See PATENT.]

SPORTING.

[See GAME.]

STAMPS.

- (a) *Conveyance on mortgage.*
- (b) *Conveyance by local board.*
- (c) *Transfer of shares.*
- (d) *Order to pay money.*
- (e) *Drafts by members of benefit building society.*
- (f) *Voting paper at municipal election.*

[No duty in addition to the *ad valorem* duty to be charged upon leases granted in consideration not only of a rent reserved but also of improvements effected or to be effected or of any covenant entered into by the tenant. 33 & 34 Vict. c. 44.]

[The Acts regulating stamps generally amended. The Stamp Act, 1870. 33 & 34 Vict. cc. 97, 98, 99.]

[Sections 113, 114 of the Stamp Act, 1870, repealed, and new stamp duties imposed on foreign securities, mortgages of stock, and proxy papers. 34 & 35 Vict. c. 4.]

[No stamp duty to be payable on admission of English barrister to be a Scotch advocate, or *vice versa*; and 10*l.* only on admission of Irish barrister to be a Scotch advocate, or *vice versa*. 37 & 38 Vict. c. 19.]

*Stamp duty under Table A of Bankruptcy Rules*, 1870. [See BANKRUPTCY, Q 8, 9.]

(a) *Conveyance or mortgage.*

**1.**—By a deed made between the Limmer

Asphalte Company of the first part, the directors of the company of the second part, and H. (therein styled the "licensee") of the third part, the company—in consideration of 7,500*l.*, of which 1,500*l.* was paid down on the execution of the deed, and the balance 6,000*l.* was to be paid by six equal monthly instalments—granted to the licensee, his executors, &c., the sole and exclusive right, license, and authority to carry on with the asphalte to be supplied by the company (but not with any other) the business of asphalte paving and dealing in asphalte within the counties of Lancaster and Chester and not elsewhere, for the then remaining unexpired periods for which certain concessions then held by the company had respectively been granted. The licensee covenanted to pay the instalments when due, with interest; and the deed contained a proviso that if he should assign over the benefit of the license, the whole of the instalments then remaining unpaid should immediately become payable:—Held, that this deed was not chargeable with stamp duty as a "conveyance or transfer of property," within the meaning of the "Stamp Act, 1870;" but that it was properly chargeable with a stamp duty of ten shillings, and also with an *ad valorem* duty of 2*s.* 6*d.* per cent. on the 6,000*l.* remaining unpaid, as a "mortgage or covenant, being the only or principal or primary security for the payment of money" within the meaning of the schedule to the Act. *The Limmer Asphalte Company v. The Commissioners of Inland Revenue*, 41 Law J. Rep. (N.S.) Exch. 106; Law Rep. 7 Exch. 211.

(b) *Conveyance by local board.*

**2.**—The City of Bath Act, 1851, constituting the mayor, &c., the local board of health for the city of Bath, incorporates portions of the Public Health Act, 1848, but expressly excepts section 151, which exempts from stamp duty, deeds, &c., executed by local boards for the purposes of that Act. The 85th section of the Bath Act declares that the Act shall be subject to the provisions of any subsequent Act for amending the Public Health Act, 1848. The Local Government Act, 1858, is to be construed with and form part of the Public Health Act, 1848, and to take effect where the Act of 1848 was already in force wholly or partially; and local boards formed under the later Act are to have all the rights and liabilities of boards under the Act of 1848. A subsequent Act of 1861 provides that the Act of 1858 shall extend to local boards constituted under local Acts as well as under the general Act of 1858, with this qualification, that provisions of the general Act opposed to or restrictive of the provisions of any local Act, shall be of no force in the district for which the local Act was passed:—Held, that a deed by which (in pursuance of the powers in the Act of 1858) land was conveyed to the mayor, &c., of Bath, "acting as the local board, and requiring the land thereby conveyed for a street improvement within their district," was exempt from stamp duty by virtue of the 151st section of the Public Health Act, 1848, notwithstanding the express exception of that section from the



Bath Local Act of 1851. *The Mayor, &c., of Bath v. The Commissioners of Inland Revenue*, 40 Law J. Rep. (n.s.) Exch. 181.

(c) *Transfer of shares.*

3.—A deed executed by four persons entitled to personal estate under a will, purporting to operate as a transfer and release to each of the four (by two of them who were the executors, in pursuance of an agreement for partition) of shares in various railway companies forming part of testator's estate, is chargeable with only four stamp duties of 30s. each, notwithstanding that the effect of the deed may be to vest in each of the four persons stock in eight or nine different companies. *Freeman v. The Commissioners of Inland Revenue*, 40 Law J. Rep. (n.s.) Exch. 85; Law Rep. 6 Exch. 101.

Per Martin, B.—Such a deed is not a deed of transfer, and is properly chargeable with one 35s. stamp duty only. *Ibid.*

(d) *Order to pay money.*

4.—A document given by A. to S., which was an order for the payment of money at a future date out of moneys payable at a future time to A. by third persons was not stamped:—Held, that the document ought to have been stamped as a bill of exchange, and that not having been stamped at the time, it could not be received in evidence. *Diplock v. Hammond* (23 Law J. Rep. (n.s.) Chanc. 550) distinguished. *Ex parte Shelland; In re Adams*, 43 Law J. Rep. (n.s.) Bankr. 3; Law Rep. 17 Eq. 109.

(e) *Drafts by members of benefit building society.*

5.—The rules of a benefit building society enabled members after 28 days' notice to withdraw their shares, in the order of the notices, as the society had money in hand enough to pay. The withdrawal was effected by draft payable to bearer furnished by the society, and signed by the member. Members holding uncompleted shares might in the same way withdraw any part of their money. Such drafts were usually paid a few days after the notice of withdrawal. Drafts payable by bearer were also sent by the society for signature to those members entitled to interest on their shares. The society did not purchase land but merely advanced money on mortgage:—Held, that these drafts were liable to stamp duty as cheques or orders for the payment of money, and were not within the exemption in 10 Geo. 4. c. 56, s. 37, which is to be regarded as limited to drafts or orders drawn by an officer of the society for its purposes, or by a member of the society payable to himself only. *The Attorney-General v. Gilpin*, 40 Law J. Rep. (n.s.) Exch. 134; Law Rep. 6 Exch. 193.

(f) *Voting paper at municipal election.*

6.—By the Stamp Act, 1870 (33 & 34 Vict. c. 97), Schedule, Letter or Power of Attorney, a duty of a penny is charged upon every letter or power of attorney, or commission, factory mandate, or other instrument in the nature thereof. (1) For

the sole purpose of appointing or authorising any one person to vote as a proxy at any one meeting at which votes may be given by proxy. By the schedule voting paper, a like duty is charged upon "any instrument for the purpose of voting by any person entitled to vote at any meeting":—Held, that a voting paper used at the election of an alderman, under the Municipal Corporation Acts (7 Will. 4. & 1 Vict. c. 78, ss. 13, 14) does not require a stamp. *The Queen v. Strachan*, 41 Law J. Rep. (n.s.) Q. B. 210; Law Rep. 7 Q. B. 463.

*On bills of exchange.* [See BILL OF EXCHANGE, 3.]

*On Judge's notes.* [See PRACTICE AT LAW, 31.]

*On policy of marine insurance.* [See MARINE INSURANCE, 3.]

## STATUTE.

### (A) CONSTRUCTION OF PARTICULAR STATUTES.

(a) *Private Act vesting lands in trustees of settlement.*

(b) *Construction as to period of accounting.*

(c) *Statute inflicting penalty for not doing an act.*

### (B) EFFECT OF GENERAL ON SPECIAL LEGISLATION.

### (C) INCORPORATION OF STATUTES.

### (A) CONSTRUCTION OF PARTICULAR STATUTES.

(a) *Private Act vesting lands in trustees of settlement.*

1.—A private Act of Parliament vesting lands in trustees on trust to sell, proceeding on the supposition that the lands are comprised in a settlement, does not bring the lands within that settlement if they were not in it previously. *Howard v. The Earl of Shrewsbury*, 43 Law J. Rep. (n.s.) Chanc. 495; Law Rep. 17 Eq. 378.

(b) *Construction as to period of accounting.*

2.—The S. Dock Company were liable, under an Act of Parliament, to pay the S. Harbour and Pier Board deficiencies of their income made up to a certain day in each year:—Held, that the Board were bound to claim such deficiencies every year. *The Southampton Dock Company v. The Southampton Harbour and Pier Board*, 41 Law J. Rep. (n.s.) Chanc. 832; Law Rep. 14 Eq. 595.

The Board had power to reduce or alter their tolls:—Held, that as against the company they had no power to remit tolls on particular classes of goods. *Ibid.*

The Board had power to compound for tolls:—Held, that, as against the company, they could not let the whole annual tolls. *Ibid.*

(c) *Statute inflicting penalty for not doing an act.*

3.—When a statute inflicts a penalty for not doing an act, the penalty implies that there is a legal

compulsion to do the act, and this principle is not affected by the fact that the penalty has a particular destination. *Redpath v. Allen*; *The Hibernian*, 42 Law J. Rep. (N.S.) Adm. 8; Law Rep. 4 P. C. 511.

The 27 & 28 Vict. c. 13 (Canadian Statute) by section 14 provides that "no owner or master of any ship shall be answerable to any person whatever, for any loss or damage occasioned by the fault or incapacity of any qualified pilot, acting in charge of such ship, within any place where the employment of such pilot is compulsory by law." The 27 & 28 Vict. c. 58 (Canadian Statute), by section 10, provides that "the master or person in charge of each vessel, over 125 tons, leaving the port of Montreal for a port out of this Province, shall take on board a branch pilot, for and above the harbour of Quebec, to conduct such vessel, under a penalty equal in amount to the pilotage of such vessel":—Held, 1st, that these statutes are of binding authority in every case to which they are applicable, as well in the Vice-Admiralty Court of Canada, as in the High Court of Admiralty, and on appeal. 2ndly, That the two statutes are to be read and construed together, as being *in pari materia*, and that the owner of a ship, navigating Canadian waters, under the direction of a pilot, in compliance with the provisions of the above statutes, is exonerated from liability for damage caused in consequence of the orders of the pilot. *Ibid*.

*Validity of Act of colonial legislature indemnifying persons against consequences of wrongful acts.* [See COLONIAL LAW, 1.]

#### (B) EFFECT OF GENERAL ON SPECIAL LEGISLATION.

4.—By 4 & 5 Anne, c. xxxii., the rectory of T. was united and annexed to the deanery of L., and the dean was to be instituted without presentation; by 3 & 4 Vict. c. 113, s. 50, all the estate and interest of any holder of any deanery in any lands, tithes, and other hereditaments or endowments whatsoever annexed or belonging to, or usually held or enjoyed with such deanery (except any right of patronage), or whereof the rents and profits had been usually taken and enjoyed by the holder of such deanery, as such holder, separately and in addition to his share of the corporate revenues of the chapter, were vested in the Ecclesiastical Commissioners; and by 13 & 14 Vict. c. 94, s. 19, no spiritual person appointed to a deanery of a cathedral may accept to take and hold therewith any benefice, unless in the cathedral city, and not exceeding 500*l.* a year in value. The rectory of T. was not situated in the cathedral city of L., and the defendant was appointed Dean of L. after these statutes came into force:—Held, that looking to the intention and wording of the whole statute, 3 & 4 Vict. c. 113, s. 50, did not apply to the rectory of T., as the effect would be to pass to the Commissioners the whole rectory, involving the patronage, cure of souls, and temporalities, and a clear intention was shewn, on looking to the whole statute, not to pass

to them patronage or anything involving the cure of souls, or interfere when such matters were involved, without express mention and proper provisions respecting them; that 13 & 14 Vict. c. 94, s. 19, also did not apply, as the dean had no option as to accepting the rectory; and that therefore 4 & 5 Anne, c. xxxii., was not affected, and the defendant was entitled to the rectory. *The Queen v. Champneys*, 40 Law J. Rep. (N.S.) C. P. 95; Law Rep. 6 C. P. 384.

#### (C) INCORPORATION OF STATUTES.

5.—Where an Act of Parliament, with compulsory powers, incorporates the whole of the Lands Clauses Act, a right to compensation is, without any other enactment, conferred upon the persons interested in lands injuriously affected by the exercise of such powers. *The Queen v. The Vestry St. Luke's, Chelsea* (Exch. Ch.), 41 Law J. Rep. (N.S.) Q. B. 81; Law Rep. 7 Q. B. 148: affirming the decision of the Court of Queen's Bench, 40 Law J. Rep. (N.S.) Q. B. 305; Law Rep. 6 Q. B. 572.

By the Chelsea Improvement Act, 8 & 9 Vict. c. cxliii., the Lands Clauses Act, 1845, is incorporated in these words: "So much of the Lands Clauses Consolidation Act, 1845, as is applicable to, and is not modified by this Act, or as is not inconsistent with the provisions thereof, shall apply to the improvements by this Act authorised to be made, and shall be read as forming part of this Act." By sections 124 and 127, compensation is expressly given where projections, made before the passing of the Act, are ordered to be removed, and where a house taken down to be rebuilt is ordered to be set back to the line of street. By section 104, power is given to alter the level of streets, but there is no provision as to compensation:—Held, notwithstanding the absence of any such provision, that the lessee of a house injuriously affected by the raising of the level of the street, under the powers of section 104, was entitled to compensation. *Ibid*.

6.—By section 1 of the Gasworks Clauses Act, 1871, that Act and the Gasworks Clauses Act, 1847, are to be read together. By section 3 it is to apply to every gas undertaking authorised by any Act thereafter passed; and by section 36, whenever the undertakers neglect or refuse to give a supply of gas to any owner or occupier of premises within the limits of the special Act entitled to the same under such pressure as is prescribed, they shall be liable to a penalty. The special Act of the appellant company was prior in time to the Gasworks Clauses Act, 1871, but the Metropolis Gas Act, 1860, which incorporated the Gasworks Clauses Act, 1847, applied, among others, to the appellant company. On a conviction of the appellants, under section 36, for cutting off the supply of gas from the respondent,—Held, first, that section 36 did not merely apply to variations from the prescribed pressure, but included cutting off the supply of gas altogether; and, secondly, that the Act of 1871 being incorporated with that of 1847, and so with that of 1860, applied to the appellant company, and was not restricted to companies incorporated after 1871. *The Commercial*

*Gas Company v. Scott*, 44 Law J. Rep. (n.s.) M. C. 171; Law Rep. 10 Q. B. 400.

7.—Effect of the Gas Light and Coke Company's Act, 1868, and the City of London Gas Act, 1868, on the provisions of the Metropolis Gas Act, 1860, as to the purity and illuminating power of the gas without as well as within the City of London. *The Gas Light and Coke Company v. The Vestry of St. George, Hanover Square*, 41 Law J. Rep. (n.s.) Q. R. 360

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## STATUTE OF FRAUDS.

[See FRAUDS.]

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## STATUTE OF DISTRIBUTIONS.

[See DISTRIBUTIONS.]

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## STATUTORY DUTY.

[See NEGLIGENCE, 33, 34.]

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## STAY OF PROCEEDINGS.

[See BANKRUPTCY, N 30-32; COMPANY, I 60-63; DIVORCE, 61; PRACTICE AT LAW, 40-42; PRACTICE IN EQUITY, 138-141.]

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## STOCK EXCHANGE.

- (a) *Liability of principal of defaulting broker.*
- (b) *Right of broker to close account.*
- (c) *Contract between vendor and ultimate vendee.*

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### (a) *Liability of principal of defaulting broker.*

1.—The plaintiffs, brokers on the Stock Exchange, who had at the request of the defendant contracted for the purchase of shares for him, were on the 13th of July, the "carrying over day" for the 15th, instructed by him to carry over or continue the contract from the 15th till the 29th of July, the next account day. On the 15th they paid for him (as was necessary in order to have the contract carried over) the difference on the shares at the price on the 13th, amounting to 1,688*l.* On the 18th of July the plaintiffs, by reason of many persons for whom they had entered into contracts failing to meet their engagements, became defaulters on the Stock Exchange, whereupon, in accordance with the rules of the Exchange, all their bargains were closed and made up by the official assignees at the prices of that day. The price of the shares purchased for the defendant having fallen, the amount due in respect thereof

(including the 1,688*l.* differences) was 6,013*l.*, which the plaintiffs then became liable to pay to the official assignees, and now sought to recover from the defendant:—Held, that the plaintiffs' insolvency having been brought about by want of means to meet their other primary obligations, and not by reason of their having entered into any contract on behalf of the defendant, no promise could be implied on the part of the defendant, as their principal, to indemnify them against the consequences of the enforcement of the Stock Exchange rules with regard to defaulters, and that, therefore, the plaintiffs could only recover from the defendant the sum of 1,688*l.*, the amount of the differences they had actually paid for him—reversing the judgment below, 40 Law J. Rep. (n.s.) Exch. 137; Law Rep. 6 Exch. 255. *Duncan v. Hill, and same v. Beeson*, 42 Law J. Rep. (n.s.) Exch. 179; Law Rep. 8 Exch. 242.

### (b) *Right of broker to close account.*

2.—A speculator on the Stock Exchange having failed to pay the balance of his brokers' account against him when requested, and having died, and a bank, of which he was senior partner, having in consequence stopped payment, the brokers sold out stock which he had directed to be carried over, at a loss, but the stock had fallen still lower before the next account day. On a claim by them for the balance of their next account, which was resisted on the ground that they had broken their contract, and could not speculate as to what would have happened had they kept it:—Held, that their conduct at the most gave rise to a right of set-off for any damage resulting from it, and that, none being shewn, their claim was good. *Lacey v. Hill; and Laney v. Hill; Scrimgeour's Claim*, 42 Law J. Rep. (n.s.) Chanc. 657; Law Rep. 8 Chanc. 921.

Evidence was given of a custom of the Stock Exchange that where a principal who had bought for the account became bankrupt or died, leaving no person ready to take up his account, his broker might cover himself by selling out the shares or stock:—Held, by Mellish, L.J., that the custom was reasonable, and that the claim was sustainable on that ground also. *Ibid.*

3.—In equity the liability of a principal to indemnify his agent is not confined to actual losses, but extends to all the liabilities of the agent. *Lacey v. Hill; Crowley's Claim*, 43 Law J. Rep. (n.s.) Chanc. 551; Law Rep. 18 Eq. 182.

C., broker for H., entered into contracts for purchase of stock for the next settling day, the 15th of July, 1870. The contracts were in the usual form, subject to the "rules and usages of the Stock Exchange," and the broker's notes from time to time sent to H., also had these words. When that day arrived C., by request of H., and relying on a promise of H. to settle on that day the amount then due to C. for brokerage and losses, "continued" the contracts till next settling day. H. did not settle his account on the 15th. On the 16th, the Norwich Bank, in which he was partner, stopped payment, and H. became in fact insolvent. C. was thereupon declared defaulter on the Exchange. According to the rules, all his transac-

tions were immediately closed. No loss accrued to the principal by the closing of the transactions before the next settling day. Subsequently C. was re-admitted to the Stock Exchange, on payment of a composition, but not the full amount of his debts. After such re-admission, members of the Stock Exchange were in effect forbidden by the rules of the Exchange to sue him for the balance of previous losses without the leave of the committee, which was rarely, if ever, granted, but no legal release was given to him. In a creditor's suit instituted for administering the estate of H., C. claimed for the whole amount shewn to be due to him for brokerage and losses, by an account made up on the footing of all transactions being closed on the day of the insolvency of H. the amount of claim being calculated on the full amount of the liabilities of C. in respect of the contracts for stock, and not on the amount that he had actually paid on those contracts:—Held, first, that on the insolvency of H., the transactions might be closed according to the rules of the Stock Exchange, without affecting the right of C. to an indemnity from H. Secondly, that C. not having had a legal release from claims under the contracts, but being still liable in law for the full amount, was entitled to claim against the estate of H. for the full amount of losses on the contract, including not only what he had actually paid, but also the amount for which he was legally liable. *Ibid.*

(c) *Contract between vendor and ultimate vendee.*

4.—The plaintiff, through his brokers, who were members of the Stock Exchange, sold to the defendant, a jobber, likewise a member of the Stock Exchange, ten shares in Overend, Gurney & Co., for the account. The sale was subject to the rules of the Stock Exchange. On the name day the defendant passed a ticket to the plaintiff's brokers issued by Messrs. Foster & Co., brokers, members of the Stock Exchange, and giving the name of Goss as the person to whom the shares were to be transferred. No objection was made to the name, and the plaintiff executed a transfer of the shares to Goss. Calls were subsequently made on the shares, which the plaintiff was obliged to pay, and which he was unable to recover from Goss, who turned out to be a person of no means. It was then discovered by the plaintiff, that Messrs. Foster & Co. had purchased, by the instructions of one S., a number of shares in Overend, Gurney & Co., Limited, for the account, but by an arrangement between S. and Goss the latter had consented to allow his name to be given in as the person to whom the shares were to be transferred, in consideration of a sum of money. Neither Foster & Co. nor the defendant were aware of the nature of this arrangement, or that Goss was not a substantial person. Under these circumstances, the plaintiff sought to recover the calls he had paid from the defendant. Held, affirming the decision of the Court of Exchequer, *dissentiente* Lush, J., that the defendant was not liable. *Marsted v. Paine*, 40 Law J. Rep. (N.S.) Exch. 57; Law Rep. 6 Exch. 132.

Per Cockburn, C.J., Keating, J., Mellor, J., Montague Smith, J., and Brett, J.—That Goss was an ultimate purchaser within the meaning of that term as applied to the usage of the Stock Exchange, and that the defendant had performed his contract by passing the name of such an ultimate purchaser, to whom no objection had been taken, and to whom the shares had been transferred. *Ibid.*

5.—On the 13th of April, 1866, the defendant, through his brokers C. & Co., purchased 100 shares in a company, registered under the Companies Act, 1862, of a jobber, for the account or settling day, the 26th of April. Before the day arrived, he requested his brokers to carry over the contract to the next account day, the 15th of May. On the 14th of May, the brokers passed a ticket with the defendant's name as purchaser of the shares. This ticket was split or divided, according to the practice of the Stock Exchange, and a part or split for fifteen shares was handed to the brokers of the plaintiff, who was the ultimate seller of that number of shares. The plaintiff thereupon, on the 15th of May, executed a deed of transfer to the defendant in the proper form, and delivered the transfer and the share certificates to the defendant's brokers, who accepted them on behalf of the defendant, paid the plaintiff's brokers the price of the shares, and forwarded the transfer and certificates to the defendant. The defendant refused to accept the shares, and the company having stopped payment the plaintiff was made a contributory and compelled to pay calls:—Held, that the transactions above stated were evidence of a contract by which the defendant, as purchaser of the fifteen shares, was bound to indemnify the plaintiff against the calls made in respect of them. *Bowring v. Shepherd* (Exch. Ch.), 40 Law J. Rep. (N.S.) Q. B. 129; Law Rep. 6 Q. B. 309.

6.—When the owner of shares in a joint-stock company sells them through a broker upon the Stock Exchange to a jobber, the contract of the jobber is to take a transfer of the shares himself or to pass on the name day the name of a person or persons competent and willing to contract as transferee or transferees in his stead. *Nickalls v. Merry*, Law Rep. 7 E. & L. App. 530.

The ten days' rule is to give time for the vendor to enquire into the solvency of the person so named, but is no bar to a claim of indemnity against the jobber upon its subsequently appearing that the party named was incompetent or unwilling to contract. *Ibid.*

*Rennie v. Morris* (Law Rep. 13 Eq. 203) overruled. *Ibid.*

The decision of the Court of Appeal in Chancery (41 Law J. Rep. (N.S.) Chanc. 767; Law Rep. 7 Chanc. 733, *sub nom.* *Merry v. Nickalls*) affirmed. *Ibid.*

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STOP ORDER.

[See COSTS IN EQUITY, 13.]

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## STOPPAGE IN TRANSITU.

[See SALE, 18.]

## SUBROGATION.

[See INSURANCE, 10.]

## SUCCESSION DUTY.

[See LEGACY AND SUCCESSION DUTY.]

## SUITORS' DEPOSITS.

The chief clerk of the Court of King's Bench was the custodian of moneys deposited by the suitors to await the result of actions, and invested a portion of them in Exchequer Bills. When the late Lord Ellenborough succeeded to the office in 1811, he found a sum of 5,000*l.* so invested. He received for his own benefit the interest thereupon until the report of the committee of the House of Commons on sinecure offices in 1834, in deference to which he received no further dividends, but caused them to be carried by his bankers to a separate account. After his death a suit was instituted to administer his estate, and upon a summons taken out thereon, it was held, that the funds thus accumulated formed no part of his estate, but must be treated as public moneys, and that the Crown, in right of the public, was entitled to receive them. *Colchester v. Law*, 43 Law J. Rep. (n.s.) Chanc. 80; Law Rep. 16 Eq. 253.

## SUNDAY.

[Prosecutions for non-observance of the Sunday to be only by chief officer of police or with consent of two Justices of the Peace. 34 & 35 Vict. c. 87.]

[Power to Crown to remit penalties under the above Act for preventing profanation of the Lord's Day. 38 & 39 Vict. c. 80.]

*Trading: sale of intoxicating liquor: bonâ fide traveller.* [See ALIHOUSE, 20-22.]  
*Profanation of Lord's Day.* [See LORD'S DAY.]

## SUNDAY AND RAGGED SCHOOLS.

*Exemption from poor rate.* [See RATE, 21, 22.]

## SUPERFLUOUS LANDS.

[See LANDS CLAUSES ACT, 47-49; PRE-EMPTION.]

## SUPPLEMENTAL BILL.

[See PRACTICE IN EQUITY, 115, 116.]

## SUPPORT.

[See MINES, 3-7.]

## SUPREME COURT OF JUDICATURE.

[The Judicature Act, 1873, amended and repealed in part. Rules and regulations as to procedure in actions, &c. Additional Rules as to costs have been issued by Order in Council 12th August, 1875, and further Rules dated December 1st, 1875. 38 & 39 Vict. c. 77.]

## SURGEON.

[See MEDICAL ACT.]

## TACKING.

[See MORTGAGE, 8.]

## TAXATION OF COSTS.

[See COSTS.]

## TENDS.

[See SCOTCH LAW, 31; TITHES, 4.]

## TELEGRAM.

C., a banker at Lyons, posted a letter containing bills of exchange to D. in London, but before the departure of the mail he received a telegram from D., telling him to remit nothing. C. accordingly sent to the Post Office to reclaim his letter, which, by the regulation of the French Post Office, he was entitled to do, on complying with certain formalities. By mistake the formalities were not observed and the letter was forwarded to its destination. In the meantime D. had filed a petition for liquidation:—Held, that the property in the bills did not pass to the trustee. *Ex parte Cote; in re Devezze*, 43 Law J. Rep. (n.s.) Bankr. 19; Law Rep. 9 Chanc. 27.

## TELEGRAPH ACTS.

By 31 & 32 Vict. c. 110, s. 7, any railway company possessed of a telegraph open to the use of the public on the 1st of January, 1868, for

transmitting messages for money, or possessing any beneficial interest in such telegraph, might require the Postmaster-General to purchase the right of such railway company to transmit such messages or other beneficial interest. By 32 & 33 Vict. c. 73, s. 10, any telegraph company with which the Postmaster-General may not come to an agreement with respect to the amount of compensation to be paid to them for their undertaking, may have such amount settled by arbitration in manner provided by the Lands Clauses Consolidation Act, 1845. By an agreement with a telegraph company, under which the telegraph company erected and placed their telegraphic apparatus on the Cowes and Newport Railway Company's line, the railway company took the exclusive use of one wire during the continuance of the agreement, but were prohibited from using the wire for public use or for profit, or for any other purpose than the transmission of the railway company's own messages. The agreement was to be in force for twenty-one years, and at the end of that time the telegraph company were to remove their telegraphic apparatus:—Held, that the railway company had no interest in the telegraph such as to entitle them to require the Postmaster-General to purchase it under the Telegraph Acts, 1868 and 1869. *The Cowes and Newport Railway Company v. The Board of Trade*, 43 Law J. Rep. (N.S.) Q. B. 242.

#### TENANT FOR LIFE AND REMAINDERMAN.

##### (A) RIGHT OF TENANT FOR LIFE TO CUSTODY OF DEEDS.

##### (B) ADJUSTMENT OF RELATIVE RIGHTS AS BETWEEN CORPUS AND INCOME.

- (a) *Payment of debts, legacies, &c.*
- (b) *Legacy where estate insufficient.*
- (c) *Calls on railway shares.*
- (d) *Bonus on shares or stock.*
- (e) *Costs incurred under Lands Clauses Act.*
- (f) *Compromise of breach of trust by testator.*
- (g) *Farming stock.*
- (h) *Profits of partnership.*
- (i) *Income of investments unconverted.*
- (k) *Renewable leaseholds.*
- (l) *Direction to accumulate rents till debts paid.*

##### (A) RIGHT OF TENANT FOR LIFE TO CUSTODY OF DEEDS.

1.—Although, as a general rule, a legal tenant for life is entitled to the custody of title deeds as against trustees with a mere power of sale; yet where a suit affecting the estates is being prosecuted, the custody of the deeds must depend on the question of convenience for the purposes of the suit. In such a case the Court of Appeal will not interfere with the discretion of the Vice-Chancellor. *Stanford v. Roberts*, Law Rep. 6 Chanc. 307.

##### (B) ADJUSTMENT OF RELATIVE RIGHTS AS BETWEEN CORPUS AND INCOME.

##### (a) *Payment of debts, legacies, &c.*

2.—In administering an estate a proportionate amount of capital, and the income actually made in the first year, are to be applied in payment of debts, legacies, funeral and testamentary expenses, and costs and profits made in a business are to be treated as income. *Lambert v. Lambert*, 43 Law J. Rep. (N.S.) Chanc. 106; Law Rep. 16 Eq. 320.

##### (b) *Legacy where estate insufficient.*

3.—Where a legacy was bequeathed, with interest from the testator's death at four per cent., on trusts for one for life, and trusts over, and the estate was insufficient to pay in full,—Held, that sums from time to time received by the trustees, and applicable to the legacy, were divisible rateably between capital and income, so that 4l. per cent. on each sum invested by the trustees to answer the legacy should be attributed to income. *In re Tinkler's Estate*, 45 Law J. Rep. (N.S.) Chanc. 135; Law Rep. 20 Eq. 456.

##### (c) *Calls on railway shares.*

4.—Settlement of railway shares on trust for a married lady for life, for her separate use with remainders over. Calls having been made, the tenant for life, at the request of the trustees, made advances out of her separate estate for the payment of them. On bill filed by her legal personal representative,—Held, that the sums so advanced were in the nature of salvage moneys, and that she had a lien on the shares for their repayment, with interest at four per cent. *Todd v. Moorhouse*, Law Rep. 19 Eq. 69.

##### (d) *Bonus on shares or stock.*

5.—Testator bequeathed a sum of East and West India Dock Stock to life tenants and others in succession. Some time after his death bonuses were declared upon the stock. On the 8th of February, 1865, by an order made in a suit for the administration of the estate, the bonuses were invested in Bank 3l. per Cent. Annuities, and the dividends thereon directed to be paid to the tenants for life. On the 12th of January, 1871, that investment order was discharged:—Held, that the bonuses were income, and not capital of the estate, and belonged to the life tenants. *Dale v. Hayes*, 40 Law J. Rep. (N.S.) Chanc. 244.

6.—Testator died on the 20th of December, 1870, having by his will bequeathed the residue of his personal estate to trustees to invest, as therein mentioned, and then to permit and empower his wife to receive "the dividends, interest, and income of his trust money, stocks, funds, shares and securities" for her life; and on her death to permit his brother to receive the residue (after the payment thereof of certain legacies) of the same "dividends, interest and income," for his life, with remainder to one of his brother's children and another legatee, as therein mentioned. At his death the testator had twenty-five

shares in the Sun Life Assurance Society and fifty-two in the Sun Fire Insurance Office. The trustees of the will paid his widow the dividends on those shares till 1873, when they withheld the January and July dividends on the respective shares, on the ground that it was doubtful whether the dividends were corpus, or income, of the estate. The question depended on the construction of the company's deed of settlement, and on the mode in which the company had declared the dividends, which were called "extraordinary" and "special." The resolutions under which the dividends were declared were not produced to the Court; but it was stated that they were identical in terms with the dividend warrants; and the warrants spoke of the money payable thereunder as "dividend paid out of profits." The trustees paid the money into Court, and the testator's widow presented a petition, praying payment of it out to her:—Held, on the construction of the company's deed of settlement, and the resolutions declaring the dividends, that the dividends were income and not corpus of the estate, and belonged to the petitioner. Costs were allowed out of the fund. *In re Hopkins's Trusts*, 43 Law J. Rep. (N.S.) Chanc. 722; Law Rep. 18 Eq. 696.

(e) *Costs incurred under Lands Clauses Act.*

7.—A tenant for life of a settled estate is not entitled to throw upon the estate his costs of opposing in Parliament a bill brought in by a public company for taking part of the estate. But he is entitled to charge the estate with the costs, charges and expenses properly incurred by him in or about an arbitration entered into between him, under the provisions of the Lands Clauses Act, regarding the value of the land, on the ground that, under the Act, he is made the fiduciary agent for such purposes on behalf of the estate. *In re Berkeley's Will*, 44 Law J. Rep. (N.S.) Chanc. 3; Law Rep. 10 Chanc. 57.

(f) *Compromise of breach of trust by testator.*

8.—A claim against a testator's estate for a breach of trust having been compromised by payment of a gross sum,—Held, that, as between tenant for life and remainderman, the sum paid was to be treated as composed of a debt due on the day when the claim originated, of interest at five per cent., from that day to the testator's death, and of interest at four per cent. on such debt, and interest from thence to the time of payment; the debt and interest up to the testator's death to be chargeable to corpus, and the subsequent interest to income. *Maclaren v. Stainton*, Law Rep. 11 Eq. 382.

(g) *Farming stock.*

9.—Under a gift of farming stock to one for life, with remainder over, the first taker does not become absolutely entitled to such of the articles comprised in the gift as are of a consumable nature, but if he enjoy it *in specie* he must keep up the amount of it, and if it has to be sold he will only be entitled to the income produced by

the proceeds. *Cockayne v. Harrison*, 41 Law J. Rep. (N.S.) Chanc. 509; Law Rep. 13 Eq. 432.

(h) *Profits of partnership.*

10.—In apportioning the profits of a testator's partnership business between corpus and income, such profits will be considered as earned at the expiration of the particular periods down to which the partnership profits and losses are from time to time ascertained, and the profits earned during a period which expired before the testator's decease will not be considered as income merely because, owing to delay, they were not actually ascertained until after his decease. *Clive v. Clive* (Kay, 600) followed. *Browne v. Collins*, Law Rep. 12 Eq. 586.

11.—Where executors carried on the partnership business of their testator, in which the widow took a life interest under the will, and by the deed of partnership the majority in value of the partners had power to divide the profits, or to add them to the capital, or carry them to the separate accounts of the partners, and large accumulations were carried to a profit and loss account, and the greater part thereof used for business purposes,—Held, that the remaindermen were entitled to the sums standing to the profit and loss account as against the widow. *Straker v. Wilson*, 40 Law J. Rep. (N.S.) Chanc. 630; Law Rep. 6 Chanc. 503.

(i) *Income of investments unconv. rted.*

12.—Where a testator empowered his trustees to continue invested any of his government stocks,—Held, that this only extended to stocks of a permanent character, and that the estate of the deceased tenant for life under the will was liable to recoup the amount which would have been produced by the sale of long annuities which had expired in her lifetime, and of which she had received the proceeds. *Tickner v. Old*, Law Rep. 18 Eq. 422.

13.—Gift of residue to a testator's sister, confirmed in a codicil, but with a desire "that the same should be invested in any way my executors think proper," in trust for her sole benefit during her lifetime, and at her death for her children:—Held, that she was not entitled to the income of leaseholds and other parts of the testator's estate, consisting of investments not usually authorised by the Court, which had remained for some time unconverted, but only to interest on their value at four per cent. *Green v. Britten*, 42 Law J. Rep. (N.S.) Chanc. 187.

14.—H., by his will, gave his property to trustees upon trust, to convert, or in their discretion to retain present investments. The estate was administered by the Court, and acting on the chief clerk's certificate, some of the investments were retained, and in particular several shares in the West Middlesex Water Works, which were shewn to have paid a high dividend, and also to have increased in value since the death of the testator. On a question as to the apportionment of the dividends on these shares between a tenant for life and remaindermen,—Held, that the tenant

for life was only entitled to interest at four per cent. per annum on the value of the shares at the death of the testator. *Furley v. Hyder*, 42 Law J. Rep. (N.S.) Chanc. 626.

15.—A testator devised a brickfield on trust for sale when the trustees should think it desirable. They deferred the sale in the exercise of their discretion:—Held, that the tenant for life was entitled to the royalties as income. *Miller v. Miller*, 41 Law J. Rep. (N.S.) Chanc. 291; Law Rep. 13 Eq. 263.

16.—A testator, possessed of leasehold collieries, gave his real, leasehold and personal estates to trustees, upon trust for tenants for life, and in remainder, and empowered his trustees, if they should deem it beneficial, to carry on his colliery business, and to renew the leases. They did so, and expended part of the profits in renewing and acquiring leases of collieries and buying plant, and the rest of the profits were paid to the tenants for life. The will contained no express direction to convert, but contained leasing powers. The Court declared the collieries and plant to belong to the estate, and held the tenants for life entitled to the actual income arising therefrom. *Thursby v. Thursby*, 44 Law J. Rep. (N.S.) Chanc. 289; Law Rep. 19 Eq. 395.

17.—A testator gave his real and personal estate to trustees on trust, to sell and convert so much thereof, as in their sole discretion they might think necessary to discharge his mortgage and other debts, and funeral and testamentary expenses. Subject to this charge, the trusts were in favour of tenants for life, with remainders over:—Held, that the tenants for life were entitled to enjoy *in specie* leaseholds which the trustees had not actually converted. *In re the London and North-Western Railway Company (Sevell's Estate)*, 40 Law J. Rep. (N.S.) Chanc. 135; Law Rep. 11 Eq. 80.

(k) *Renewable leaseholds.*

18.—Where renewable leaseholds were held in trust, and the trustees were directed to reserve a fund for fines on renewals out of the rental, and the leaseholds were taken by a railway company, and shortly afterwards the practice of renewal was discontinued, the value of the leaseholds having been assessed at an amount which, invested in three per cents., gave a reduced income to the tenant for life:—Held, that the tenant for life was not entitled to be recouped the deficiency of income out of corpus. *In re Wood's Estate*, 40 Law J. Rep. (N.S.) Chanc. 59; Law Rep. 10 Eq. 572.

19.—P. D. being entitled to an ecclesiastical lease which it was customary to renew every seven years, bequeathed it to trustees for his daughter for life, remainder to her children, subject to a provision for raising out of the income a fund for renewing the lease, and to a power of sale. The reversion having become vested in the Ecclesiastical Commissioners they refused to renew, but offered to sell part of the reversion in fee to the trustees upon having a surrender of the lease in the remainder and a sum down. The proposal

was opposed by the tenant for life, on the ground that it would considerably reduce her income:—Held, that under sections 20, 35, 37 and 39 of the Act 23 & 24 Vict. c. 124, and having regard to the provisions of the will, the Court had power to direct the trustees under the will to carry the arrangement into effect if, upon due consideration of the rights of all persons interested, it should appear just to do so. And an inquiry was directed whether the arrangement was proper, or calculated to give the remaindermen the enjoyment, as nearly as possible, of the corpus of the property bequeathed by the will, or what modification of it, if any more proper, could be arranged. *Hollier v. Burne*, 42 Law J. Rep. (N.S.) Chanc. 789; Law Rep. 16 Eq. 163.

20.—W. T. was beneficially entitled for his life to renewable leaseholds for three lives, held on trust to renew, and subject to certain charges. All the *cestuis que vie* having died, and W. T.'s right to renew being disputed by the reversioner, the trustee of the leaseholds, with the consent of the persons entitled to the charges, in order to facilitate the obtaining of a renewal, transferred the legal estate to W. T. by a deed, which recited (though contrary to the fact) that the charges had been paid by W. T. Thereupon W. T. obtained a renewal (without prejudice to the question in dispute), and subsequently, to avoid litigation, purchased the reversion in fee. He subsequently paid off the charges, and mortgaged the premises in fee. By his will, reciting that the charges were subsisting, he devised his interest in the premises to T. T., subject to the charges:—Held, affirming the decision of Bacon, V.C. (41 Law J. Rep. (N.S.) Chanc. 673; Law Rep. 14 Eq. 295), that T. T. took the fee subject to the charges. *Trumper v. Trumper*, 42 Law J. Rep. (N.S.) Chanc. 641; Law Rep. 8 Chanc. 870.

(l) *Direction to accumulate rents till debts paid.*

21.—Testator died in 1844, having by his will directed his trustees, out of the rents and profits of his real estates, to pay all his debts, including a sum of 8,000*l.* charged on part of his realty. Testator also directed that "no person to whom any estate for life or in tail was given by the will should be entitled to the rents and profits of the estate, or any part of them, until they were totally disencumbered and clear of debt." The trustees were to invest the moneys to come to their hands under the trusts of the will until applied by them in any payment under it. All the debts had been paid except the 8,000*l.*, and there was stock enough in Court to meet that. The payment of the debts had been effected by a sale of part of the realty, under the orders of the Court, and a receiver had been appointed. In 1874 a summons was taken out by the tenant for life to discharge the receiver, and to be let into possession of the estates:—Held, that the receiver must be discharged, and the tenant for life admitted to the estates. *Tewart v. Lawson*, 43 Law J. Rep. (N.S.) Chanc. 673; Law Rep. 18 Eq. 490.

*Annuity: whether payable out of corpus or income.* [See ANNUITY, 8.]



## TENANTS IN COMMON.

## (A) WHAT WORDS CREATE TENANCY IN COMMON.

## (B) RIGHTS OF TENANTS IN COMMON.

## (A) WHAT WORDS CREATE TENANCY IN COMMON.

1.—A gift to A. and B. (in terms creating a joint tenancy), followed by a proviso for survivorship to B. if A. died without children,—Held, to create a tenancy in common. *Ryves v. Ryves*, 40 Law J. Rep. (N.S.) Chanc. 252; Law Rep. 11 Eq. 539.

2.—Held, that a direction that a class should take "between them" created a tenancy in common. *The Attorney-General v. Fletcher*, 41 Law J. Rep. (N.S.) Chanc. 167; Law Rep. 13 Eq. 128.

[And see WILL, CONSTRUCTION, I 1-7.]

## (B) RIGHTS OF TENANTS IN COMMON.

3.—One tenant in common cannot maintain trespass or trover against his co-tenant for cutting and carrying away the grass off their land unless there has been an ouster, or unless it is shewn that the grass has been destroyed. *Jacobs v. Seward* (H. L.), 41 Law J. Rep. (N.S.) C. P. 221; Law Rep. 5 E. & F. App. 464.

The plaintiff and the defendant being tenants in common of certain land, the defendant entered upon the land, cut the grass, put a lock upon the gate, and carried away the grass. There was no evidence that the defendant kept the gate locked, but there was evidence that he opened the gate for the plaintiff's son to take away the hay of a former year:—Held, that these facts did not amount to an ouster of the plaintiff by the defendant, so as to enable the plaintiff to maintain an action of trespass against the defendant, nor to a destruction of the common property so as to entitle him to maintain an action of trover. Held, also, that the Court below was right in refusing to allow an amendment of the declaration by converting the action into an action for an account under 4 Anne, c. 16, s. 27. Ibid.

4.—A., B., and C. were tenants in common in fee of a piece of land containing coal. B. and C. with the knowledge, but without the consent of A., entered into an agreement with J. to lease to him their two undivided thirds of the mine for three years, and gave him authority to work the coal. J. entered under the agreement and worked the coal for three years, from 1865 to 1868, leaving unworked one-third of the coal, and reserving one-third of the royalties for A. In 1872 A. filed a bill against his co-tenants and J., praying for an enquiry as to the value of the coal gotten by J., and that in making such enquiry no allowance might be made for cost of severance or of bringing to the surface, and that the defendants might be ordered to pay to him one-third of the amount found due:—Held, that B. and C. were entitled to work the coal by themselves or their agent, provided they took no more than their proper share. *Job v. Potton*, 44 Law J. Rep. (N.S.) Chanc. 262; Law Rep. 20 Eq. 84.

Also, that as A. had not given his consent to the agreement, he was entitled to an account of the value of the coal gotten, but that as J. had worked the mine in the assertion of a right, and had not done anything either tortious or negligent, all just allowances must be made in taking the account for cost of severance and bringing to the surface. Ibid.

A. having elected to take the account against J. alone, the bill was dismissed against B. and C. with costs. Ibid.

## THAMES CONSERVANCY ACT.

A riparian proprietor on the banks of a public navigable river, where the tide flows and reflows, has no greater rights over the river or the foreshore than the public at large. *Lyon v. The Fishmongers' Company*, 44 Law J. Rep. (N.S.) Chanc. 747; Law Rep. 10 Chanc. 679.

The right of a wharfowner on the banks of the Thames, between the limits subject to the jurisdiction of the conservators of the river, to have free access for his barges to and from the doors of his wharf, opening and abutting on the river, for the purpose of loading and unloading the barges, and his right of ingress and egress from his wharf to his barge, and *vice versa*, is not a private right within the 179th section of the Thames Conservancy Act, 1857, which is interfered with by the exercise of the powers conferred on the conservators by the 53rd section of the Act. Decision of Malins, V.C. (44 Law J. Rep. (N.S.) Chanc. 408) reversed. Ibid.

## THEATRE.

By section 3 of 1 Geo. 4. c. lx, (one of the Acts under which Drury Lane Theatre was built), each of the new renters there referred to is, for a certain term of years (not yet expired), to be entitled "to the free liberty and privilege of admission into the usual audience part of the said theatre . . . before the curtain" (except in certain fourteen private boxes), "on every day and night on which any theatrical or other performance shall be publicly exhibited between the time at which the doors of the said theatre shall be open for admittance of the public and the termination of such performance, in as full and effectual manner" as the same was then enjoyed by the said new renters, provided that such persons should be subject to such regulations as the sub-committee of the company of proprietors of the theatre should from time to time deem necessary or make for the government and management of the said theatre, so that such regulations do not affect or abridge the rights of the said new renters as then enjoyed. Since that Act part of what was then the pit of the said theatre has been railed off from the rest of the pit and converted into stalls, each of which is numbered, and the whole of which are approached by a separate entrance. A

seat in the stalls is let at a higher price than a seat in either the pit or the dress-circle, and is retained the whole evening for the person to whom it is let:—Held, that such stalls are part of "the usual audience part of the theatre" within the meaning of the said Act, and that any such renter has a right of free admission to a seat in such stalls which is unoccupied and not pre-engaged when he arrives there, and that he does not lose such right because he has used his privilege of free admission by going in the first instance into the dress-circle, and consequently that he has a right to change from the dress-circle to the stalls without being required to pay 2s., the difference in price between a seat in the dress-circle and in the stalls, and which is paid by any of the public on so changing from the dress-circle to the stalls. *Dawney v. Chatterton*, 44 Law J. Rep. (N.S.) C. P. 53.

Per Lord Coleridge, C.J., and Brett, J., that the right of such renter being limited to the time between the opening of the doors of the theatre to the admittance of the public and the termination of the performance, and being also subject to the said regulations for the management of the theatre, such renter cannot go into any seat which has been pre-engaged, although it may not be occupied when he arrives; nor can he go into any private box (although it is not one of the fourteen boxes from which he is excluded expressly by the Act), because by the said regulations a seat cannot be taken in a private box, but the whole box must be taken. *Ibid*.

#### THELLUSSON ACT.

A testator bequeathed several annuities payable out of the income of his residuary personal estate, and to abate rateably if the securities provided for them proved insufficient, directing the surplus income to be accumulated till the death of the surviving annuitants. He bequeathed his residuary personalty to be paid and divided into five public charities according to the amounts set after their names in the will. The sum of 100*l*. only was set after the name of each charity. There was a very large amount of personal estate after providing for the annuities; and the testator left no next-of-kin:—Held, that the charities were entitled to the whole of the residuary pure personalty; but that, being charities, they could not now call for the payment of the surplus to them, and the accumulations must go on till further order. *Harbin v. Masterman*, 40 Law J. Rep. (N.S.) Chanc. 760; Law Rep. 12 Eq. 559.

#### THIEVES.

*Permitting thieves to assemble.* [See HABITUAL CRIMINALS ACT.]

#### TITHES.

[The Tithe Commutation Acts amended with respect to market gardens. 36 & 37 Vict. c. 42.]

##### *Modus: conversion into tillage.*

1.—Land was held subject to a modus in lieu of tithe until it should be converted into tillage, when a yearly rent at so much per acre was to become payable:—Held, that the building a house upon such land and converting a part of it into an orchard was not a conversion into tillage or a breach of the modus, and that the same modus continued in force. *Dudman v. Vigar* (H.L.), 42 Law J. Rep. (N.S.) C. P. 297; Law Rep. 6 E. & I. App. 212.

A small portion of the land was converted into a garden for the use and convenience of the house:—Semble, such conversion was not a conversion into tillage. *Ibid*.

An award made under an Inclosure Act set out the "tithe money payment to be hereafter payable out of lands subject to moduses in the event of and during the time when the lands or any part thereof should be converted into tillage." A schedule to the award shewed the actual measurement of the land in question to be 1a. 1r. 3p.; the payment to be made on conversion 12s. 8½*d*.; and the payment per acre 10s. The owner having converted a small portion into garden, and having paid in respect of that portion after the rate of 10s. per acre,—Held, that if such payment was of right payable in respect of the small portion so converted, it did not follow that payment must be made in the same way in respect of the rent of the land which was not converted. *Ibid*.

Decision of the Court of Exchequer Chamber (41 Law J. Rep. (N.S.) C. P. 64; Law Rep. 7 C. P. 72, *sub nom. Vigar v. Dudman*), affirming the Court of Common Pleas (40 Law J. Rep. (N.S.) C. P. 229; Law Rep. 6 C. P. 470), affirmed. *Ibid*.

##### *Extraordinary charge on land cultivated as hop grounds.*

2.—The power of the Tithe Commissioners under 6 & 7 Will. 4. c. 71, s. 42, and 23 & 24 Vict. c. 93, s. 42, to impose an extraordinary charge on lands in a parish newly cultivated as hop grounds or market gardens, is not limited to lands in a parish in which a district had been assigned at the time of the commutation within which such extraordinary charge should be payable, but such charge may be made although no district had ever been so assigned. *Russell v. The Tithe Commissioners for England and Wales*, 40 Law J. Rep. (N.S.) C. P. 265; Law Rep. 6 C. P. 596.

##### *Assessment of tithe rent-charge owner to church-rate.*

3.—The owner of tithe rent-charge in a parish where money has been borrowed under the provisions of 5 Geo. 4. c. 36, is liable to be assessed to the rate made for repayment of the money. *Smallbones v. Edney*, 40 Law J. Rep. (N.S.) Ecc. 8.

*Scotch Law.*

4.—A plea of *bona fide perceptio et consumptio* is a good defence to a claim for arrears of tithes. *The Lord Advocate v. Drysdale*, Law Rep. 2 Sc. App. 368.

[And see SCOTCH LAW, 31.]

## TOLL.

*Bridge toll.*

1.—By 6 Geo. 4. c. 29 (Lower Canada), the appellant was empowered to build a bridge over a river, and to take tolls from persons using the same, and it was provided that any person other than the appellant conveying a person across the said river within certain limits should be liable to a penalty. By the 16 Vict. c. 107 (Lower Canada), the respondents were authorised to construct a railway and to make a bridge over the same river, within the limits prescribed in the former Act. The respondents constructed a bridge and carried their railway over it. In an action by the appellant, claiming the demolition of the bridge, an injunction and damages,—Held, that the respondents could not be treated as wrong doers, and that no such action could be brought. Secondly, that even if the appellant was entitled to compensation, the making compensation was not a condition precedent to the exercise of the powers granted by statute to the respondents. *Jones v. The Stanstead, Sheffield, and Chambley Railway Company*, 41 Law J. Rep. (N.S.) P. C. 19; Law Rep. 4 P. C. 98.

*Liability of railway company.*

2.—The simple fact of a corporation being entitled to an ancient drift toll on waggons passing to, through or from a borough does not support a claim (even if such a claim can be legal) to take toll on railway waggons passing over a railway made through the borough—affirming the judgment below, 41 Law J. Rep. (N.S.) C. P. 257; Law Rep. 7 C. P. 555. *The Brecon Markets Company v. The Neath and Brecon Railway Company* (Exch. Ch.), 42 Law J. Rep. (N.S.) C. P. 63; Law Rep. 8 C. P. 157.

*Market tolls: cattle brought into market-place, but not occupying any part of the soil.* [See MARKET, 3.]  
*Port dues.* [See PORT.]

## TOTAL LOSS.

[See MARINE INSURANCE, 30-35.]

## TOWNS POLICE ACT.

1.—A piece of ground, the property of a railway company, is not—though used as an approach to a station, and though not fenced off from the

public highway—a “street” or “road” within the meaning of the 3rd section of the Town Police Clauses Act, 1847, so as to render persons who by agreement with the company keep carriages standing there, liable to a penalty for allowing carriages to ply for hire without a license. *Curtis v. Embrey*, 42 Law J. Rep. (N.S.) M. C. 39; Law Rep. 7 Exch. 369.

2.—By s. 33 of 10 & 11 Vict. c. 89 (the Town Police Clauses Act, 1847), the commissioners may send fire engines for the purpose of extinguishing fires in the neighbourhood, and “the owner of the lands and buildings where such fire shall have happened shall, in such case, defray the actual expense,” &c. The respondent was the owner of a haystack which stood upon land in his occupation. Expenses were incurred in sending an engine and working the same in the endeavour to extinguish a fire in the haystack,—Held, that the respondent was the owner within the meaning of the 33rd section, and was bound to defray the expenses. *Lewis v. Arnold*, 44 Law J. Rep. (N.S.) M. C. 68; Law Rep. 10 Q. B. 245.

3.—Certain clauses of the Towns Improvement Act, 1847, incorporated in the Public Health Act, 1848, provide that no slaughter-house shall be erected without the license of the Local Board of Health. Under the Local Government Act, 1858 (which is to be read as one with the Public Health Act, 1848), the corporation constituted the Local Board of Health for B. A local Act, passed subsequently, provided that a company formed thereby for the purpose of managing the property of the corporation of B., might, with the consent of the corporation, erect slaughter-houses in the borough of B. The company erected slaughter-houses under the local Act with the consent of the corporation, testified by writing duly signed, but the corporation afterwards, when acting as the Local Board under the Act of 1858, refused to license the buildings as slaughter-houses:—Held (reversing the decision of the Court of Exchequer), that the consent given by the corporation under the local Act included the license required by the Towns Improvement Act. *Antony v. The Brecon Markets Company*, 41 Law J. Rep. (N.S.) Exch. 201; Law Rep. 7 Exch. 399.

## TRADE FIXTURES.

[See FIXTURES.]

## TRADE MARK.

## (A) WHAT MAY CONSTITUTE A TRADE MARK.

- (a) *User of name of a place.*
- (b) *Adjective denoting quality.*
- (c) *Arbitrary name given to new article.*
- (d) *Trade mark in gross.*

## (B) INFRINGEMENT.

- (a) *User of single word not publici juris.*
- (b) *User of name with variation.*
- (c) *Claim to be original inventor.*

- (d) *User of name of former firm.*
- (e) *Evidence of deception of public.*
- (f) *Effect of misrepresentation by plaintiff.*
- (C) PRACTICE IN SUITS FOR INFRINGEMENT.
  - (a) *Costs.*
  - (1) *Deception of public.*
  - (2) *Defendant innocent of fraud.*
  - (b) *Discovery and production.*

[Register of trade marks established. 38 & 39 Vict. c. 9.]

#### (A) WHAT MAY CONSTITUTE A TRADE MARK.

##### (a) *User of name of a place.*

1.—Where a name, whether of a place or person, has, by user by a particular maker of a particular article of manufacture, acquired a secondary signification in connection with that manufacture, and has obtained currency and value in the market as the trade denomination of that particular maker's goods, it becomes in connection with that manufacture the property of that maker as his trade mark or as part of his trade mark. The user of that name by another maker in connection with that manufacture will be prohibited, even though he may not copy the whole of the first maker's trade mark, whatever means such other maker may devise for the purpose of availing himself of the name; provided the Court is satisfied that those means are adopted in order to obtain a colourable right to use the name, and that the object and the probable result of such user would be to deceive unwary purchasers of such other maker's goods into the belief that they were buying the goods of the party to whom the right to use the name belongs. *Wotherspoon v. Currie* (H. L.), 42 Law J. Rep. (n.s.) Chanc. 130; Law Rep. 5 E. & L. App. 508.

W., having acquired in connection with starch a property in the name of a small place, Glenfield, where he at one time made his starch, removed his works elsewhere, but continued to call his starch Glenfield Starch. C. went to Glenfield and also made starch there which he called Royal Palace Starch, but he printed on his labels conspicuously the word Glenfield as the name of the place where his starch was made. It was proved that this starch was pushed in the trade as Glenfield Starch. It was proved also that as regards the first purchasers, the retail dealers, there was no deception; that they well knew that in buying C.'s starch they were not buying that made by W.; and that W.'s was the original Glenfield Starch:—Held, that this was a fraudulent use of the word "Glenfield," and an infringement of W.'s trade mark. *Ibid.*

2.—An injunction will be granted on an interlocutory motion to restrain the use or imitation of the name of a place, used as a trade mark, if the plaintiff proves *prima facie*, that such name in the market has come to mean the plaintiff's article. *Radde v. Norman*, 41 Law J. Rep. (n.s.) Chanc. 525; Law Rep. 14 Eq. 348.

##### (b) *Adjective denoting quality.*

3.—An English adjective merely descriptive of the quality of an article, such as "nourishing stout," is not by itself entitled to protection as a trade mark. *Raggett v. Findlater*, 43 Law J. Rep. (n.s.) Chanc. 64; Law Rep. 17 Eq. 29.

##### (c) *Arbitrary name given to new article.*

4.—The plaintiff, a woollen manufacturer, introduced into the market cloths of particular textures, made by him, under arbitrary names, as "Sefton," "Turin," &c. The defendants copied the patterns, which were not registered, and sold the cloths under the same name. The defendants also used a ticket in sending their cloth to the wholesale dealers, closely resembling that of the plaintiff; but they explained that they purchased the ticket, which was of a simple description, and did not bear the manufacturers' name, from the stock of a stationer, without any intention to copy the plaintiff's. They claimed to be entitled to describe the cloths by the names given to them by the plaintiff:—Held, that the plaintiff was solely entitled to the names as trade marks; and that the use of the tickets, even if innocent, was unjustifiable. *Hirst v. Denham*, 41 Law J. Rep. (n.s.) Chanc. 752; Law Rep. 14 Eq. 542.

##### (d) *Trade mark in gross.*

5.—The inventor of a sauce gave it the name of the Licensed Victuallers' Relish, and designed a trade mark for labels on the bottles containing it, and employed his son to sell it. He permitted his son to describe himself in his circulars and invoices as the sole proprietor of the sauce. The son became bankrupt and his trustee sold his interest in the sauce and its trade mark to the plaintiffs, who now sought to restrain the inventor from infringing the trade mark. It appeared that the plaintiffs did not know the defendant's recipe, but made a sauce which their witnesses deposed to be undistinguishable from the defendant's:—Held, that a trade mark could not exist in gross, and that as the plaintiffs did not know the recipe for the original article, they could not have a right to affix the trade mark to a sham article for the purpose of imposing on the public. *Cotton v. Gillard*, 44 Law J. Rep. (n.s.) Chanc. 90.

#### (B) INFRINGEMENT.

##### (a) *User of single word not publici juris.*

6.—The user by a dealer or manufacturer in connection with an article of manufacture of a single word, being a material part of a particular title to which as a trade mark another manufacturer has a right in connection with the same article, may be an infringement of the trade mark. *Ford v. Foster*, 41 Law J. Rep. (n.s.) Chanc. 682; Law Rep. 7 Chanc. 611.

The test whether a fancy name adopted by a manufacturer as a trade mark for certain goods has become *publici juris* is the question whether the use of it by other persons in connection with the same goods is calculated to deceive the public,

so as to induce them to believe that in purchasing the goods so named they are purchasing goods of the original manufacturer. Consequently a trade-mark may have become *publici juris* among a certain class, as between the wholesale and retail dealers who will not be deceived by it, and yet may not have become *publici juris*, as between the retail dealers and their ordinary customers. *Ibid.*

The misrepresentation, such for example, as falsely calling himself a "Patentee," which will disentitle a plaintiff to relief in equity in respect of an infringement of his trade mark, must be such a misrepresentation as would prevent him from recovering nominal damages in an action at law brought to establish his right to the trade mark. And since a misrepresentation, not forming a part of the trade mark itself, although used in connection with the trade mark, and with the article to which the trade mark applies, would be no answer to the plaintiff's action to establish his title at law, neither will such a misrepresentation disentitle the plaintiff to relief in equity. *Ibid.*

The plaintiff Ford, a shirt manufacturer, gave the name "Eureka" to a particular shape of shirt invented by him, and stamped all such shirts with the words "Ford's Eureka Shirts," and with a statement that such words were his trade mark. He advertised the shirts, falsely calling himself the "patentee" of them, and he falsely described himself on his bill-heads, &c., as patentee of the shirts. Shirts of the particular shape came to be commonly known in the trade as "Eureka" shirts. The defendants, wholesale shirt manufacturers, made shirts of the same shape, and stamped them in the same part of the shirts as "Eureka Shirts."—Held, that the plaintiff was entitled to an injunction to restrain the defendants from using the word "Eureka," as applied to shirts not of the plaintiff's manufacture, except that the defendants were to be at liberty to advertise their shirts as "Eureka" in their trade lists. *Ibid.*

Having regard to the plaintiff's misrepresentations, the account against the defendants was confined to the time from the filing of the bill. *Ibid.*

(b) *User of name with variation.*

7.—The plaintiff was publisher and proprietor of a book called "The Birthday Scripture Text-Book." Defendants published a book of the same nature called "The Children's Birthday Text-Book."—Held, that the plaintiff was entitled to an injunction to restrain defendants from publishing their book by that name or by any other name containing the words "Birthday Text-Book" as a portion thereof. *Mack v. Petter*, 41 Law J. Rep. (N.S.) Chanc. 781; Law Rep. 14 Eq. 431.

(c) *Claim to be original inventor.*

8.—"Reading sauce" was first invented and introduced to the public by one J. C., but subsequently many manufacturers by unrestrained usage acquired the right to call their articles the "Reading Sauce".—Held, that the description "the original Reading Sauce" applied only to that made by J. C. and those claiming under him,

and that they had a right to restrain other parties from using that designation without shewing that any purchaser was actually deceived. *Cocks v. Chandler*, 40 Law J. Rep. (N.S.) Chanc. 575; Law Rep. 11 Eq. 446.

9.—After the death of Lieutenant Robert James, the inventor of a blister ointment, known as Lieutenant James's blister, the recipe for making which was a valuable trade secret, but not patented, while his successors in title were carrying on the business of selling it, his nephew, R. J. James, who had discovered the recipe under circumstances which did not make it a breach of duty to avail himself of his discovery, made and sold the ointment under the name of the original inventor, signed with the signature R. James, and advertised his ointment as the only genuine:—Held, on bill filed against him by the successors of the original inventor, that he was entitled to make and sell the article as Lieutenant James's blister, but not to do anything which was calculated to make the public think that he was the original inventor or the successor of the inventor, or to represent that his was the only genuine preparation. *James v. James*, 41 Law J. Rep. (N.S.) Chanc. 353; Law Rep. 13 Eq. 421.

(d) *User of name of former firm.*

10.—A manager or former partner in a firm, who sets up in business on his own account, will not be permitted to advertise the fact of his previous connection with the old firm in such a way as might induce the public to believe that he is carrying on the business of the old firm. *Hookham v. Pottage*, Law Rep. 8 Chanc. 91.

(e) *Evidence of deception of public.*

11.—An injunction to prevent the infringement of a trade mark will not be granted unless there is evidence that the public has been actually deceived, or the Court is satisfied from inspection that there is an intention or probability of deception. Evidence of opinion of experts on the latter point is not sufficient. *Cope v. Evans*, Law Rep. 18 Eq. 138, and see *supra* No. 8.

(f) *Effect of misrepresentation by plaintiff.*

[See *supra* No. 6.]

(C.) PRACTICE IN SUITS FOR INFRINGEMENT.

(a) *Costs.*

(1) *Deception of public.*

12.—A suit was instituted to restrain an alleged improper use by the defendants of the plaintiffs' trade name. Both the plaintiffs and the defendants were engaged in the manufacture of a compound intended for sale to brewers, and to be used by them in the making of beer in the place of hops. Upon the merits the Court decided that the plaintiffs had failed to make out any case for relief. But inasmuch as the defendants as well as the plaintiffs were engaged in the manufacture and sale of an article which was intended to enable brewers to deceive

the public.—Held, that the bill must be dismissed without costs. *Estcourt v. The Estcourt Hop Essence Company (Limited)*, 44 Law J. Rep. (N.S.) Chanc. 223; Law Rep. 10 Chanc. 276.

(2) *Defendant innocent of fraud.*

13. Bill by the plaintiff, a merchant, to restrain the defendant, an agent, who received goods from the Continent, and forwarded them to parties in England for a commission, from forwarding goods bearing a forged imitation of the plaintiff's trade mark. On a first application, the defendant, who was innocent of the fraud, readily gave the names of the persons by whom the goods were sent, and offered to erase the forged marks:—Held, affirming the decision of the Master of the Rolls, that costs ought not to be given against the defendant. *Upmann v. Elkan*, 41 Law J. Rep. (N.S.) Chanc. 246; Law Rep. 7 Chanc. 130.

(b) *Discovery and production.*

*Discovery and production of documents in suit to restrain infringement of trade mark.*  
[See PRODUCTION, 20.]

### TRADES UNIONS.

[32 & 33 Vict. c. 61 repealed. Enactments as to the status, registration, and rules of Trades Unions. 34 & 35 Vict. c. 31.]

By the Trades Union Act, 1871, 34 & 35 Vict. c. 31, s. 6, any seven or more members of a trade union may, by subscribing their names to the rules of the union, &c., register the trade union under the Act, and by section 8, all property belonging to any trade union so registered shall be vested in its trustees. By section 13, subsection 2, the registrar, upon being satisfied that the trade union has complied with the regulations respecting registry in force under the Act, shall register such trade union; and by subsection 3, no trade union shall be registered under a name identical with that by which any other existing trade union has been registered. By subsection 6 power is given to a Secretary of State to make regulations respecting registry under the Act, and the Home Secretary, acting by virtue of this power, made a regulation providing that upon an application for the registration of a trade union which was already in operation, the registrar if he had reason to believe that the applicants had not been duly authorised by such trade union to make the same, might, for the purpose of ascertaining the fact, require from the applicants such evidence as might seem to him necessary. An application was made to the registrar, dated the 23rd of December, requiring him to register the Amalgamated Society of Carpenters and Joiners, signed by certain persons who stated that they were authorised to make it by a resolution passed by the executive council of the society. A second application was made, dated the 30th of December, by different persons, to register a

society under the same title, the applicants stating that they were authorised to make it by a vote of the whole of the members of the society. The registrar required evidence from both sets of applicants in support of their applications; and being satisfied from the evidence that differences had arisen which had led to the division of the society into two sections, which were represented by the respective applicants, he refused to register the society upon either application:—Held, that, apart from any question as to the validity of the regulations made by the Home Secretary, the registrar had properly refused the applications, as he was not bound upon an application for registration to enquire into differences which existed within the society, and to alter the position of one party by granting registration upon the application of the other. *The Queen v. The Registrar of Friendly Societies*, 41 Law J. Rep. (N.S.) Q. B. 366; Law Rep. 7 Q. B. 741.

Semble, per Lush, J.—That the regulation made by the Home Secretary was valid. *Ibid.*

### TRAMWAYS.

The General Tramways Act, 1870, provides that no tramways authorised by provisional order shall be laid within a certain distance from the footpath, if one-third of the occupiers of houses adjoining object. A local Act gave a tramways company power to make tramways in accordance with certain plans and sections therein mentioned. The Act scheduled an agreement by the occupiers providing that the general Acts should apply as fully as if the private Act were a provisional order:—Held, that as the objection by the occupiers must be prior to the obtaining of the provisional order, they had waived it and were not entitled to object to a tramway being laid within the prescribed distance, if in accordance with the plans and sections. *The Edinburgh Street Tramways Company v. Black*, Law Rep. 2 Sc. App. 336.

*Rateability of tramways.* [See RATE, 20.]

### TREASURY.

*Costs of criminal prosecution: jurisdiction to issue mandamus against Lords of Treasury.* [See MANDAMUS, 2.]

### TRESPASS.

(A) *RIGHT OF ACTION.*

- (a) *Lessee and sub-lessee.*
- (b) *Tenant of mortgagor and mortgagor.*
- (c) *Tenants in common.*
- (d) *Obstruction of highway in navigable lake.*

(e) *Alteration of drain granted "as at present enjoyed."*

(f) *Escape of water.*

(B) RIGHT TO INJUNCTION.

(A) RIGHT OF ACTION.

(a) *Lessee and sub-lessee.*

1.—The lessee of a theatre held it under a lease in which he covenanted not to convert it to any other use than for acting or performing of operas or theatrical entertainments. He demised certain boxes and stalls to a sub-lessee, reserving power of access for the purpose of repairing; the sub-lessee covenanted only to use the same for the purpose of viewing and hearing the operas and other entertainments. The underleases contained covenants for quiet enjoyment. The lessee demised the theatre for a term of three months for the purpose of holding religious meetings. To enable these meetings to be held, the stalls were covered with a flooring, the divisions between the boxes removed, and other temporary structural alterations made:—Held, that a trespass had been committed by the lessee and persons claiming under him in thus entering upon the sub-lessee's boxes and stalls without his license, and the conversion of the theatre for other than theatrical purposes was a derogation from the grant and a breach of the covenant for quiet enjoyment. *Leader v. Moody*, 44 Law J. Rep. (N.S.) Chanc. 711; Law Rep. 20 Eq. 145.

[And see THEATRE.]

(b) *Tenant of mortgagor and mortgagee.*

2.—The tenant of a mortgagor, whose tenancy was created after the mortgage, and has never been recognised by the mortgagee, cannot maintain trespass against the mortgagee for entering and distraining on the land under the powers of the mortgage. *Gibbs v. Cruikshank*, 42 Law J. Rep. (N.S.) C. P. 273; Law Rep. 8 C. P. 454.

(c) *Tenants in common.*

*By one tenant in common against his co-tenant.* [See TENANTS IN COMMON, 3.]

(d) *Obstruction of highway in navigable lake.*

3.—A. being the owner of land adjoining a navigable lake, the bed of which was the soil and freehold of the plaintiff, granted to the defendants a right of way, and made a pier, part of which was upon his own land, and part upon the bed of the lake. He then leased the pier and the land belonging to it to the defendants, a steamboat company, who used the pier for the purpose of landing and embarking passengers. If the pier had not been built on the bed of the lake, they might have brought their steamboats sufficiently near to be able to land their passengers by means of a temporary stage reaching from their boats to the land so leased to them, and upon which part of the pier was built. The

DIGEST, 1870–1875.

public had a right to navigate the lake, and the plaintiff had not removed the pier, although it had been erected without his consent and against his will:—Held, that he could not maintain an action against the defendants for using the pier as above stated, inasmuch as while he allowed it to remain, it was an obstruction to their right to navigate the lake, and to land and embark their passengers at that place. *Marshall v. The Ulleswater Steam Navigation Company*, 41 Law J. Rep. (N.S.) Q. B. 41; Law Rep. 7 Q. B. 166.

(e) *Alteration of drain granted "as at present enjoyed."*

4.—A conveyance of land was made, subject to the reservation to the grantor and his assigns and the owners and occupiers for the time being of land of the grantor, of joint ownership and right to use a drain "as at present enjoyed by him or them, but no further or otherwise," and also subject to a right of entry for the purpose of repairing the drain. These rights became vested in the defendants. A local board of health having altered the level of a sewer into which the drain emptied, the drain became useless unless deepened. The defendants therefore entered on the land, and relaid the drain two feet deeper than before:—Held, that the limitation was intended to affect the use to which the drain might be put, and not to limit the power to keep it in an efficient state, and that whether the deed created a tenancy in common or only an easement, the defendants had not exceeded the powers reserved by it. *Finlinson v. Porter*, 44 Law J. Rep. (N.S.) Q. B. 56; Law Rep. 10 Q. B. 188.

(f) *Escape of water.*

[See NEGLIGENCE.]

(B) RIGHT TO INJUNCTION.

5.—Where the plaintiff's title is not disputed, the Court will grant an injunction to restrain acts of trespass without requiring him first to bring an action at law. *Goodson v. Richardson*, 43 Law J. Rep. (N.S.) Chanc. 790; Law Rep. 9 Chanc. 222.

If the plaintiff is guilty of no acquiescence or delay, he will be entitled to a mandatory injunction, though the works complained of may have been completed before the filing of the bill. *Ibid.*

6.—Where an agent employed by the tenants of houses adjoining an ornamental garden, who had rights of management of the garden, under colour of a contract with such occupiers, entered into the garden and committed continuing acts of trespass,—Held, that there was sufficient privity between him and the owners of the fee to sustain a bill by the latter for an injunction. *Allen v. Martin*, Law Rep. 20 Eq. 462.

7.—An estate was intersected by a canal and an accommodation bridge built by the canal company, over which a private road was carried. Coal pits were afterwards opened in the lands, and the colliery owners made a tramway over the bridge. The canal company having brought an

action of trespass and applied for a writ of injunction, the coal owners submitted to judgment for 1*l.* damages, and gave an undertaking not to repeat the trespass. A few months afterwards they again laid down the tramway, without breaking the soil of the bridge:—Held, that the undertaking gave the Court jurisdiction to grant an injunction. *The Neath Canal Company v. The Ynisarwed Resolwen Colliery Company*, Law Rep. 10 Chanc. 450.

*Liability of surveyor of highways for trespass by order of board.* [See HIGHWAY, 19.]  
*Trespass by animals.* [See NEGLIGENCE, 5.]

### TRIAL AT BAR.

[See JURISDICTION AT LAW, 3.]

### TROVER.

#### (A) WHEN ACTION MAINTAINABLE.

- (1) *Purchaser of goods subject to vendor's lien.*
- (2) *Action on estoppel in pais.*
- (3) *Sale of horse in market overt.*
- (4) *Waiver of tort by plaintiff.*
- (5) *Tenant in common.*

#### (B) WHAT AMOUNTS TO CONVERSION.

#### (C) SPECIAL DAMAGE BY LOSS OF BARGAIN.

#### (D) EVIDENCE ON TRIAL TENDING TO PROVE FELONY.

#### (A) WHEN ACTION MAINTAINABLE.

##### (1) *Purchaser of goods subject to vendor's lien.*

1.—A purchaser of goods, of which the vendor retains possession with a lien for unpaid purchase-money, cannot maintain trover against a mere wrongdoer. Quære—whether he can, if after the conversion he pays or tenders the purchase-money to the vendor. *Lord v. Price*, 43 Law J. Rep. (n.s.) Exch. 49; Law Rep. 9 Exch. 54.

##### (2) *Action on estoppel in pais.*

2.—An action of trover cannot be maintained upon an estoppel in pais, where the defendant has never had the goods alleged to be converted. *Carr v. The London and North-Western Railway Company*, 44 Law J. Rep. (n.s.) C. P. 109; Law Rep. 10 C. P. 307.

##### (3) *Sale of horse in market overt.*

3.—The defendant's mare, which he had turned out in a public park, was found out of the park, and was sold at public auction by the "pinner." After an intermediate sale she was sold in market overt to the plaintiff, and was subsequently taken possession of by the defendant. There was no proof that the formalities which the statute 31 Eliz. c. 12 requires upon the sale of horses at fairs and markets had been observed:—Held, that in the absence of such proof, the Court

would not infer that such formalities had been observed, and that the plaintiff could not maintain an action for the mare against the defendant the true owner. *Moran v. Pitt*, 42 Law J. Rep. (n.s.) Q. B. 47.

#### (4) *Waiver of tort by plaintiff.*

4.—The defendant sold the goods of D. under a bill of sale. D. became bankrupt, and the plaintiff, his trustee, petitioned the Court of Bankruptcy to set aside the sale as fraudulent or void, and order payment of the proceeds (the amount of which he knew) to him. The Court so ordered, and the money was paid. The plaintiff afterwards being dissatisfied with the amount realised, and desiring to obtain the difference between the value of the goods and proceeds of the sale, brought trover against the defendant:—Held, that he could not do so, as by his acts he had waived the tort. *Smith v. Baker*, 42 Law J. Rep. (n.s.) C. P. 155; Law Rep. 8 C. P. 350.

#### (5) *Tenant in common.*

*By one tenant in common against his co-tenant.* [See TENANTS IN COMMON, 3.]

#### (B) WHAT AMOUNTS TO CONVERSION.

5.—Any person who, however innocently, obtains the possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of a conversion, unless the possession was obtained by him as finder or as bailee, or by purchase in market overt or from an agent, so as to be protected by the Factors Acts. *Hollins v. Fowler* (H. L.), 44 Law J. Rep. (n.s.) Q. B. 169; Law Rep. 7 E. & I. App. 757; affirming the judgment of the Court of Exchequer Chamber (41 Law J. Rep. (n.s.) Q. B. 277; Law Rep. 7 Q. B. 616, *sub nom.* *Fowler v. Hollins*).

Broker A. had fraudulently obtained possession of thirteen bales of cotton, pretending that he was buying for S., a fictitious principal, the price to be paid within ten days. Before the ten days expired he sold the cotton to broker B. for cash, payable that day. Broker B. promised to send in the name of his principal in the course of the day. In the morning, when he purchased the cotton, B. had no positive orders from any principal to buy cotton, but he had in his mind a customer, M., whom he thought the cotton would suit, and who had by letter told B. that he would call on him that day with a view to buying cotton. B. had numerous customers whose trade and requirements he knew, and frequently, without definite instructions, he used to buy cotton which he believed would suit one or other of them, feeling satisfied such a one would take it, but trusting also, if the particular customer for whom he intended the cotton would not take it, that he would be able to place it with some other of his customers. In fact, M. called on B. in the course of the day and bought the cotton, paying the price agreed between brokers A. and B., together with B.'s cus-



tomary charges. Thereupon B. sent to A. the name of M. as that of his principal, and before the day was out B. paid A. the agreed price, and the cotton was removed by B.'s men and carts, and was then taken by train to M.'s mills at Stockport, where it was spun into yarn. Broker A. kept the price of the cotton, and soon after became bankrupt. The original and rightful owner then for the first time discovered A.'s fraud, and learning that the cotton had been removed from A.'s warehouse by B.'s men and carts, he brought trover against B. The jury found that the cotton was bought by B. as agent in the course of his business as broker, and that he dealt with it as agent and not as principal. The verdict was on the finding entered for the defendant, leave being reserved for the plaintiff to move to have the verdict entered the other way. A rule was obtained and made absolute to enter the verdict for the plaintiff, but no new trial was asked for, nor was the verdict set aside, either as against the weight of evidence or for misdirection:—Held, that B. was liable because he had in the first instance bought the cotton on his own account, and the finding of the jury might be explained that he bought as agent in the course of his business as broker, as he was in the habit of conducting that business. *Ibid.*

Whether an action would have lain against B. if he had, in the first instance, bought for and given in the name of an actual principal, that is to say, whether brokers when they purchase as agents are bound at their peril to enquire into the title of selling brokers with whom they deal—*Quære?*

Also, if brokers are not liable for purchases made by them as agents for principals, and when acting as brokers, whether if they further obtain delivery of and remove the goods so purchased on behalf of their clients, they are liable should the selling broker turn out to have had no title—*Quære?*

6.—The grantee under a bill of sale of furniture, being in possession in the house of the grantor and intending to remove the goods from the premises, was told by the landlord (who was there for the purpose of distraining) that he would not allow them to be removed till his arrears of rent were satisfied, and that he was prepared to resist the removal by force. The grantee thereupon made no further attempt to remove the goods:—Held, by Kelly, C.B., Bramwell, B., and Pollock, B. (*dissentiente* Martin, B.), that such assertion of the intention not to allow the removal of the goods did not, under the circumstances, amount to a conversion by the landlord. *England v. Cowley*, 42 Law J. Rep. (n.s.) Exch. 80; Law Rep. 8 Exch. 126.

7.—Where one by an unauthorised act deprives another of his goods, though without any intention to appropriate them to his own use, it is a conversion of the goods. *Hiort v. Bott*, 43 Law J. Rep. (n.s.) Exch. 81; Law Rep. 9 Exch. 86.

The defendant having, through an error of the consignor of goods, received what purported to be an invoice of goods sold by the consignor to

the defendant through a named broker, and an order which required a railway company to deliver the goods to the order of the consignor or consignee, indorsed the order to the broker, who thereby obtained from the company, and made away with, the goods:—Held, that, though the defendant indorsed the order with the intention of correcting what he believed to be an error and of returning the goods to the consignor, yet since the circumstances did not require him to indorse the order or interfere with the goods in any way, he was liable in trover to the consignor. *Ibid.*

#### (C) SPECIAL DAMAGE BY LOSS OF BARGAIN.

8.—The plaintiff, a wine merchant, having obtained from a wine broker samples of wine then lying at a wharf of the defendants', who were wharfingers, and which the broker had agreed to sell to the plaintiff at 14s. per dozen, sold the wine to H., the captain of a ship about to sail, at 24s. per dozen, to be delivered on board next day. The plaintiff obtained the delivery warrants from the broker, and claimed the wine from the defendants, who refused to deliver it. No other wine of the same brand and quality was to be had in the market, and the plaintiff was unable to carry out the contract with H., who sailed without the wine:—Held, that, although the defendants had no notice of the bargain with H., yet the plaintiff was entitled to recover in an action of trover the actual value of the wine to him, which at the time of the conversion was 24s. per dozen, he having *bonâ fide* sold to H. at that price. *France v. Gaudet*, 40 Law J. Rep. (n.s.) Q. B. 121; Law Rep. 6 Q. B. 199.

#### (D) EVIDENCE ON TRIAL TENDING TO PROVE FELONY.

9.—At the trial of an action of trover to recover damages for the conversion of a chattel, evidence was given on both sides. The evidence tended to shew the defendant had stolen the chattel. The plea was, not guilty. The issue raised having been left to the jury, a verdict was found for the plaintiff. A rule *nisi* having been granted, calling upon the plaintiff to shew cause why there should not be a new trial on the ground that the Judge ought to have nonsuited or directed a verdict for the defendant, the Court discharged the rule, holding that the Judge had acted properly in leaving the case to the jury, and that the defendant could not complain of his having done so. *Wells v. Abraham*, 41 Law J. Rep. (n.s.) Q. B. 306; Law Rep. 7 Q. B. 554.

### TRUST AND TRUSTEE.

#### (A) TRUST.

##### (a) Creation of trust.

- (1) Words of present gift.
- (2) Transfer to trustees.
- (3) Incomplete voluntary gift.
- (4) Secret trust.

- (b) *Executory trusts : shifting clauses.*
- (c) *Implied trusts.*
  - (1) *Charge of debts.*
  - (2) *Precatory trust.*
- (d) *Resulting trusts.*
  - (1) *Equitable interest undisposed of.*
  - (2) *Purchase or investment in name of wife or child.*
- (e) *Constructive trusts.*
- (B) *TRUSTEE.*
  - (a) *What estate passes to trustee.*
  - (b) *Payment to trustees.*
  - (c) *Investments by trustees.*
    - (1) *"Real or personal" security.*
    - (2) *Debenture stocks.*
    - (3) *On mortgage of hotel.*
    - (4) *Discretion as to time of conversion.*
    - (5) *Where no power given.*
    - (6) *Control of discretion by Court.*
  - (d) *Renewable leaseholds : charges.*
  - (e) *Contingent remainders.*
  - (f) *Trustees to raise portions.*
  - (g) *Trust for sale.*
  - (h) *Trust to invest in land.*
  - (i) *Powers of trustees.*
    - (1) *Usual.*
    - (2) *Power to compromise.*
  - (k) *Allowances.*
  - (l) *Liabilities of trustees.*
    - (1) *Breach of trust.*
    - (2) *Negligence.*
    - (3) *Premature payment to executor.*
    - (4) *Responsibility for solicitor.*
    - (5) *Release by married woman cestui que trust.*
  - (m) *Annuity to trustee.*
  - (n) *Right to indemnity from cestui que trust.*
  - (o) *New trustees.*
    - (1) *Appointment of.*
    - (2) *What enquiries they should make.*
- (C) *CESTUI QUE TRUST.*
  - (a) *Dealings between trustee and cestui que trust.*
    - (1) *Sales and purchases.*
    - (2) *Set-off.*
  - (b) *Breach of trust.*
    - (1) *Misapplication of trust funds.*
    - (2) *Sale with depreciatory condition.*
    - (3) *Liability of share of defaulting trustee.*
    - (4) *Liability of separate estate of feme covert.*
    - (5) *Liability as constructive trustee.*
    - (6) *Acquiescence and confirmation.*
  - (c) *Conversion.*
- (D) *TRUSTEE RELIEF ACT.*
  - (a) *Payment in.*
    - (1) *When justifiable.*
    - (2) *Effect of, on powers of trustee.*
  - (b) *Service out of jurisdiction.*
  - (c) *Payment out.*
    - (1) *French lunacy.*
    - (2) *Mistake in settlement.*
  - d) *Costs.*
    - (1) *Improper payment in.*
- (2) *Unfounded claims.*
- (3) *Whether payable out of corpus or income.*
- (E) *TRUSTEE ACT.*
  - (a) *Application whether in Chancery or Lunacy.*
  - (b) *Service on new trustee.*
  - (c) *Appointment of new trustees.*
    - (1) *Appointment of feme sole.*
    - (2) *Appointment in place of bankrupt trustee.*
  - (3) *Residence abroad.*
  - (4) *Constructive trustee.*
  - (5) *Discharge of one trustee.*
  - (6) *Trustees predeceasing testator.*
  - (7) *Infant devisee.*
  - (8) *Vesting order.*
    - (i) *Copyholds.*
    - (ii) *Leaseholds.*

[On the death of a bare trustee of any hereditament of which such trustee was seised in fee simple, such hereditament shall vest like a chattel real in the legal personal representative from time to time of such trustee. Where any freehold or copyhold hereditament shall be vested in a married woman as a bare trustee she may convey or surrender the same as if she were a *feme sole*. 37 & 38 Vict. c. 78, ss. 5, 6.]

#### (A) TRUST.

##### (a) *Creation of trust.*

###### (1) *Words of present gift.*

1.—A person entitled to a leasehold mill, with plant, machinery and stock-in-trade, indorsed on the lease a memorandum : "This deed and all thereto belonging I give to A. from this time forth, with all the stock-in trade;" and he signed the memorandum and handed the deed to A.'s mother. After his death A. claimed the mill and appurtenances, on the ground that the memorandum amounted to a valid declaration of trust:—Held, that A.'s claim was bad, on the ground that words importing a present intention to give cannot be held to amount to an intention to retain as trustee. *Richards v. Delbridge*, 43 Law J. Rep. (N.S.) Chanc. 459; Law Rep. 18 Eq. 11.

*Milroy v. Lord* (31 Law J. Rep. (N.S.) Chanc. 798) followed and approved of; *Morgan v. Malleson* (39 Law J. Rep. (N.S.) Chanc. 680; Law Rep. 10 Eq. 475), and *Richardson v. Richardson* (36 Law J. Rep. (N.S.) Chanc. 653; Law Rep. 3 Eq. 686), disapproved of. *Ibid*.

###### (2) *Transfer to trustees.*

2.—On transfer of a fund to three persons, without a formal declaration of trust, the transferor in a letter to his solicitor named the three persons as trustees "for his niece Mrs. C. and her children." The three persons were also trustees of a will, by which property was bequeathed to the same niece for life, with remainder to her children, and the issue of deceased children:—

Held, that the fund was subject to the trusts of the letter and not of the will, and went to Mrs. C. for life, with remainder to her children as joint tenants. *In re Bellasis' Trusts*, Law Rep. 12 Eq. 218.

3.—W. H. transferred certain shares into the names of trustees, and by a deed, which, on the face of it, was voluntary, declared trusts of the shares for the immediate and absolute benefit of the sister of his deceased wife, with whom he shortly afterwards went through the form of marriage. Upon bill filed ten years after the death of W. H., by his legal personal representative against the lady, a husband whom she subsequently married, and the surviving trustee, praying for a re-transfer of the shares,—Held, that the transfer having been complete, a Court of Equity would not have interfered on behalf of the settlor who was a *particeps criminis*, and that his personal representative stood in no better position. *Agerst v. Jenkins*, 42 Law J. Rep. (N.S.) Chanc. 690; Law Rep. 16 Eq. 275.

(3) *Incomplete voluntary gift.*

4.—A. declared his intention to give his daughter a share in a partnership. An attempted transfer to the daughter was ineffectual for want of formality, but the daughter received dividends down to the death of A.:—Held, that the daughter was not entitled to the share. *Heartley v. Nicholson*, 44 Law J. Rep. (N.S.) Chanc. 277; Law Rep. 19 Eq. 233.

5.—In order to give validity to a declaration of trust, it is necessary that the donor should have parted with his interest in the property. Where the donor delivered a box to the donee not to be opened till the donor's death (the donor retaining the key), which box contained what purported to be a written memorandum of gift of real estates and chattels to the donee, the memorandum not being under seal,—Held, not a valid declaration of trust. *Morgan v. Malleon* (39 Law J. Rep. (N.S.) Chanc. 680; Law Rep. 10 Eq. 475), and *Richardson v. Richardson* (36 Law J. Rep. (N.S.) Chanc. 653), considered. *Warriner v. Rogers*, 42 Law J. Rep. (N.S.) Chanc. 581; Law Rep. 16 Eq. 340.

(4) *Secret trust.*

6.—Where a testator informed a married woman that he had conferred great benefits on her and her husband by his will, and begged her to make a provision of 300*l.* per annum for N., which she, with her husband's assent, promised to do,—Held, that property in which she had a life interest under the will and of which her husband was in possession *jure mariti*, was fixed with a secret trust in favour of N. *Norris v. Frazer*, Law Rep. 15 Eq. 318.

*Constitution of trust: army agents: equitable assignment.* [See MORTGAGE, 17, 18.]

(b) *Executory trusts: shifting clauses.*

7.—A patent conferring a barony contained a

clause that, if any person taking under the patent should succeed to a certain earldom, then, and so often as the same should happen, the succession to the dignity should devolve upon the son of the grantee, or the heir who would be next entitled to succeed to the dignity if the person succeeding to the earldom was dead without issue male. In pursuance of executory trusts in the grantee's will, an estate was settled to follow the dignity with a clause following the above clause in the patent. The earldom having devolved on the second son of the grantee (who succeeded her in the dignity),—Held, that whether the clause in the patent was valid or not, the clause in the settlement took effect, and took effect so as to shift the estate immediately. *Cope v. Earl de la Warr*, 42 Law J. Rep. (N.S.) Chanc. 870; Law Rep. 8 Chanc. 982.

Whether the clause in the patent was valid, *quære*. *Ibid.*

8.—The testatrix devised freehold estates to trustees upon trust for her sister E. for life, with remainder in strict settlement to her sons excluding the second and with powers of jointuring and charging portions. By letters patent, subsequent to the will, the barony of B. was created and limited to E. for life, with remainder to her second son R. and the heirs male of his body, and in default of such issue to the third and younger sons of E. and the heirs male of their bodies respectively and successively. The patent contained a shifting clause, by which if any person taking thereunder should succeed to the earldom of D., and there should then or thereafter be a younger son or heir male of a younger son of E., then the succession to the barony was to devolve upon the son of E. or the heir who would be next entitled to succeed thereto if the person succeeding to the earldom of D. was dead without issue. By a subsequent codicil, the testatrix devised her said estates to trustees on trust, to settle the same in a course of entail corresponding as nearly as might be with the limitations of the barony, and the provisoes affecting the same contained in the patent, and with all such powers, provisoes, declarations, and agreements as the trustees should think proper or their counsel advise. The House of Lords after E.'s death declared that the devised estates ought to be limited in strict settlement to the second son for life with remainder to his first and other sons in tail male, with remainder to the third and other younger sons of E. and the heirs male of their bodies respectively and successively in tail male, and that the settlement should contain a shifting clause similar to that in the letters patent:—Held, that clauses postponing the vesting of portions until the death of the person creating them and providing for the cesser of jointures and portions charged on the estates upon the person charging them succeeding to the earldom of D. ought not to be inserted in the settlement. *Holmesdale v. West*, 40 Law J. Rep. (N.S.) Chanc. 795; Law Rep. 12 Eq. 280.

*Cy-près: estate tail: will in execution of power.* [See POWER, 10.]

(c) *Implied trusts.*(1) *Charge of debts.*

9.—Under a will which contains a charge of debts a devisee, who is also one of the executors, may make a good title to a purchaser or a mortgagee, and such purchaser or mortgagee is not bound to look to the application of the money. *Corser v. Cartwright* (H.L.), Law Rep. 7 E & L App. 731.

The fact that the mortgagee's solicitor was also solicitor for the devisee,—Held, not sufficient to fix the mortgagee with constructive notice of an intended misapplication of the money, such solicitor distinctly denying any knowledge or suspicion thereof. *Ibid.*

Decision of the Lords Justices (Law Rep. 8 Chanc. 971) affirmed. *Ibid.*

10.—The doctrine of *Forbes v. Peacock* (12 Sim. 528; 1 Ph. 717; 13 Law J. Rep. (n.s.) Chanc. 46; 15 *ibid.* 371) amounts only to this, that where prior to the statutes 22 & 23 Vict. c. 85 and 23 & 24 Vict. c. 145, there is a trust to sell real estate, and pay debts and legacies out of the proceeds, there is also an implied power in the trustees to give receipts for the purchase-money. There is nothing in that case authorising trustees, by reason merely of such a charge, to sell a settled estate. *Carlyon v. Truscott*, 44 Law J. Rep. (n.s.) Chanc. 186; Law Rep. 20 Eq. 348.

(2) *Precatory trust.*

11.—Under a bequest of "all my property and effects, whatsoever and wheresoever, unto my dear wife, S. L. E. (trusting that she will do justice to any children we may have) for her own absolute use and benefit"—S. L. E. was held entitled to the property absolutely. *Ellis v. Ellis*, 44 Law J. Rep. (n.s.) Chanc. 225.

12.—A testator bequeathed a sum of stock to the trustees of a charity to pay for painting and repairing a gravestone for a certain day yearly, and to pay the balance for the purpose of the charity.—Held, there was a valid bequest subject to a precatory trust. *Hunter v. Bullock*, 41 Law J. Rep. (n.s.) Chanc. 637; Law Rep. 14 Eq. 45.

(d) *Resulting trusts.*(1) *Equitable interest undisposed of.*

13.—A. being in prison on charge of felony assigned real estate, which was in the hands of trustees, to his brother R. A. was acquitted on the ground of insanity. R. accumulated the income, except a small portion which he spent for the benefit of A. After R.'s death it was held that he was a trustee for A. *Manning v. Gill*, 41 Law J. Rep. (n.s.) Chanc. 736; Law Rep. 13 Eq. 485.

14.—A testator devised and bequeathed his "estate and effects" to trustees, their heirs, executors, and administrators upon trust, to sell his trade and the good will thereof, and get in and convert all such of his "personal estate" as should not consist of money, and should stand possessed of the money arising from such sale, and "the residue of his estate and effects" upon trust to

invest, and other trusts:—Held, that the real estate passed to the trustees, but that the beneficial interest resulted to the heirs of the testator. *Longley v. Longley*, 41 Law J. Rep. (n.s.) Chanc. 168; Law Rep. 13 Eq. 133.

15.—Where a settlor directed his bankers, who under a power of attorney from the trustees of his marriage settlement (under which he took the first life interest) received and paid to him the dividends on the settled funds, to invest an additional sum of 2,000*l.* consols in the names of the trustees, and receive the dividends as before, and this was accordingly done, without the knowledge of the trustees:—Held, that the 2,000*l.* became subject to the trusts of the settlement as an augmentation of the trust funds, and that there was no resulting trust for the settlor. *In re Curteis' Trusts*, 41 Law J. Rep. (n.s.) Chanc. 631; Law Rep. 14 Eq. 217.

*Composition deed: resulting trust of surplus.*

[See BANKRUPTCY, M 15.]

(2) *Purchase or investment in name of wife or child.*

16.—Where a husband, being in bad health, changed his banking account from his own name into the joint names of himself and his wife, directing the manager to honour the cheques of either, and saying that the balance would belong to the survivor, and thereafter all cheques were drawn by the wife:—Held, that there was no evidence to rebut the presumption of a resulting trust for the husband. *Marshall v. Crutwell*, 44 Law J. Rep. (n.s.) Chanc. 504; Law Rep. 20 Eq. 328.

17.—Where property has been purchased by one person in the name of himself and another, and the circumstances connected with the purchase are such as to render it antecedently probable that a gift was intended, the presumption of a resulting trust may be rebutted by the evidence of the party interested in supporting the gift alone. *Fowkes v. Pascoe*, 44 Law J. Rep. (n.s.) Chanc. 367; Law Rep. 10 Chanc. 343.

The presumption that a legacy or a gift of residue is adeemed or satisfied by a subsequent advancement made by the testator to the legatee, arises only in the case of children or persons towards whom the testator stands *in loco parentis*. Therefore, if a testator has placed himself *in loco parentis* to one member only of a family, there can be no presumption as against that one that a provision made for him in common with the others by the testator's will is satisfied or adeemed by a subsequent advancement to him by the testator in his lifetime. Observations on *Pym v. Lockyer* (5 M. & C. 29). *Ibid.*

18.—W. (a widow) transferred stock (previously standing in her name and that of her deceased husband) into the names of herself, her daughter, and her daughter's husband. W. received the dividends on the stock during her life. The daughter predeceased W., who died, leaving her daughter's husband surviving:—Held, that he was entitled to the stock absolutely. *Batstone v. Salter*, 44 Law J. Rep. (n.s.) Chanc. 760; Law Rep. 10 Chanc. 143.

(e) *Constructive trusts.*

19.—A. deposited the title deeds of an estate with his bankers, and signed a memorandum charging the estate with payment of a sum due from him to the bankers. He afterwards married, and in consideration of such marriage he settled the estate by articles and shortly after marriage executed a settlement conveying the legal estate to a trustee. During the negotiations he told the lady's solicitor that he was entitled to the estate free from incumbrances, and that the deeds were at his bank for safe custody:—Held, that the solicitor ought to have enquired of the bankers whether they had a charge upon the deeds, and that, as he omitted to do so, all persons claiming under the settlement were fixed with constructive notice of the charge. *Macfield v. Burton*, 43 Law J. Rep. (n.s.) Chanc. 46; Law Rep. 17 Eq. 15.

*By participation in fraudulent conduct of trustee.* [See infra C 9.]

*Constructive trustee within the Trustee Acts.* [See infra E 7.]

*Constructive notice to mortgagee by employment of solicitor.* [See No. 9 supra.]

## (B) TRUSTEE.

(a) *What estate passes to trustees.*

1.—Devise to trustees and their heirs upon trust to stand seised during the life of W., and until the testator's debts and legacies were paid, upon trust to set and let the property and apply rents and profits, and the value of timber, in discharge of debts and legacies, and thenceforth to pay rents to W. for life; and after W.'s death and payment of the debts and legacies the testator devised the estate to the heirs of the body of W., remainder to his own right heirs. After the debts, &c., were paid, the trustees conveyed the legal estate to W. for life, who suffered a common recovery to himself in fee:—Held, first, that the trustees took a legal fee, and that W. being equitable tenant in tail under the rule in *Shelley's case* acquired by the recovery a good equitable fee; secondly, that if the trustees had only taken a life estate their conveyance of it to W., which enabled him to suffer a recovery and bar the contingent remainders at law and in equity was not a breach of trust. A general devise to trustees and their heirs *prima facie* gives a fee, and it lies on those who allege the contrary to shew what less estate they take. The trusts to set and let and sell timber were held grounds for holding that they took a fee. *Collier v. Walters*, 43 Law J. Rep. (n.s.) Chanc. 216; Law Rep. 17 Eq. 252.

*Appointment of trust fund to trustees for objects of power: original trustees held entitled to retain funds.* [See POWER, 12.]

(b) *Payment to trustees.*

2.—Solicitors instructed by trustees of a will to receive money, who paid over the money to one trustee without the receipt or authority of the other:—Held, liable for consequent loss. *Lee v. Sankey*, Law Rep. 15 Eq. 204.

3.—In the absence abroad of one of several trustees the Court may order a sum of money under its control to be paid to the other trustees, without requiring the absent trustee to join in giving the receipt by power of attorney. *Clark v. Fenwick*, 42 Law J. Rep. (n.s.) Chanc. 320.

[And see PRACTICE IN EQUITY, 98, 99.]

(c) *Investments by trustees.*(1) *"Real or personal" security.*

4.—Where trustees of a marriage settlement were empowered to invest with the consent of the husband and wife on such security "real or personal" as they should think fit,—Held, that a loan of 2,500*l.* due on the husband's note of hand, which had been lent him by the wife before the marriage, and which, though a separation had taken place, she still desired should remain in his hands, might be continued until further order on the husband executing a bond for the amount. *Pickard v. Anderson*, Law Rep. 13 Eq. 608.

(2) *Debenture stocks.*

[Trustees, having power to invest in railway bonds or mortgages, empowered to invest in debenture stocks. 34 & 35 Vict. c. 27.]

(3) *On mortgage of hotel.*

5.—Trustees having power to invest upon real security invested 1,400*l.*, part of the trust fund, upon the security of a freehold house at Broadstairs, used as an hotel. The evidence of value, upon which they made the investment, was a report made by a London surveyor, who, according to his report, went to Broadstairs, and examined the property, and made some inquiries; he valued the security at 2,700*l.*, including in this sum 800*l.* as the value of the beer and spirit license. No other enquiries appeared to have been made. In fact, the house had only recently been opened as an hotel, and did not prove successful. The security turned out to be deficient:—Held, reversing the decision of one of the Vice-Chancellors (41 Law J. Rep. (n.s.) Chanc. 520), that the security was not a proper security for the investment of trust funds, and that the trustees must be charged with the amount advanced. *Budge v. Gummow*, 42 Law J. Rep. (n.s.) Chanc. 22; Law Rep. 7 Chanc. 719.

(4) *Discretion as to time of conversion.*

6.—A testator, by will dated in August 1862, bequeathed his shares in a public company and the rest of his estate to his trustees upon trust, to convert, "immediately after his decease, or so soon thereafter as they might see fit to do so." Part of the estate consisted of thirty-six shares in the Birmingham Bank, an unlimited company. At the testator's death the shares were at a premium, and considered a good and safe investment. Soon after the testator's death the bank issued new shares, offering them to the original shareholders at par. Nine were offered to the trustees in respect of the testator's shares, and being at a premium were purchased by them, though the trust for invest-

ment did not authorise investment in shares. The old and new shares were held together by the trustees until July 1866, when the bank broke:—Held, that the trustees should not have purchased the new shares, and should have sold the old shares in reasonable time after the testator's death; that reasonable time, in such case, if no cause is shown for delay, is a year after testator's death; and that the trustees must replace not only the amount of the calls made upon all the forty-six shares and the purchase-money of the shares purchased, but also the loss to the testator's estate in respect of the shares having become valueless. *Sculthorpe v. Tipper*, 41 Law J. Rep. (N.S.) Chanc. 266; Law Rep. 13 Eq. 232.

7.—Where a testator empowered his trustees to continue invested any of his government stocks,—Held, that this extended only to stocks of a permanent character. *Tickner v. Old*, Law Rep. 18 Eq. 422.

(5) *Where no power given.*

8.—When specific property is bequeathed upon trust without any power being given to the trustees to alter the mode of investment, such trustees may, nevertheless, sell the property and invest the proceeds on any of the statutory investments, and vary such investment from time to time, provided that they never buy any redeemable security at a premium. *Waite v. Littlewood*, 41 Law J. Rep. (N.S.) Chanc. 636.

(6) *Control of discretion by Court.*

9.—When a decree for administration has been made all discretionary powers of management vested in the trustees are suspended, and whatever discretionary power of investment is given to the trustees, the Court will only authorise investments in securities in which funds under the control of the Court may be invested. *Bethel v. Abraham*, 43 Law J. Rep. (N.S.) Chanc. 180; Law Rep. 17 Eq. 24.

Semble—In order to give trustees power to invest in securities not authorised by the Court, a clear and express discretionary power must be given to them. *Ibid.*

10.—After a decree in a suit for administration of trust funds the Court will not without reason control a discretionary power given to the trustees by the instrument creating the trust. *Brophy v. Bellamy*, 43 Law J. Rep. (N.S.) Chanc. 183; Law Rep. 8 Chanc. 798.

(a) *Renewable leaseholds: charges.*

11.—A. was beneficially entitled to renewable leaseholds for three lives held on trust to renew, and subject to certain charges. All the *cestuis que vie* died. It being disputed whether the right to renew was lost, the reversioners granted a lease to A. for three new lives, without prejudice to the disputed question. A. subsequently bought the reversion:—Held, that the fee became subject to the charges. *Trumper v. Trumper*, 41 Law J. Rep. (N.S.) Chanc. 673; Law Rep. 14 Eq. 295.

(e) *Contingent remainders.*

[See supra B 1.]

(f) *Trustees to raise portions.*

12.—Power to raise a sum of money by mortgage includes power to raise also by mortgage the costs of effecting the security. *Armstrong v. Armstrong*, 43 Law J. Rep. (N.S.) Chanc. 719; Law Rep. 18 Eq. 541.

Trustees of a marriage settlement made in 1802 were empowered to raise and levy the sum of 6,000*l.* for portions on the security of a term of 300 years in certain freeholds. Part of the 6,000*l.* was raised. In 1872 it became necessary to raise the residue, which then amounted to the sum of 3,290*l.* 8*s.* 4*d.* By an order then made in this suit which was instituted for the execution of the trusts of certain indentures of settlement, certain trustees were authorised to advance this amount out of their trust funds upon the security of the term. Considerable costs had to be incurred in effecting the security, and it was now asked that the lastly named trustees might be at liberty to advance a further sum out of their trust funds upon the same security to cover the costs so incurred:—Held, that the term of 300 years might properly be taken as a security, not only for the whole amount of 6,000*l.*, but also for the costs. *Ibid.*

*Portions: satisfaction by advancement in lifetime of tenant for life: gift by will.*  
[See ADVANCEMENT, 9.]

(g) *Trust for sale.*

13.—A sale to a tenant for life, whose consent is requisite to the exercise of the power of sale by the trustees, cannot be impeached on the ground of the purposes for which he buys, his motives being immaterial to the trustees, provided they obtain a fair price. *Dicconson v. Talbot*, Law Rep. 6 Chanc. 32.

14.—The doctrine of *Forbes v. Peacock* (12 Sim. 528; s. c. 13 Law J. Rep. (N.S.) Chanc. 46; s. c. 15 *ibid.* 371) amounts only to this, that where prior to the statutes 22 & 23 Vict. c. 85 and 23 & 24 Vict. c. 145 there is a trust to sell real estate, and pay debts and legacies out of the proceeds, there is also an implied power in the trustees to give receipts for the purchase-money. There is nothing in that case authorising trustees, by reason merely of such a charge, to sell a settled estate. *Carlyon v. Truscott*, 44 Law J. Rep. (N.S.) Chanc. 186; Law Rep. 20 Eq. 348.

*Sale of land and minerals separately.* [See CONFIRMATION OF SALES ACT.]

(h) *Trust to invest in land.*

15.—Where the trustees of a will were directed to lay out the testator's residuary personality in the purchase of land to go along with his settled estates, which comprised the advowson of a certain benefice,—Held, that the trustees might lay out such personality in rebuilding the parsonage house of the benefice, which was in a ruinous state, and which the testator had himself intended to rebuild. *In re Lord Hotham's Trusts*, Law Rep. 12 Eq. 76.

16.—When personality is directed to be invested

in land to be conveyed to the same uses a certain existing settled estates, the Court of Chancery cannot authorise the outlay of any of the personalty in doing repairs on the existing settled estates. *In re Lord Hotham's Trusts*, (Law Rep. 12 Eq. 76) not followed. *Brunskill v. Caird*, 43 Law J. Rep. (n.s.) Chanc. 163; Law Rep. 16 Eq. 493.

(i) *Powers of trustees.*

(1) *Usual.*

17.—Power to raise a sum by mortgage includes a power to raise the costs of the security. *Armstrong v. Armstrong*, 43 Law J. Rep. (n.s.) Chanc. 719; Law Rep. 18 Eq. 541.

*Power of advancement.* [See **ADVANCEMENT**, 11, 12; **POWER**, 29, 30.]

(2) *Power to compromise.*

18.—The Court will, on a petition under 22 & 23 Vict. c. 35, s. 30, sanction the compromise by trustees of a claim, depending on foreign law, and the accounts of disbursements on an estate in a foreign country, which accounts the trustees have no means of verifying. *In re Mackintosh's Settlement*, 42 Law J. Rep. (n.s.) Chanc. 208.

(k) *Allowances.*

[See *supra* No. 15.]

(l) *Liabilities of trustees.*

(1) *Breach of trust.*

[See *infra* C 4-11.]

(2) *Negligence.*

19.—A trustee, who had no actual knowledge of his right to real property, suffered an adverse title to be acquired by lapse of time. A bill to make him accountable was dismissed. But the chirograph of a fine relating to the title having come to the trustee's hands, without the deed leading the uses, such dismissal was without costs. *Youde v. Cloud*, 44 Law J. Rep. (n.s.) Chanc. 93; Law Rep. 18 Eq. 634.

20.—A bill in 1872 for an account against trustees of an estate which had been administered in 1847, who had kept no vouchers or accounts, dismissed on the ground of delay, but without costs in consequence of the negligence of the trustees in not keeping vouchers or accounts. *Payne v. Evens*, Law Rep. 18 Eq. 356.

(3) *Premature payment to executor.*

21.—A fund was vested in trustees on trust for A. for life, remainder for B. for life, remainder for such persons as A. should by will appoint. A. appointed that certain legacies should be paid out of the fund after B.'s death, and named B. her executor. B. proved the will, and the trustees then handed over the whole fund to B., who spent it, and died insolvent. On bill by the legatees against the original trustees,—Held, that they were discharged by the payment to A.'s executor.

Digest, 1870-1875.

*Hayes v. Oatley*, 41 Law J. Rep. (n.s.) Chanc. 510; Law Rep. 14 Eq. 1.

(4) *Responsibility for solicitor.*

22.—A trustee is liable for the loss of a trust fund occasioned by his solicitor's neglecting proper precautions on the investment of the fund on mortgage: whether the loss falls on the trustee if occasioned by a fraud practised on him, *quære*. *Hopgood v. Parkin*, Law Rep. 11 Eq. 74.

23.—If trustees lending money on mortgage have the same solicitor as the mortgagor, they must take the utmost precaution; if they trust implicitly in the solicitor, however high his reputation, they will be held responsible for any loss which his fraud may occasion. The indemnity clause usually inserted in settlements will not protect them. *Sutton v. Wilders*, 41 Law J. Rep. (n.s.) Chanc. 30; Law Rep. 12 Eq. 373.

(5) *Release by married woman *cestui que trust*.*

24.—There is no presumption of law that the payment of a sum of money to a child (even by a father) before the date of his will, is to go against a legacy, bequeathed by the will to that child. *Taylor v. Cartwright*, 41 Law J. Rep. (n.s.) Chanc. 529; Law Rep. 14 Eq. 167.

M. M., by her will, dated March 30, 1848, bequeathed her residuary personalty to her two sons, E. and T., upon trust for them, and her son J., and her married daughter A. T. equally. A. T.'s share was left to her for life, for her separate use, with a restraint on anticipation, and on her death to her children. M. M. died on March 31, 1848. In 1850 a family arrangement was entered into by two deeds, one a declaration of trust, the other a release, for the division of the testatrix's property among her children. The release was executed by A. T., but not by her husband, and it contained a recital that "the testatrix during her lifetime advanced to A., the wife of R. D. T., with his privity and consent, the sum of 400*l.*, in part of, and to be deducted out of, any money which the testatrix might leave by will to A. T. or her issue." The division of the property was made on the assumption that that recital was true; and it was said that T. M. had had his share, less a like sum of 400*l.* The trustees of the will had both since died and their legal personal representatives were defendants. A. T. died in 1870, leaving her husband and six children. The children filed a bill against the defendants to compel them to make A. T.'s share of the testatrix's property good, by the addition to it of the 400*l.*, deducted in 1850:—Held, that the recital was not binding on A. T. in her lifetime, and therefore not effectual as against the plaintiffs; that there was no such presumption in law as that above stated; that A. T.'s husband was not bound by the recital; and that the defendants must pay the 400*l.* or other the proper sum to the plaintiffs, with interest at 4*l.* per cent. from their mother's death. *Ibid*.

*Attachment against defaulting trustee under Debtors Act.* [See **DEBTORS ACT**, 4-7.]

(m) *Annuity to trustee.*

25.—An annuity was given by will to A. B., one of the trustees of the testatrix, "so long as he should continue to execute the office of trustee under her will."—Held, that the annuity ceased when the estate was handed over to a *cestui que trust* absolutely entitled. *Bull v. Christian*, 43 Law J. Rep. (n.s.) Chanc. 861; Law Rep. 17 Eq. 546.

(n) *Right to indemnity from cestui que trust.*

26.—It is a general rule of equity that when a person accepts a trust at the request of another, and that other is a *cestui que trust*, the *cestui que trust* is liable personally to indemnify the trustee against all losses accruing in the due execution of the trust. *Jervis v. Wolfertan*, 43 Law J. Rep. (n.s.) Chanc. 809; Law Rep. 18 Eq. 18.

Where the loss in respect of which such indemnity is sought occurs after the death of the *cestui que trust* the trustee is in the position of a creditor of the *cestui que trust*, and entitled to recover as a creditor from legatees to whom his estate has been paid. *Ibid.*

Distribution of the estate by an executor with notice of a contingent liability does not preclude him from recovering the estate from the legatees in case the contingent liability afterwards ripens into actual loss. *Ibid.*

An executor who compels a legatee to refund can only require repayment of the capital and not of any intermediate income. *Ibid.*

J. and P. at the request of a settlor, accepted transfers of shares in an unlimited company upon trust for a tenant for life and remainderman. J. and P. were executors of the will of the settlor, and distributed the residue of his estate. Subsequently in the lifetime of the tenant for life large calls were made on the shares, and the remainderman under the settlement disclaimed:—Held, that J. and P. as trustees were entitled to be indemnified against the liability out of the settlor's residuary estate, and to recover the capital which they had distributed among the residuary legatees. *Ibid.*

The same testator had covenanted to leave by will or otherwise provide for his daughter B. one-third of the residuary estate; he bequeathed one-third to her, which was settled on her marriage and paid to the trustees of her marriage settlement:—Held, that the testator had satisfied his covenant; that the daughter B. took her share, not as a creditor, but as a residuary legatee, and that her trustees must refund the amount with the other residuary legatees. *Ibid.*

(o) *New trustees.*(a) *Appointment of.*

*As to appointment of new trustees by the Court of Chancery.* [See infra D 4-12.]

27.—A testator left real estate on trust for his wife for life, and, after her death, for his son for life, with further trusts, and made his wife

and son executors, and appointed strangers trustees, giving the trustees a power of sale and power to appoint new trustees, the latter exercisable with the consent of the tenant for life for the time being. Shortly after his death the last remaining trustee appointed the wife and son to be trustees, and he and the wife died. The son then contracted to sell the estate under the power:—Held, that he could validly exercise the power of sale, for, though the Court will not appoint a tenant for life to be trustee, such an appointment out of Court is valid; and there was nothing in the will specially disqualifying the son from becoming trustee. *Forster v. Abraham*, 43 Law J. Rep. (n.s.) Chanc. 199; Law Rep. 17 Eq. 351.

28.—A power, in case any trustee or trustees should die, or become unwilling or unable to act, for the trustees for the time being, whether continuing or declining, to appoint new trustees, is well exercised by two trustees out of three, the third being of unsound mind. *In re East*, 42 Law J. Rep. (n.s.) Chanc. 480; Law Rep. 8 Chanc. 735.

(b) *What enquiries they should make.*

29.—By a marriage settlement, executed in 1834, certain trust funds were vested in three trustees, for the wife for her life, without power of anticipation, and (in the event, which happened) as she should by deed or will appoint. In 1843 the husband joined with his wife in appointing part of the trust funds to secure a debt due from him to A. D., and notice of that appointment was given to the two then surviving trustees of the settlement. In 1848 the then surviving trustee of it was released from the trusts, and three new trustees appointed. The two survivors of those trustees, and afterwards the sole survivor of them, joined with the wife in various dealings with the trust funds. In 1867 the wife appointed a portion of the funds to the sole surviving trustee of the settlement by way of indemnity to him, and the estate of the other trustee who had dealt with the funds at her request. There were other subsequent dealings with the funds. Bills were filed to administer the trusts of the settlement, and ascertain the priorities of the various incumbrancers. The sole surviving trustee of the settlement alleged that he had had no notice of the appointment of 1843:—Held, that the appointees under that deed were entitled in priority to all other incumbrancers on the funds. Held also, on the facts, that there was no ground for making the sole surviving trustee of the settlement liable for a breach of trust. *Phipps v. Lovegrove and Prosser v. Phipps*, 42 Law J. Rep. (n.s.) Chanc. 892; Law Rep. 16 Eq. 80.

Semble—that however desirable it might be for new trustees of a fund to enquire, on their appointment, of the old trustees of it whether they have had notice of any and what incumbrances on it, it is not the practice to make such enquiries, nor does the Court direct any such to be made when it appoints new trustees. *Ibid.*

*Costs of trustee when disallowed.* [See Costs in Equity, 41, 42.]



(C) *CESTUI QUE TRUST.*(a) *Dealings between trustee and cestui que trust.*(1) *Sales and purchases.*

1.—If a legatee agrees to sell to the executor of the will his legacy for an annuity, the burden will lie on the executor to shew that there was no unfairness in the transaction. *In re Beal's Estate, Gray v. Warner*, 42 Law J. Rep. (N.S.) Chanc. 556; Law Rep. 16 Eq. 577.

2.—Sale by trustees to tenant for life held not impeachable. *Dicconson v. Talbot*, supra B, No. 13.

(2) *Set-off.*

3.—Declaration upon an order of the Court of Queen's Bench in Ireland (in an action by the defendant against the plaintiff) by which the plaintiff was dismissed and ordered to pay costs, and which order had the force of a judgment of nonsuit. Plea of set-off of other Irish judgments recovered by the defendant against the plaintiff. Replication on equitable grounds, that the plaintiff retained C. as his attorney to conduct his defence in the Irish Court, and that the money ordered to be paid to him, was due to C. for costs in the action, and therefore became due to the plaintiff as a trustee for C., and that the plaintiff sues as such trustee:—Held, that the replication was bad, as the lien of the attorney did not constitute the relation of trustee and *cestui que trust* between him and his client so as to prevent the defendant from pleading a set-off, but was at most only ground for the summary interference of the Court on an application to set off cross judgments. *Mercer v. Graves*, 41 Law J. Rep. (N.S.) Q. B. 212; Law Rep. 7 Q. B. 499.

[See *UNDUE INFLUENCE*, 5.]

(b) *Breach of trust.*(1) *Misapplication of trust funds.*

4.—The manager of a benefit building society established pursuant to 6 & 7 Will. 4. c. 32, deposited, in pursuance of a resolution passed by the directors but contrary to the provisions of the Act and the rules of the society, money of the society with a finance company of which he was also manager. The company gave a cheque to the manager for the repayment of the money to the building society, but he did not pay over the money to the society:—Held, on bill filed by the trustees of the society (reversing the decision of the Master of the Rolls), that the money was trust money improperly deposited with the finance company, that the giving the cheque to the manager was no discharge to the company, nor repayment to the building society, and that, therefore, the trust money being still in the hands of the finance company, a suit would lie in this Court on behalf of the real owners to recover it, and that, without making the directors of the building society a party to it. *Hardy v. The Metropolitan Land and Finance Company*, 41 Law J. Rep. (N.S.) Chanc. 257; Law Rep. 7 Chanc. 427.

5.—A. was the senior partner in a firm under articles of partnership, whereby the partners were

to receive out of the profits five per cent. on their respective shares in the capital, and to divide the balance in a certain proportion, which bore no relation to the value of their shares; it was also provided that the share of a partner dying should be ascertained as therein directed, and paid by the survivors to his executors in two years from his death, with interest at five per cent. from that date. A. died, having by his will given his real and personal estate to his executors, on trust to divide the same among his children in equal shares, and he appointed B., C. and D. his executors; B. was a partner at the date of his death, C. subsequently entered the firm; D. never was a partner. The value of the testator's share in the partnership was duly ascertained, but was not paid over to the executors; but the firm treated it as a debt due from the partnership, and credited each of the testator's children with the amount of his or her share in their books, with interest at five per cent. on the amount so due, and annual rests. All the testator's children but one accepted the arrangement, and ratified and approved it. Upon bill by E., the youngest child, upon her coming into possession, against the executors for administration of the estate, and seeking to make them liable either for the profits made by the partnership by the use of her share, or for compound interest at five per cent. at her option,—Held (reversing a decision of Bacon, V.C.), that though the employment of the trust fund in trade by the firm was technically a breach of trust, yet that, inasmuch as the amount of profit attributable to capital alone was not ascertainable, and as the trustees had acted *bonâ fide*, and had accounted to her for the value of her share with five per cent. compound interest, the Court would not call upon them for an account of the profits, so as to enable her to exercise an option between the profits and the compound interest. *Vyse v. Foster*, 42 Law J. Rep. (N.S.) Chanc. 245; Law Rep. 8 Chanc. 309; and see *Flockton v. Bunning*, Law Rep. 8 Chanc. 323 n.

Whether, in case of a loan by a trustee to himself and others in breach of trust, the *cestui que trust* may elect between interest and profits, *quære*. *Ibid*.

Trustees of a mixed fund of realty and personalty laid out 1,600*l.* part of the personalty, upon the erection of a house on the real estate, for the *bonâ fide* purpose of increasing the value of the whole as building land:—Held (reversing the decision of Bacon, V.C.), that the trustees should not be entirely disallowed the sum so expended, but if the plaintiff desired it, they should be ordered to take the house themselves at the price of 1,600*l.*, and the value of the site as unbuilt upon. *Ibid*.

*By directors of company.* [See *COMPANY*, D 22-24.]

*Trustee of shares for company: breach of trust: consequence of allowing trustee to hold share certificates.* [See *COMPANY*, G 52.]

*Executor: deposit of moneys in private bank on account current.* [See *EXECUTOR*, 23.]

(c) *Sale with depreciatory condition.*

6.—Trustees having power to sell under such special or other conditions or stipulations as they should think fit, sold by auction with a condition limiting the title to commence in 1858 (fourteen years previously). The next convenient root of title was a deed of 1819, from which a good title could be deduced, but the trustees could not find this deed, and had only recitals of its contents. There was also a condition that all recitals and statements in the deeds and particulars should be accepted as conclusive evidence:—Held, that the sale under such conditions was a breach of trust, and an injunction was granted at the suit of a *cestui que trust* to restrain completion. And held also, that such an injunction would be granted against an innocent purchaser. *Dance v. Goldingham*, 42 Law J. Rep. (N.S.) Chanc. 777; Law Rep. 8 Chanc. 902.

The bill was filed in the name of an infant having a very small interest:—Held, that the Court could not look into the motives of the next friend. *Ibid.*

Such a suit can be maintained by one *cestui que trust* without making the others parties. *Ibid.*

(3) *Liability of share of defaulting trustee.*

7.—The principle which gives *cestuis que trust* an equity against any interest in the trust funds belonging to the trustee who has committed the breach of trust, extends to any interest taken by the trustee as next-of-kin of a deceased *cestui que trust*. Such equity is prior to the interest of a mortgagee of the trustee, as the trustee is considered to have paid himself before the interest accrued. *Jacobs v. Rylance*, 43 Law J. Rep. (N.S.) Chanc. 280; Law Rep. 17 Eq. 341.

(4) *Liability of separate estate of feme covert.*

8.—The separate estate of a married woman is not liable for general torts committed by her, nor for breaches of trust, unless the breaches of trust consist in appropriation of trust funds comprised in the same settlement as that creating her separate estate. Liability of a married woman's separate estate discussed. *Weyford v. Heyl*, 44 Law J. Rep. (N.S.) Chanc. 567; Law Rep. 20 Eq. 321. *nom. Wainford v. Heyl.*

(5) *Liability as constructive trustee.*

9.—Although the responsibility of trustees may be extended in equity to persons who are not properly trustees, if they are found either making themselves trustees *de son tort*, or actively participating in any fraudulent conduct of the trustee, to the injury of the *cestui que trust*, yet strangers are not to be made constructive trustees, merely because they act as agents of trustees in transactions within their legal power, even though such transactions may be such as the Court would not approve of. *Barnes v. Addy*, 43 Law J. Rep. (N.S.) Chanc. 513; Law Rep. 9 Chanc. 244.

A solicitor acting for the sole survivor of three trustees, prepared, by his direction, a deed appointing the husband of the *cestui que trust* sole trustee in his place, and another solicitor, acting

for the *cestui que trust* and her husband, perused and approved of the draft. The deed was executed, and the trust fund transferred to the husband as new trustee, and by him sold out and never replaced. There being no ground for imputing to either of the solicitors knowledge or suspicion of any improper design in the transaction,—Held, affirming the decision of Wickens, V.C., that neither of them was liable for the loss occasioned by the breach of trust. *Ibid.*

*Breach of trust: complicity.* [See PRINCIPAL AND SURETY, 6.]

(6) *Acquiescence and confirmation.*

10.—A settlement made with the sanction of the Court, on the marriage of an infant, of certain funds alleged to represent the infant's share under a will, does not operate as a confirmation of prior dealings by the trustees, so as to preclude the *cestuis que trust* under the settlement from filing a bill charging the trustees with breaches of trust. *Zambaco v. Cassavetti*, Law Rep. 11 Eq. 439.

11.—Where a married woman had a claim against a trustee in respect of a breach of trust, and she and her husband took no steps in respect of the claim until the death of the trustee thirty-eight years after:—Held, that the claim was barred by acquiescence. *Sleeman v. Wilson*, Law Rep. 13 Eq. 36.

*Attachment against defaulting trustee.* [See DEBTORS ACT, 4-7.]

*Liability of executor for involuntary losses.* [See EXECUTOR, 23, 24.]

(c) *Conversion.*

12.—A tenant for life of real estate under a settlement, having power to charge the same with 6,000*l.*, to be raised and paid at such time and for such purposes as he should think fit, by deed charged the estate with the above sum, payable to trustees for such purposes as he should by will appoint, and afterwards appointed the same by his will for certain purposes, which partially failed:—Held, that the part of the money undisposed of was personality, and went to the estate of the next-of-kin. *Simmons v. Pitt*, 43 Law J. Rep. (N.S.) Chanc. 267; Law Rep. 8 Chanc. 978.

13.—When land is subject to a power of sale, and the power is exercised, it is converted into personality from the time of the sale, unless the proceeds are re-invested in land, or are stamped with a trust for re-investment in land. *Atwell v. Atwell*, 41 Law J. Rep. (N.S.) Chanc. 23; Law Rep. 13 Eq. 23.

A trust to re-invest the proceeds in land, or government or real securities, with a direction superadded that these when purchased shall be and enure, and be made liable to the same uses, trusts, estates, limitations and provisos, as the land originally settled, does not amount to a trust for re-investment in land, at least when the limitations of the land originally settled are applicable to personality as well as realty. *Ibid.*

14.—In March, 1862, L. and S. (who was the wife of an alien) conveyed land of which they were

tenants in common to a trustee, upon trust to sell and stand possessed of the proceeds in trust for L. and S. in equal shares, the share of S. to be for her separate use. In April, 1862, L. and S. entered into an agreement to allot the lands in severalty, and that the trustee should stand possessed of each such respective allotment on the respective trusts declared by the deed of March, and that nothing in the agreement should prejudice or affect any of the powers or trusts of the deed. No sale was ever effected and S. died in 1866, having by her will given to her husband the alien, her personal estate absolutely, and a life interest in her real estates:—Held, first, reversing the decision of one of the Vice-Chancellors, that the land was not in equity converted into money, secondly, that the title of the alien having accrued before the passing of the Naturalization Act, 1870, that Act did not remove his disability to hold land. Thirdly, following the decision of Lord Romilly, M.R., in *Barrow v. Wadkin* (24 Beav. 1, 327; 27 Law J. Rep. (n.s.) Chanc. 129), that the trust for the alien could be enforced for the benefit of the Crown. *Sharp v. De St. Sauveur*, 41 Law J. Rep. (n.s.) Chanc. 576; Law Rep. 7 Chanc. 343.

#### (D) TRUSTEE RELIEF ACT.

##### (a) *Payment in.*

##### (1) *When justifiable.*

1.—By statute 56 Geo. 3. c. lxxiii. (local) a fund was constituted in the nature of a life insurance fund for the benefit of officers in the Customs, their widows and relatives. The Act provided that the directors of the fund might admit to the benefits thereof nominees, of a subscriber other than his relatives. By rules made for the management of the fund under powers given by the Act it was directed that the admission of a nominee might be revoked either by the subscriber or by the directors where there might be cause to believe the admission had been procured in fraud of the policy of the fund, and that the money forthcoming at a subscriber's death might be appropriated by his will or by an instrument in writing signed by him in the presence of an attesting witness, and deposited with the directors during his life, but it was provided that one-third of the money should be set aside as the portion of the subscriber's widow, while the other two-thirds should, in default of any such appropriation as before mentioned, go to his children and their issue. A subscriber to the fund signed a written instrument attested by a witness, and thereby directed that a third of the money forthcoming at his death should be paid to the trustees of an insurance company. This direction was in fact given to secure an advance which had been made to the subscriber by the trustees and which advance had been used for the subscriber's own benefit. After the subscriber's death the insurance company claimed the money which had been so directed to be paid them, but the subscriber's family also claimed it on the ground that the direction was void, and the directors of the

fund having also notice that questions were raised as to the payment of succession duty, paid the money into Court under the provisions of the Trustee Relief Act. On a petition for payment out by the trustees of the insurance company,—Held, that the directors were justified in paying the money into Court, and were entitled to their costs thereout as between solicitor and client. *In re Maclean's Trusts*, 44 Law J. Rep. (n.s.) Chanc. 145; Law Rep. 19 Eq. 275.

Held also, that the trustees of the insurance company were assignees of an assured person within the meaning of section 17 of the 16 and 17 Vict. c. 96, and that no succession duty was payable as between the subscriber and them. *Ibid.*

[And see *infra* Nos. 6, 7.]

##### (2) *Effect of, on powers of trustee.*

2.—A trustee having a discretionary power as to the application of a trust-fund, does not necessarily abandon it by paying the trust-fund into Court under the Trustee Relief Act. *In re London's Trusts*, 40 Law J. Rep. (n.s.) Chanc. 370.

##### (b) *Service out of jurisdiction.*

3.—The Court has power to order service of a petition under the Trustee Relief Act upon a respondent out of the jurisdiction, in the same manner as in the case of proceedings commenced by bill. *In re Haney*, 44 Law J. Rep. (n.s.) Chanc. 272; Law Rep. 10 Chanc. 275.

##### (c) *Payment out.*

##### (1) *French lunacy.*

4.—Where a fund belonging to an Englishman residing abroad and found lunatic there under a foreign inquisition is paid into Court under the Trustee Relief Act, the Court has a discretion to refuse to transfer the *corpus* to the foreign provisional committee of the estate of the lunatic, though such committee is duly constituted according to the laws of the country where the inquisition was held, and has power to sue and give valid receipts for the fund. *In re Garnier*, 41 Law J. Rep. (n.s.) Chanc. 419; Law Rep. 13 Eq. 532.

##### (2) *Mistake in settlement.*

5.—Words were inserted in a settlement by mistake. The Court being convinced of the mistake, ordered funds, which had been paid into Court under the Trustee Relief Act, to be paid to the persons who would be entitled under the settlement as intended to be drawn, without rectifying the settlement. *In re De la Touche's Settlement*, 40 Law J. Rep. (n.s.) Chanc. 85; Law Rep. 10 Eq. 599.

##### (d) *Costs.*

##### (1) *Improper payment in.*

6.—Trustees are not entitled, simply to relieve themselves of liability, to pay their trust fund into Court under the Trustee Relief Act; they are bound to act in the trust if there is no reason-

able doubt or difficulty in the way, and if they pay the fund into Court without sufficient cause they thereby render themselves liable to costs. *In re Elliot's Trusts*, 42 Law J. Rep. (N.S.) Chanc. 289; Law Rep. 15 Eq. 194.

7.—Trustees who pay into Court a fund claimed in default of appointment, after satisfactory evidence of the non-exercise of the power, will be ordered to pay the costs of paying the fund into Court. *In re Wyll's Trusts* (28 Beav. 458) not followed. *In re Cull's Trusts*, 44 Law J. Rep. (N.S.) Chanc. 664; Law Rep. 20 Eq. 561.

## (2) Unfounded claims.

8.—The respondents who make an unfounded claim to a fund, and so occasion the payment of it into Court under the Trustee Relief Acts, will be ordered to pay the costs of getting the fund out of Court. *In re Benton's Policy Trusts*, 43 Law J. Rep. (N.S.) Chanc. 715.

## (3) Whether payable out of corpus or income.

9.—Costs of trustee upon petition by tenant for life for payment of dividends ordered to be paid out of income. *In re Mason's Trusts; Ex parte Smithett*, Law Rep. 12 Eq. 111.

10.—Where a fund had been paid into Court under the Trustee Relief Act on account of the inability of a sole trustee to act,—Held, that on an application relating solely to the payment of dividends, the trustee's costs might be charged on the corpus. *In re Wood's Trusts*, 40 Law J. Rep. (N.S.) Chanc. 179; Law Rep. 11 Eq. 155.

11.—The costs of all parties of a petition presented by a tenant for life and other persons interested in the fund for the payment of the income of a fund which has been paid into Court under the Trustee Relief Act, are payable out of the income. The rule laid down in *In re Marner's Trusts*, 36 Law J. Rep. (N.S.) Chanc. 58; Law Rep. 3 Eq. 432, adopted as the established practice of the Court. *In re Evans's Trusts*, 41 Law J. Rep. (N.S.) Chanc. 512; Law Rep. 7 Chanc. 609.

## (E) TRUSTEE ACT.

### (a) Application whether in Chancery or Lunacy.

1.—A petition for the appointment of new trustees, and a vesting order, where the trust estate has become vested in a lunatic who has not been properly appointed a trustee, should be presented in Lunacy as well as in Chancery. *In re Mason*, 44 Law J. Rep. (N.S.) Chanc. 678; Law Rep. 10 Chanc. 273.

2.—Where the sanction of the Court is required to the sale of an ecclesiastical lease to the Ecclesiastical Commissioners by reason of a beneficiary being of unsound mind, the application should, under 23 & 24 Vict. c. 124, s. 38, be made in Chancery, and not in Lunacy. *In re Cheshire's Estate*, 41 Law J. Rep. (N.S.) Chanc. 208; Law Rep. 7 Chanc. 50.

*Appointment of new trustee in place of lunatic trustee.* [See LUNATIC, 2.]

### (b) Service on new trustee.

3.—A petition for appointment of a new trustee in the place of one of unsound mind need not be served on the latter. *In re Green. In re Murton's Trusts*, Law Rep. 10 Chanc. 272.

### (c) Appointment of new trustees.

#### (1) Appointment of feme sole.

4.—Order made to appoint a *feme sole* a trustee; following *In re Campbell's Trust* (31 Beav. 176). *In re Berkley*, 43 Law J. Rep. (N.S.) Chanc. 703; Law Rep. 9 Chanc. 720.

Part of a testator's estate consisted of shares upon which there was an unlimited liability. Upon a petition to appoint a new trustee an order was made that one of the continuing trustees, in whose name the shares stood, should sell them, and invest the proceeds in the names of himself and the other trustees. *Ibid.*

#### (2) Appointment in place of bankrupt trustee.

5.—The "Court" authorised by the 117th section of the Bankruptcy Act, 1869, to appoint a new trustee in place of a bankrupt trustee is the Court of Chancery. *Coombs v. Brookes*, 41 Law J. Rep. (N.S.) Chanc. 114; Law Rep. 12 Eq. 61.

#### (3) Residence abroad.

6.—A trustee permanently residing abroad, does not thereby become "incapable to act," so as to enable the persons to whom the power of appointing new trustees in such an event has been given, to appoint a trustee in his place; but the Court has jurisdiction, under the 32nd section of the Trustee Act, 1850, to appoint a new trustee in such a case without the consent of or service of the petition on the trustee so resident abroad, and will exercise that jurisdiction and also make the usual vesting order if it appears to the Court "expedient" so to do. *In re Blanchard* (30 Law J. Rep. (N.S.) Chanc. 516) distinguished. *In re Bignold's Settlement*, 41 Law J. Rep. (N.S.) Chanc. 235; Law Rep. 7 Chanc. 223.

#### (4) Constructive trustee.

7.—Executors of a will, which contained no appointment of trustees, set apart a sum of money to answer a legacy; the fund was standing in the name of the surviving executor:—Held, that he was a constructive trustee within the Trustee Acts, and new trustees were appointed on petition. *In re Davis's Trusts*, 40 Law J. Rep. (N.S.) Chanc. 566; Law Rep. 12 Eq. 214.

#### (5) Discharge of one trustee.

8.—One of three trustees desiring to retire, and no person being willing to be trustee in his place:—Held, that upon a petition under the Trustee Act, 1850, the Court could appoint the two continuing trustees to be trustees in substitution for the three trustees, so as to discharge the retiring trustee from the trusts. *In re Stokes's Trusts*, 41 Law J. Rep. (N.S.) Chanc. 290; Law Rep. 13 Eq. 333.

(6) *Trustees pre-deceasing testator.*

9.—Where all the trustees of real estate named in a will have pre-deceased the testator, new trustees may be appointed if the heir of the testator is before the Court. *In re Smirthwaite's Trusts*, 40 Law J. Rep. (n.s.) Chanc. 176; Law Rep. 11 Eq. 251.

(7) *Infant devisee.*

10.—A vendor contracted to sell some land to a railway company, and died, having devised the land to an infant. The company had entered into possession under their statutory powers, but had not accepted the title. On petition under the Trustee Act, the Court made an order declaring the infant a trustee for, and directing that on payment of the purchase-money he or some proper person should convey to, the company. *In re Lowry's Trusts*, 42 Law J. Rep. (n.s.) Chanc. 509; Law Rep. 15 Eq. 78.

(8) *Vesting order.*(i) *Copyholds.*

11.—A mortgagor of copyholds refusing for twenty-eight days to make a surrender in accordance with his covenant, an order was made vesting the legal estate in the mortgagee, subject to the proviso for redemption. *In re Crowe's Mortgage*, 41 Law J. Rep. (n.s.) Chanc. 32; Law Rep. 13 Eq. 26.

(ii) *Leaseholds.*

12.—The Court will not re-appoint as trustee a person already duly appointed for the purpose of making a vesting order under section 34 of the Trustee Act, 1850, but will appoint an additional trustee, and then make the order. *In re Mandel's Trusts* (8 W. R. 683) not followed. *In re Driver's Settlement*, Law Rep. 19 Eq. 352.

## TURNPIKE.

## (A) TOLLS.

## (a) "Taxed cart."

(b) *Exemptions.*(1) *Locomotive steam plough.*(2) *Dissenting minister.*(B) *EVASION OF TOLL.*(C) *APPLICATION OF TOLLS.*(D) *POWERS OF TURNPIKE TRUSTEES.*

[Provision for the reduction of interest on certain mortgage debts secured on turnpike roads. 33 & 34 Vict. c. 22.]

## (A) TOLLS.

## (a) "Taxed cart."

1.—By a local Act the trustees of a turnpike road were empowered to take a certain toll "for every horse or other beast drawing any car or chair or other such like carriage with double seats (except a dog cart), or any phaeton, caravan, or

taxed cart, or any four-wheeled light carriage, if drawn by one horse or other beast only":—Held, that the words "taxed cart" mean such a cart as comes within the designation of "taxed cart" in 43 Geo. 3. c. 161, and do not apply to any cart, simply because it is a cart in respect of which a tax is paid. *Purdy v. Smith* (28 Law J. Rep. (n.s.) M. C. 150) dissented from. *Williams v. Lear*, 41 Law J. Rep. (n.s.) M. C. 76; Law Rep. 7 Q. B. 285.

(b) *Exemptions.*(1) *Locomotive steam plough.*

2.—A steam engine, which, in being taken along a turnpike road for the purpose of working a plough for hire, and on its way to take up a plough to be driven on a farm not occupied by the owner of the engine, having on it the necessary plough gear, passes through a turnpike-gate more than three miles distant from where the plough is, is liable to toll under 24 & 25 Vict. c. 70, s. 1, and is not within the exemption arising from 24 & 25 Vict. c. 70, s. 12, and 3 Geo. 4. c. 126, s. 32, inasmuch as it is not a horse or carriage conveying a plough, or a plough itself. *Skinner v. Visger*, 43 Law J. Rep. (n.s.) M. C. 49; Law Rep. 9 Q. B. 199.

(2) *Dissenting minister.*

3.—The 3 Geo. 4. c. 126, s. 32, enacts that "no toll shall be demanded or taken by virtue of this or any other Act or Acts of Parliament on any turnpike road of or from (amongst other persons) any person going to or returning from his, her, or their usual place of religious worship tolerated by law on Sundays," &c. A dissenting minister had assigned to him by the persons having authority in his connection certain Sunday and week-day services in a district comprising thirteen parishes. He had to preach in the parish of F. on three Sundays in the quarter, and on other Sundays he had to preach at four other parishes in the district:—Held, that in going from his residence to the chapel of F. which was out of the parish where he resided, he was within the above exemption, and exempt from toll. *Smith v. Barnett*, 40 Law J. Rep. (n.s.) M. C. 15; Law Rep. 6 Q. B. 34.

(B) *EVASION OF TOLL.*

4.—H., the occupier of land adjoining a turnpike road, made an opening through the fence which separated his land from the turnpike road, and another opening through the same fence at a few yards' distance. He also made a road over the land in his occupation, connecting the two openings in the fence, between which was a toll gate, at which the trustees of the turnpike road were authorised to take tolls. By means of the two openings in the fence, and the road connecting them, he was able to use the turnpike road without passing through the gate:—Held, that in doing so with intent to evade the payment of toll he did not incur any liability to the penalty imposed by section 41 of 3 Geo. 4. c. 126. *Harding v. Headington*, 43 Law J. Rep. (n.s.) M. C. 59; Law Rep. 9 Q. B. 157.

## (C) APPLICATION OF TOLLS.

**5.**—A Local Turnpike Act, 4 Vict. c. xxxv., after reciting that the principal sum borrowed on the credit of the tolls under former Acts still remained unpaid, together with arrears of interest thereon, by section 18 directed that "all moneys received by the trustees should be applied in the first place in paying and discharging any interest which might from time to time be owing in respect of any money borrowed on the credit of the tolls; secondly, in maintaining and keeping the road in repair; and thirdly, in reducing and paying off the principal sums borrowed":—Held, Quain, J., doubting, on an application by the trustees to justices for an order on the highway board to contribute under 4 & 5 Vict. c. 59, out of the highway rates towards the repairs of a turnpike road, that the Act did not authorise the payment of arrears of interest before repairing the road. *The Trustees of Market Harborough and Brampton Turnpike Trust v. The Kettering Highway Board*, 42 Law J. Rep. (n.s.) M. C. 137; Law Rep. 8 Q. B. 308.

## (D) POWERS OF TURNPIKE TRUSTEES.

**6.**—By a Local Turnpike Act, 5 Vict. c. lxi. s. 2, in case the trustees should keep in good repair part of a road within the parish of G. B. they were empowered to take certain specified tolls upon it. The tolls received by the trustees in respect of this portion of the road were considerably more than was sufficient to keep it in repair:—Held, that so long as the trustees continued to take these tolls, and found them sufficient to keep such part of the road in repair, they could not in addition to the tolls claim to have an order made on the parish of G. B. for the payment of a further sum under 4 & 5 Vict. c. 59, s. 1, on the ground that there was a general deficiency of the funds of the whole turnpike trust. *The Trustees of the Market Harborough and Brampton Turnpike Trust v. The Market Harborough Highway Board*, 42 Law J. Rep. (n.s.) M. C. 139; Law Rep. 8 Q. B. 327.

## UNDUE INFLUENCE.

## (A) ACTS INTER VIVOS.

- (a) *Solicitor and client.*
- (b) *Parent and child.*
- (c) *Trustee and cestui que trust.*
- (d) *Persons in confidential relations.*

## (B) WILL.

## (A) ACTS INTER VIVOS.

- (a) *Solicitor and client.*

**1.**—Where a mortgagee who was also a solicitor took a conveyance from the mortgagor, an aged labourer, who had no independent advice:—Held, that in order to support the deed, the onus lay on the mortgagee of shewing that the circumstances were explained to the mortgagor. *Prees v. Coke*, Law Rep. 6 Chanc. 645.

**2.**—The plaintiff having been induced by the fraud and undue influence of L., her agent and trustee, to execute deeds by which, without any consideration, she conveyed all her property to him absolutely, filed a bill against his executor to set them aside. Her former solicitor, who prepared and had the custody of the deeds, was joined as a defendant for purposes of discovery, and costs were prayed against him, as well as the executor, on the ground of neglect of duty. The bill also charged him with fraud, which however was not proved. Throughout the litigation he acted as the solicitor of the defendant executor. A decree was made, setting aside the deeds with costs against L.'s estate, and the solicitor was ordered to pay the whole costs of the suit, in case L.'s estate proved insufficient to pay them. *Baker v. Loader*, 42 Law J. Rep. (n.s.) Chanc. 113; Law Rep. 16 Eq. 49.

The Court will, in a proper case, order a solicitor to pay the costs of litigation occasioned by deeds improperly prepared by him. *Ibid.*

(b) *Parent and child.*

**3.**—A person seeking to set aside a voluntary deed on the ground of undue parental influence must not be guilty of unreasonable delay. *Turner v. Collins*, 41 Law J. Rep. (n.s.) Chanc. 558; Law Rep. 7 Chanc. 329.

In 1855 J. T. T., who had recently attained his age of twenty-one years, and was entitled under the will of his grandfather to a present income of 1,200*l.*, which would be increased to 2,200*l.* on marriage, and to about 6,000*l.* on his attaining twenty-five, and being also entitled under his father's and mother's marriage settlement to trust funds of about the value of 30,000*l.*, part of which was brought into settlement by the father and part by the mother, was induced by his father, who had married and had a daughter by a second wife, to execute a deed whereby, subject to the father's life interest, successive life interests in the trust funds subject to the settlement, were given to the wife and daughter by the second marriage, and power was given to the father in the event of his again becoming a widower and marrying a third wife, to revoke the trusts of a portion of the trust funds and appoint the same for the benefit of the third wife and the issue of the third marriage. In 1869 J. T. T. filed his bill to have the deed rectified by confining its operations to such portion of the trust fund as had been brought into settlement by his father and by expunging the power of revocation and new appointment:—Held, that though in its inception the transaction was voidable as having been brought about by undue influence, the plaintiff had by delay forfeited his right to set aside such part of the deed as gave life interests to his step-mother and half sister; but the Court being of opinion upon the evidence that the clause giving the father a power of revocation and re-appointment on a third marriage had never been sufficiently explained to him, set aside that part of the deed. *Ibid.*

**4.**—In a transaction with a person who is

known to be under the influence and control of a father or mother (in this case the relationship was that of step-father and step-daughter), it is the duty of the person who is to reap the benefit of the transaction to see that everything that is done is fair and aboveboard, and that full explanation is given to the person conferring the benefit; otherwise the transaction will not be upheld. *Kempson v. Ashbee*, 43 Law J. Rep. (N.S.) Chanc. 689; affirmed, on appeal, 44 Law J. Rep. (N.S.) Chanc. 195; Law Rep. 10 Chanc. 15.

An act cannot be relied on as a confirmation unless the voidable nature of the original transaction was known to the confirming party. *Ibid.*

A girl, under age, gave a promissory note as surety for her step-father. Soon after coming of age she executed, under his influence (as the obligee knew), but with knowledge of the invalidity of the promissory note, a bond to secure payment of the same debt six years after date. Shortly after the expiration of the period of six years, and at the age of twenty-nine, she executed another bond to secure the same debt, under threat of legal proceedings. She was afterwards sued on this bond, and thereupon filed a bill to avoid the bonds and to restrain the action:—Held, that she was entitled to the relief prayed. *Ibid.*

The bill was not filed till nearly seven years after the last bond was executed:—Held, that the plaintiff was not barred by delay. *Ibid.*

(c) *Trustee and cestui que trust.*

5.—A testator devised his real estate to the plaintiff, and gave various legacies to his other relations; and then, after reciting that he held a farm from year to year, he declared it to be his wish, and he authorised his trustees to give up the tenancy thereof in favour of the plaintiff, provided the landlord would accept him as tenant, and in that event he bequeathed to him all the stock on the farm. On the testator's death, it appeared that his personality, other than the farming stock, would be insufficient to pay his debts and legacies, and the trustees of the will, one of whom was the landlord's agent, induced the landlord to refuse to accept the plaintiff as tenant of his farm, unless he agreed to take 200*l.* and give up the testator's realty for payment of his debts and legacies. The plaintiff agreed accordingly, was accepted as tenant, and executed a deed conveying the realty to the trustees. About four years afterwards he filed a bill to set aside this transaction:—Held (affirming the decision of the Master of the Rolls, 40 Law J. Rep. (N.S.) Chanc. 603), that the trustees had been guilty of a clear breach of trust in what they had done to induce the plaintiff to execute the deed, and that it must be set aside, and the trustees must pay the costs of the suit. *Ellis v. Barker*, 41 Law J. Rep. (N.S.) Chanc. 64; Law Rep. 7 Chanc. 104.

(d) *Persons in confidential relationship.*

6.—There can be no confirmation of a fraudulent gift or bargain obtained through undue influence by a donee or bargainee standing in a

confidential relationship towards the donor or bargainor unless there be full knowledge on the part of the latter of all the facts and the rights arising out of them, and an absolute release from the undue influence by means of which the fraud was practised. *Moxon v. Payne*, 43 Law J. Rep. (N.S.) Chanc. 240; Law Rep. 8 Chanc. 881.

M., a young man, interested in a certain business, under the advice of his family solicitor, entered into an arrangement relating to the business with P., who stood in a fiduciary position towards him, and at the same time unknown to his solicitor was induced by the influence of P. to enter into other agreements completely nullifying the effect of such arrangement. It was held that P. could not, upon abandoning the fraudulent agreements, set up the arrangement. *Ibid.*

A bill alleged that the defendant had formed the design of possessing himself of the plaintiffs' property, and in pursuance of this design had perpetrated a series of frauds; there was no evidence to sustain this allegation to the full extent of it, but there was substantial proof of fraud in respect of several transactions:—Held, that the plaintiffs were entitled to relief. *Ibid.*

(B) WILL.

7.—The influence which is "undue" in the case of gifts *inter vivos* is different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos*, it is considered by the Courts of Equity that the natural influence arising out of the relation of parent and child, husband and wife, doctor and patient, attorney and client, confessor and penitent, or guardian and ward exerted by those who possess it to obtain a benefit for themselves is an "undue" influence. Gifts or contracts brought about by it are, therefore, set aside, unless the party benefited can shew affirmatively that the other party to the transaction was placed "in such a position as would enable him to form an absolutely free and unfettered judgment." The law regarding wills is different. The natural influence which such relations as those in question involve may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing and is a free agent; and hence the rules adopted in Courts of Equity in relation to gifts *inter vivos* are not applicable to the making of wills. *Parfitt v. Lawless*, 41 Law J. Rep. (N.S.) P. & M. 68; Law Rep. 2 P. & D. 462.

Testatrix, a Roman Catholic, gave the bulk of her property to A., whom she named residuary legatee and devisee. A., who was a Roman Catholic priest, had lived in her house and been her confessor for a number of years:—Held, that undue influence could not be inferred from the relation in which A. stood to the testatrix—confessor and penitent—combined with the disposition of the property, and that it lay on the party who impeached the residuary clause on the ground of undue influence to establish the allegation. *Ibid.*

He upon whom the burden of proving an issue lies is not bound to prove every fact or conclusion

of fact upon which the issue depends. From every fact that is proved, legitimate and reasonable inferences may be drawn; and hence, in discussing whether there is, in any case, evidence to go to the jury, what the Court has to consider is whether, assuming the evidence to be true, and adding to the direct proof all such inferences of fact as in the exercise of a reasonable intelligence the jury would be warranted in drawing from it, there is sufficient to support the issue. *Ibid.*

#### UNDUE PREFERENCE.

[See RAILWAY, 38, 39.]

#### UNION ASSESSMENT COMMITTEE ACT.

[See RATE, 32-37.]

#### UNIVERSITY.

A fellow of a college at Oxford, who had a living nine miles from Oxford, at which he actually resided, and who also rented rooms in his college, of which he had exclusive occupation, and at which he frequently slept when he visited Oxford,—Held, not a “resident” within s. 48 of 17 & 18 Vict. c. 81, so as to be eligible as a member of the congregation of the University. *The Queen v. The Vice-Chancellor and Hebdomadal Council of Oxford University*, Law Rep. 7 Q. B. 471.

#### USAGE OF TRADE.

[See CUSTOM.]

#### USURY.

1.—Although by 17 & 18 Vict. c. 60, the usury laws are repealed, and by 31 & 32 Vict. c. 4, dealings with reversionary interests can no longer be set aside for inadequacy of consideration, the Court has still jurisdiction to protect the unwary from unconscionable bargains. *Tyler v. Yates*, 40 Law J. Rep. (N.S.) Chanc. 768; Law Rep. 6 Chanc. 665.

Therefore, where a bill discounters on advancing money on a bill of exchange required a former bill accepted by a minor without consideration to be provided for out of the proceeds, and this was made the foundation for other bills which were secured by charges on a reversionary interest,—Held (affirming the decision of one of the Vice-Chancellors), that the charges could only stand as security for the money actually advanced and interest. *Ibid.*

2.—The Sales of Reversions Amendment Act leaves untouched the settled law relating to con-

tracts in respect of reversionary interests in all cases where *mala fides*, fraud, or unfair dealing can be shewn. *Miller v. Cook*, 40 Law J. Rep. (N.S.) Chanc. 11; Law Rep. 10 Eq. 641.

A money-lender advanced to a young man, aged twenty-two, in distress for money and in fear of arrest, the sum of 123*l.*; taking from him a promissory note for 150*l.*, and two mortgages of his reversionary interest in a legacy of 500*l.* and in a share of residuary estate worth about 500*l.* more. One of such mortgages secured the repayment of 50*l.*, with interest at the rate of 20*l.* per cent. for the first month and 5*l.* per cent. per month afterwards, and the other secured 150*l.*, with interest at 20*l.* per cent. per annum, reducible to 10*l.* per cent. on punctual quarterly payments, and both these mortgages contained an absolute power of sale without notice. Upon a bill filed by the borrower against the money-lender to set aside the securities,—Held, that the bargain was an unconscionable one, and amounted to unfair dealing within the 31 & 32 Vict. c. 4; and it was declared that the deeds should stand as a security only for the sums actually advanced, with interest at 5*l.* per cent., but the Court directed that the defendant should have his costs of suit added to the amount to be found due on his securities. *Ibid.*

3.—The repeal of the usury laws, and the alteration of the law as to reversionary interests, have left untouched the doctrines of this Court both as to the protection of persons, who for any reason are not fully competent to protect themselves, and as to the power to relieve against what are called unconscionable bargains with such persons. *The Earl of Aylesford v. Morris*, 42 Law J. Rep. (N.S.) Chanc. 146; affirmed, on appeal, 42 Law J. Rep. (N.S.) Chanc. 546; Law Rep. 8 Chanc. 484.

Special circumstances under which the Court relieved a young man from loans contracted by him when just of age at the rate of 60*l.* per cent. per annum. *Ibid.*

4.—Loan of 85*l.* by a money-lender on mortgage of a reversion of 600*l.* for 100*l.*, bearing interest at 5 per cent. per month. On reversion falling into possession twelve years afterwards, decree made for redemption on payment of 85*l.* with simple interest at 5 per cent. per annum. *Bemyon v. Cook*, Law Rep. 10 Chanc. 389.

#### VACCINATION.

[30 & 31 Vict. c. 84, amended and in part repealed. 34 & 35 Vict. c. 98.]

[The last Act explained and extended. 37 & 38 Vict. c. 75.]

1.—By s. 11 of 34 & 35 Vict. c. 98, “Any complaint may be made . . . under the Vaccination Acts, 1867 and 1871, at any time not exceeding twelve months from the time when the matter of such complaint . . . arose, and not subsequently;—Held, that the period within which a complaint that a child within the age of fourteen years has not been successfully vaccinated, must



be made, runs from the time of giving notice to the parent of the child to procure its being vaccinated, and that unless the complaint be made within that period no order directing vaccination can be made under s. 31 of 30 & 31 Vict. c. 84. *Knight v. Halliwell*, 43 Law J. Rep. (n.s.) M. C. 113; Law Rep. 9 Q. B. 412.

*Purkis v. Huxtable* (28 Law J. Rep. (n.s.) M. C. 221) considered. *Ibid*.

2.—By the Vaccination Act of 1867, 30 & 31 Vict. c. 84, s. 31, "if any registrar, or any officer appointed by the guardians to enforce the provisions of the Act, shall give information in writing to a justice of the peace that he has reason to believe that any child under the age of fourteen years, being within the union or parish for which the informant acts, has not been successfully vaccinated, and that he has given notice to the parent, or person having the custody of such child, to procure its being vaccinated, and that this notice has been disregarded, the justice may summon such parent or person to appear with the child before him at a certain time and place, and upon the appearance, if the justice shall find, after such examination as he shall deem necessary, that the child has not been vaccinated, nor has already had the small-pox, he may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time," &c., and the parent, &c., is subject to a penalty not exceeding 20s. if it be proved that he has not obeyed the order:—Held, that a justice has power under this section to make an order for the vaccination of a child, though it has never been produced by the parent or person summoned to appear before him. *Dutton v. Atkins*, 40 Law J. Rep. (n.s.) M. C. 157; Law Rep. 6 Q. B. 373.

### VAGRANT.

[31 & 32 Vict. c. 52, repealed. 5 Geo. 4, c. 83 extended to gaming in public places. 36 & 37 Vict. c. 38.]

*Vagrant Act Amendment Act, 1868: construction of, as to what is an instrument of gaming or wagering.* [See GAMING, 6.]

### VENDOR AND PURCHASER.

[And see SPECIFIC PERFORMANCE.]

- (A) FORMALITIES REQUISITE FOR CONTRACT OF SALE.
- (B) PARTICULARS AND CONDITIONS OF SALE.
  - (a) *Misdescription in particulars.*
  - (b) *Misleading condition.*
  - (c) *Objections to and requisitions on title.*
  - (d) *Valuation of timber.*
  - (e) *Depreciatory conditions.*
  - (f) *Penal conditions.*
- (C) AUTHORITY OF HOUSE AGENT.
- (D) CONSTRUCTION AND EFFECT OF CONTRACT OF SALE.

- (a) *Description of subject-matter.*
- (b) *Sale of business: implied covenant.*
- (c) *Notice to vendor of charge on contract.*
- (d) *Liability of vendor remaining in possession.*

- (E) TIME OF THE ESSENCE OF THE CONTRACT.
- (F) APPORTIONMENT OF PURCHASE-MONEY.
- (G) COMPLETION: PRESENCE OF VENDOR.
- (H) PARTIES TO CONVEYANCE.
- (I) VENDOR'S LIEN.
- (K) EFFECT OF CONVEYANCE ON RIGHTS OF VENDOR AND PURCHASER.
  - (a) *Mistake as to property.*
  - (b) *Mistake as to title.*
- (L) ADVERSE RIGHTS OF THIRD PARTIES.
  - (a) *Purchaser without notice having legal estate.*
  - (b) *Notice of tenancies and incumbrances.*
- (M) DEPOSIT.
  - (a) *Forfeiture of.*
  - (b) *Recovery of.*
- (N) RESCISSION OF CONTRACT.
- (O) SALE BY COURT.
- (P) REMEDIES AT LAW FOR BREACH OF CONTRACT.

[Questions arising between vendor and purchaser as to requisitions, or objections, or compensation, &c., may henceforth be determined in a summary way by a Judge of the Court of Chancery in chambers. 37 & 38 Vict. c. 78.]

[Protection by possession of legal estate as against prior equities henceforth abolished even in the case of *bond fide purchasers for value without notice.* 37 & 38 Vict. c. 78, s. 7.]

[The last enactment repealed as from the date thereof, except as to anything duly done thereunder before the present Act. 38 & 39 Vict. c. 87.]

### (A) FORMALITIES REQUISITE FOR CONTRACT OF SALE.

[See FRAUDS, STATUTE OF, 2-11.]

### (B) PARTICULARS AND CONDITIONS OF SALE.

#### (a) *Misdescription in particulars.*

1.—The plaintiff purchased at a sale by auction for 2,500*l.* certain property which was described in the particulars of sale as an "immediate reversion in fee simple." Shortly after signing the contract he discovered that by the conditions of sale, which were produced for the first time and read aloud by the vendor's agent at the commencement of the sale, the purchaser was to take the property subject to the obligation of paying off mortgages for 2,500*l.*, the gross value of the reversion being under 5,000*l.*:—Held, that the description in the particulars of sale was an improper description, and the reading of the conditions of sale in the auction-room was not sufficient to convey to the purchaser a knowledge of the real facts; and that he was therefore entitled to have the contract rescinded — affirming the decision of Malins, V.C. (41 Law J. Rep. (n.s.) Chanc. 643; Law Rep. 14 Eq. 124). *Torrance v. Bolton*, 42 Law J. Rep. (n.s.) Chanc. 177; Law Rep. 8 Chanc. 118.

*(b) Misleading condition.*

2.—Condition of sale that title was to commence with a will, the purchaser to assume that the testator was at his death beneficially entitled in fee, free from incumbrances. The testator had contracted for the purchase of the property, but the purchase was not completed till many years after his death:—Held, that the purchaser was not bound by the condition. The vendor refusing an open reference as to title, his bill was dismissed. *Harnett v. Baker*, Law Rep. 20 Eq. 50.

*(c) Objections to and requisitions on title.*

3.—In a contract for sale of lands containing valuable quarries, was a clause reserving to the vendor power to rescind in case any objection or requisition should be persisted in: in another clause provision was made for compensation in case any error or mistake should appear to have been made in the description of the property or the vendor's interest therein. A requisition was made by the purchaser, founded on an exception in favour of the lord of the manor of B., of mines and minerals in one of the title-deeds relating to part of the land. The purchaser alleged, therefore, that the quarries were not as to this part of the land included, and he claimed compensation. The vendor raised a contention that by custom or prescription he had a right to the quarries, but the objection being persisted in, he rescinded the contract:—Held (affirming the Master of the Rolls), upon bill filed by the purchaser claiming specific performance with compensation, that the requisition in question was one of title, giving the vendor the right to rescind. *Mawson v. Fletcher*, 40 Law J. Rep. (N.S.) Chanc. 131; Law Rep. 6 Chanc. 91.

4.—Real property was sold on the condition that the vendor should deliver an abstract of the title, and the purchaser should make his objections and requisitions in respect of the title within twenty-one days from the delivery of the abstract; and all objections and requisitions which should not be made within the time specified should be taken to be waived; and in case any purchaser should make any objection to or requisition on the title which the vendors should be unwilling or unable to answer or comply with, the vendors reserved to themselves the option at any time to rescind the contract. The vendor having delivered an abstract, the purchaser within the twenty-one days made a frivolous objection to the title as disclosed in the abstract, and as he insisted on it the vendor filed a bill for specific performance. The purchaser having meanwhile discovered the existence of certain deeds which materially affected the title, and which were omitted from the abstract, raised an objection on this ground for the first time in his answer to the bill. This omission was made intentionally, but *bonâ fide* and under the advice of counsel, as it was supposed that the deeds did not affect the title. (The vendor, however, had, under a previous contract to sell this property, disclosed these deeds on the abstract then delivered, and had abandoned such contract when an objection founded on these deeds was

raised to the title.) Several months after the filing of the answer, the vendor gave the purchaser notice that he rescinded the contract, and the bill was eventually dismissed on the purchaser's motion without costs. The purchaser having brought an action against the vendor for breach of contract in not deducing a good title,—Held (in the Exchequer Chamber, per Blackburn, J., Keating, J., Brett, J., Archibald, J., and Honyman, J.), that the objection founded on the omission of the deeds was an "objection to the title" within the meaning of the condition, and entitled the vendor to rescind, and that the action was not maintainable. Per Grove, J. (agreeing with the decision of Bramwell, B., in the Court below), that the vendor was not entitled to rescind, since the option reserved by the condition applied only to objections to the title as disclosed in the abstract. *Gray v. Fowler* (Exch. Ch.) 42 Law J. Rep. (N.S.) Exch. 161; Law Rep. 8 Exch. 249.

5.—The plaintiff put up for sale by auction a "valuable lease" of a house and premises. By the sixth condition of sale, the abstract of title was to commence with an underlease, dated &c., and "no requisition or enquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease" &c. By the seventh condition of sale, the purchaser was to bear the expense of verifying the abstract, with the documents of title and all charges incidental thereto, and all enquiries and evidences which might be required by the purchaser for verifying the abstract or otherwise in support of the vendor's title were to be made, sought for and obtained at his own expense. The lease was knocked down to the defendant, who paid a deposit, which, by the eleventh condition of sale, would be forfeited if the defendant neglected to comply with the conditions of sale. He refused to complete the contract to purchase, because he discovered *alivunde* that the lessor had parted with the legal estate, and therefore had no power to grant a valid lease:—Held, that the word "enquiry" in the sixth condition must be taken to mean the same as "requisition;" that the defendant was not precluded by the conditions of sale from taking the objection that he had not got what he had expected to get, viz., a valuable lease, and that he was entitled to have his deposit returned to him. *Waddell v. Woolfe*, 43 Law J. Rep. (N.S.) Q. B. 138; Law Rep. 9 Q. B. 515.

6.—Land was put up for sale by auction, subject to conditions (among others) that "the vendors should within seven days of the sale deliver to the purchaser an abstract of their title, all objections and requisitions not delivered to the vendors within fourteen days after the delivery of the abstract to be considered as waived, and in this respect time to be of the essence of the contract;" that "the vendors being trustees should not be required to obtain the concurrence of any one interested in the proceeds of the sale;" and that "if the purchaser should fail to comply with the conditions his deposit should be forfeited." An abstract was delivered to the purchaser within seven

days, shewing that the property had been devised to trustees (of whom the vendor was the survivor) upon trust to pay the income to F. S. for life, and after his death to sell and divide the proceeds among his children; and that F. S. was still alive. The abstract did not state whether he had children living, though there were in fact eight, all of age:—Held, that the vendor having thus no title to sell the property, the purchaser was entitled to recover back his deposit, although he had made no requisition within the fourteen days—the Court being of opinion that the conditions as to waiver and forfeiture referred only to the waiver of requisitions for further information or security in the case of a defective title capable of being made good on the defects being supplied, but not to the case of a title wholly bad. Held also, by Kelly, C.B., that the abstract delivered was not a sufficient abstract. *Want v. Stallibrass*, 42 Law J. Rep. (N.S.) Exch. 108; Law Rep. 8 Exch. 175.

Semle—by Martin, B., and Pollock, B., that the abstract, if a true abstract of such title as the vendors had, sufficiently indicating points calling on the purchaser to make further requisitions, was an abstract of their title within the meaning of the condition, although the title was not such as the purchaser was bound to accept. *Ibid.*

(d) *Valuation of timber.*

7.—Real estate was sold, by order of the Court, subject to certain conditions. The vendors' agent made a mistake in his valuation of the timber in one of the lots purchased. No fraud was imputed to any one:—Held, that the vendors were not entitled to a revaluation of the timber; or to have the sale rescinded. *Griffiths v. Jones*, 42 Law J. Rep. (N.S.) Chanc. 468; Law Rep. 15 Eq. 279.

(e) *Depreciatory conditions.*

8.—Trustees having power to sell under such special or other conditions or stipulations as they should think fit, sold by auction with a condition limiting the title to commence in 1858 (fourteen years previously). The next convenient root of title was a deed of 1819, from which a good title could be deduced, but the trustees could not find this deed, and had only recitals of its contents. There was also a condition that all recitals and statements in the deeds and particulars should be accepted as conclusive evidence:—Held, that the sale under such conditions was a breach of trust, and injunction granted at the suit of a *cestui que trust* to restrain completion. *Dance v. Goldingham*, 42 Law J. Rep. (N.S.) Chanc. 777; Law Rep. 8 Chanc. 902.

Held, further, that such an injunction would be granted against an innocent purchaser. *Ibid.*

(f) *Penal conditions.*

*Power of Court of Equity to relieve purchasers against penal condition.* [See PENALTY, 1.]

(C) *AUTHORITY OF HOUSE AGENT.*

9.—An estate or house agent to whom instructions are given to procure a purchaser for property,

has not, though the price is named in the instructions, authority to enter into a binding contract with the purchaser to sell such property. *Hamer v. Sharp*, 44 Law J. Rep. (N.S.) Chanc. 53; Law Rep. 19 Eq. 108.

(D) *CONSTRUCTION AND EFFECT OF CONTRACT OF SALE.*

(a) *Description of subject-matter.*

10.—By an agreement for the disposal to the defendant of the plaintiff's interest and goodwill in a public-house the premises were described as "the house and premises he now occupies known by the sign of the White Hart, with stabling and garden situate and being at" &c. The agreement contained a stipulation that the plaintiff was not, during the defendant's tenancy of the premises, to be concerned in the trade of a licensed victualling house within the distance of two miles from the said premises under a penalty of 100*l.* It also contained stipulations by the defendant to purchase certain effects and stock by valuation, and it stated that if the defendant was not accepted by the landlord as tenant at a certain rent or under, a deposit money of 50*l.* should be returned, and the agreement should be void, and concluded thus, "if either party shall refuse or neglect to perform all and every part of this agreement they hereby promise and agree to pay to the other who shall be willing to complete the same the sum of 100*l.* as damages, and recoverable in any of her Majesty's courts of law."—Held, that the words "he now occupies" could not be rejected, and therefore a coach-house which belonged to the premises, but which was shewn by extrinsic evidence to be at the time of the agreement not in the occupation of the plaintiff but of a person to whom the plaintiff had let it for a term then unexpired, was not included in the agreement. *Magee v. Lavell*, 43 Law J. Rep. (N.S.) C. P. 131; Law Rep. 9 C. P. 107.

Held also, that the 100*l.* mentioned at the end of the agreement as damages was a penalty and not liquidated damages. *Ibid.*

(b) *Sale of business: implied covenant.*

11.—Sale of business, the price to be ascertained from the profits of the business during a certain period. Held, to imply a covenant by the purchasers to carry on the business so that the price could be ascertained. They, having discontinued the business, were held not entitled to an injunction to compel the performance on his part of the agreement by the vendor. *Telegraph Despatch and Intelligence Company v. McLean*, Law Rep. 8 Chanc. 658.

(c) *Notice to vendor of charge on contract.*

12.—Notice to one under contract to sell an estate that his vendee has agreed to make a valid assignment of the contract, if so requested, does not put the vendor upon enquiry whether his vendee has been requested to make, or has made such valid assignment. *Shaw v. Foster* (H.L.), 42

Law J. Rep. (n.s.) Chanc. 49; Law Rep. 5 E. & I. App. 321.

Where a deposit of title-deeds is accompanied with a memorandum in writing, the kind and amount of charge intended to be created by the deposit must be ascertained solely by reference to the written document. *Ibid.*

An agreement to assign a contract is an agreement only to place the assignee in the position of the assignor, subject to, not freed from, his obligations under the contract. *Ibid.*

F. being mortgagee, with power of sale, contracted to sell a leasehold property to P., and P., after having paid one half of the purchase-money, deposited the contract with a bank to which he was indebted. At the same time he executed a mortgage to the bank of certain freehold estates, and signed a memorandum, by which he agreed to execute a valid assignment of the contract for the purchase of the leasehold property, by way of mortgage, for further securing the amount of his debt to the bank, if the bank should at any time request him to do so. The bank gave F. notice of this agreement, and in their letter accompanying the notice their solicitor described the agreement as being a charge by P. on his purchase. F. acknowledged the receipt of the notice, but the bank never made any further communication to him until after F. had completed the sale to P., which did not happen until some time after the period fixed by the contract for completion. As soon as the conveyance was executed to P., P. conveyed over again to one S., who had no notice of the agreement P. had made with the bank when he deposited with them the contract for sale. P. then became bankrupt:—Held, that F. was not bound to treat the notice of P.'s agreement with the bank as if it had been notice of an actual charge, and that he was not liable to the bank for having completed the sale to P. without first communicating with them. *Ibid.*

(d) *Liability of vendor remaining in possession.*

13.—An agreement for purchase of real estate provided that the purchaser should be entitled to the possession or rents from the 25th of March, and in the event of the purchase not being completed on that day, the purchaser should pay interest on the unpaid balance till completion. Disputes having arisen, the purchase was not completed for several years, and the vendor refused to allow the purchaser to take possession in the meantime, but suffered the estate to remain unoccupied and to fall into decay:—Held (affirming the decision of the Master of the Rolls), that the purchaser was entitled to charge the vendor with rents and profits which, without wilful default, he might have received, and also with deterioration, and to set off what might be found due against his purchase-money and interest. *Phillips v. Silvester*, 42 Law J. Rep. (n.s.) Chanc. 225; Law Rep. 8 Chanc. 173.

(E) TIME OF THE ESSENCE OF THE CONTRACT.

14.—If it be of the essence of the contract that an act should be completed by a fixed date, an

extension of the time does not operate as an absolute waiver of that condition, but only substitutes the extended time for the original time. *Barclay v. Messenger*, 43 Law J. Rep. (n.s.) Chanc. 449.

M. and W., entitled to a lease under a building agreement, defeasible by notice in case they did not complete buildings by the 1st of January, 1874, in July, 1873, entered into an agreement to sell their interest to the plaintiffs for 2,000*l.*, 200*l.* of which was paid on signing the agreement, 800*l.* and 1,000*l.* to be paid at the times specified in the 5th clause, which was as follows: "If the purchaser shall fail to pay either the 800*l.* on the 14th of July, 1873, or the 1,000*l.* on the 31st of July, 1873, or as to the 1,000*l.* upon such deferred date as the parties may agree upon, all money paid previous to such default being made shall be absolutely forfeited and this contract become null and void." The 800*l.* was duly paid. The time for payment of the 1,000*l.* was extended to the 26th of August, 1873. The purchaser made default in payment at that date. The vendors gave notice to determine the agreement, and a suit for specific performance was instituted by the purchasers:—Held, that by the 5th clause time was made of the essence of the contract. That the extension of the time to the 26th of August did not operate as an absolute waiver of that condition, but merely substituted the 26th of August for the original date. *Ibid.*

Opinion of Lord Romilly in *Parker v. Thorold* (16 Beav. 76), that after an extension of time, time cannot be taken to be of the essence of the contract, disapproved of. Bill dismissed with costs, without prejudice to any action at law to recover the 1,000*l.* *Ibid.*

(F) APPORTIONMENT OF PURCHASE-MONEY.

15.—Where on a sale by one contract of two properties held under different titles, the money is paid into Court to the credit of a cause, an objection by the purchaser on the ground that there is no provision for apportionment, and that the cause is not connected with the deed under which one of the properties is held, is not sustainable, as the Court will see the money properly applied. In such a case, however, the Court, for the satisfaction of the purchaser, ordered apportionment. *Cavendish v. Cavendish*, Law Rep. 10 Chanc. 319.

(G) COMPLETION: PRESENCE OF VENDOR.

16.—A purchaser of real estate has no absolute right to insist on the presence of the vendor at the time of completion and payment. It is a question for the jury whether such a requisition is reasonable, and the mere circumstance that the vendor was formerly confined in a lunatic asylum will not be sufficient to render it reasonable where it is shewn clearly that at the time of completion he is perfectly competent. *Essex v. Daniell*; *Daniell v. Essex*, Law Rep. 10 C. P. 538.

(H) PARTIES TO CONVEYANCE.

17.—Where a colliery company entered into a covenant by deed for the repayment of sums advanced, and for payment of a certain fixed rate

per ton of coal, with power to the majority of the lenders to appoint a receiver, and to enter and distrain upon the collieries if the company could not pay the rate for any half-year:—Held, in the winding-up of the company under supervision, that the lenders were not necessary parties to a conveyance on sale by the liquidator of one of the company's collieries. *In re the Sankey Brook Coal Company; In re Radley and Bramhall*, 41 Law J. Rep. (n.s.) Chanc. 119; Law Rep. 12 Eq. 472.

#### (I) VENDOR'S LIEN.

**18.**—The heir of an intestate who had contracted to purchase land, was held entitled to the lands freed from the vendor's lien as against the estate of the intestate. *Harding v. Harding*, 41 Law J. Rep. (n.s.) Chanc. 523; Law Rep. 13 Eq. 493.

**19.**—Where by the contract for sale and purchase of goods it is stipulated that payment should be made by the buyers' acceptances of the sellers' drafts, if before the time for delivery of the goods the purchaser becomes insolvent or the acceptances are dishonoured, the vendor still has a lien for unpaid purchase-money. Difference in this respect between acceptances of the purchaser and those of a third person. *Gunn v. Bolckow, Vaughan & Co. (Lim.)*, 44 Law J. Rep. (n.s.) Chanc. 732; Law Rep. 10 Chanc. 491.

*Rights of unpaid vendors of railway company.* [See RAILWAY, 16, 17.]

#### (K) EFFECT OF CONVEYANCE ON RIGHTS OF VENDOR AND PURCHASER.

##### (a) Mistake as to property.

**20.**—In 1866 A. purchased a house of residence and grounds from B. The conveyance was prepared by the purchaser's solicitor, but by a mistake, the minerals under the house were excepted from it. The purchaser entered into possession, and expended money in repairs and improvements; the vendor afterwards discovered the mistake, and attempted to deal with the minerals; thereupon, five years after the purchase, the purchaser filed a bill against him, praying for specific performance of the original agreement, and to have the conveyance rectified; the vendor had died, and the suit had been renewed against his legal personal representative:—Held, that she must have the option either of having the conveyance rectified or having the whole purchase set aside, she repaying the purchase-money, with interest at 4 per cent. per annum, and all sums expended by the plaintiff in repairs and permanent improvements, and the plaintiff being charged with an occupation rent. *Bloomer v. Spittle*, 41 Law J. Rep. (n.s.) Chanc. 369; Law Rep. 13 Eq. 427.

##### (b) Mistake as to title.

**21.**—When an interest, either legal or equitable, in any real property has been sold, and the conveyance thereof has been executed by the parties to the same, the purchaser in the absence of fraud on the vendor's part cannot maintain an

action for money received for his use to recover the price paid by him, if the vendor had no title to the property sold and his conveyance turns out to be worthless. In order to protect himself, a purchaser ought to take care that proper covenants are inserted in the deed of grant to him. *Clare v. Lamb*, 44 Law J. Rep. (n.s.) C. P. 177; Law Rep. 10 C. P. 334.

The defendants believing themselves to be entitled to an equity of redemption in a term of years, purported to convey the same to the plaintiff for 240l. It afterwards appeared that they were not entitled to the equity of redemption, and that their conveyance was, in fact, worthless. The plaintiff having sued for money received to his use was nonsuited:—Held, that as the defendants were innocent of fraud, the maxim "caveat emptor" applied, that there was no such total failure of consideration as to entitle the plaintiff to maintain an action for money received, that it was incumbent on the plaintiff to ascertain whether the defendants had a good title to the equity of redemption, and that the nonsuit was right. *Ibid.*

#### (L) ADVERSE RIGHTS OF THIRD PARTIES.

##### (a) Purchaser without notice having legal estate.

**22.**—A purchaser for valuable consideration without notice of any prior equity, having accidentally acquired the legal estate under a deed of which he had no notice at the time of the purchase, is not affected with notice of anything contained in such deed. *Pilcher v. Rawlins; Joyce v. Rawlins*, 41 Law J. Rep. (n.s.) Chanc. 485; Law Rep. 7 Chanc. 259.

Per Lord Justice James.—Such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of the Court. *Ibid.*

B., a trustee, advanced trust money to A. in 1851, on a legal mortgage of land belonging to A. in fee, the mortgage deed reciting the trust. By collusion with B., A., in 1856, obtained the title deeds, and also a reconveyance of the legal estate, and then, suppressing the mortgage and reconveyance, conveyed as under his original title the legal estate to C. by way of mortgage. In a suit by B.'s *cestui que trust*,—Held, reversing the decision of the Master of the Rolls (40 Law J. Rep. (n.s.) Chanc. 105; Law Rep. 11 Eq. 53), that C. was entitled to rely on the legal estate acquired through the suppressed reconveyance, and was not affected with notice of any equities which, if he had seen that deed, he might have discovered upon enquiry. *Ibid.*

*Carter v. Carter* (3 Kay & J. 617; 27 Law J. Rep. (n.s.) Chanc. 74) distinguished. The same case disapproved of by the Lords Justices, but defended doubtfully by the Lord Chancellor. *Ibid.*

##### (b) Notice of tenancies and incumbrances.

**23.**—A public-house and premises put up for sale by auction were described in the particulars

as in the occupation of certain persons at certain rents. The conditions stated that the property was sold "subject to existing tenancies." The defendants, who were brewers, by their agent became the purchasers of the property at the auction. Shortly afterwards they discovered that the property was in lease to another brewer for a term of years, of which about nine remained unexpired. Thereupon they refused to complete their contract. In a suit against them by the vendor for specific performance,—Held, that there was a misdescription of the property, which precluded the vendor from enforcing the agreement, and that the purchasers had not constructive notice of the lease. *James v. Lichfield* (39 Law J. Rep. (n.s.) Chanc. 248) dissented from. *Caballero v. Henty*, 43 Law J. Rep. (n.s.) Chanc. 635; Law Rep. 9 Chanc. 447.

24.—The defendants were trustees for sale, under a will, of certain farms, and on the 11th of May, 1868, they entered into agreements with the tenants thereof, that the latter should at Michaelmas, 1869, give up possession of the farms held by them, and that the defendants should allow to the tenants the half-year's rent payable at Michaelmas, 1868, and should also pay to them at Michaelmas, 1868, a sum of money, and should also allow to them at Michaelmas, 1869, or at the termination of their tenancies, for all the hay, straw and manure produced on the farms during the preceding year at market value. Before the date of this agreement the tenants had held the farms from year to year pursuant to verbal agreements on the terms of being paid fodder value only, which is less beneficial to the outgoing tenant than market value. On the 18th of July the plaintiff contracted to purchase the farms. He then had no notice of the agreements of the 11th of May, and on the 6th of September he first became aware of them. On the 6th of January, 1859, the purchase of the farms by the plaintiff from the defendants was completed, but it was stipulated between them that the purchase should be without prejudice to the claim of the plaintiff for an indemnity in consequence of the defendants having entered into the agreements of the 11th of May. One of the tenants afterwards sued the plaintiff to recover the market value of the produce left by him on the farm, and the plaintiff ultimately paid all the tenants for their hay, &c., at market value:—Held (per Bramwell, B., Blackburn, J., Mellor, J., Cleasby, B., and Pollock, B., reversing the judgment of the Court of Common Pleas as reported 43 Law J. Rep. (n.s.) C.P. 74; Law Rep. 9 C.P. 196, *dissentiente* Amphlett, B.), that the plaintiff was entitled to recover from the defendant the amount which he had paid to the tenants on account of the difference between market value and fodder value; for the agreements of the 11th of May, 1868, did not amount to fresh demises but were contracts personally binding the defendants, and that the purchase must be taken to have been concluded on the terms that the defendants would repay to the plaintiff the difference between market value and fodder value, if in point of law the defendants

had rendered themselves personally liable to pay that amount to the tenants. *Phillips v. Miller* (Exch. Ch.), 44 Law J. Rep. (n.s.) C.P. 265; Law Rep. 10 C.P. 420.

### (M) DEPOSIT.

#### (a) Forfeiture.

25.—In the absence of any stipulation a purchaser's deposit is forfeited if he fails to complete the contract. *Ex parte Barrell; In re Parnell*, 44 Law J. Rep. (n.s.) Bankr. 138; Law Rep. 10 Chanc. 512.

26.—Where conditions of sale provided for forfeiture of deposit on non-completion, the vendor to be at liberty to re-sell and the purchaser to pay the deficiency between the amount realised at the second sale and the original price and expenses of the first sale:—Held, that the vendor was not bound to re-sell, and that on non-completion by neglect of the purchaser he was entitled to retain the deposit and the costs of the abortive sale. *Essex v. Daniell; Daniell v. Essex*, Law Rep. 10 C.P. 538.

27.—Under the ordinary conditions for forfeiture of deposit or non-compliance with conditions of sale, and for delivery of requisition as to title within fourteen days, where the vendor had no title to sell, the deposit was held not forfeited although the requisition as to the absence of title was not made within the fourteen days. *Want v. Stallibras*, 42 Law J. Rep. (n.s.) Exch. 108; Law Rep. 8 Exch. 175.

#### (b) Recovery of.

28.—Particulars stated that property was to be sold pursuant to a decree of the Court, and one of the conditions was that if the purchaser should make any objection the vendor should be unable or unwilling to comply with, the latter should be entitled to rescind, and the deposit should be returned without interest or costs. The sale took place, and the deposit was paid and invested. It afterwards appeared that the sale took place before the chief clerk had made his certificate, and the Court had decided in a suit between the vendor and the purchaser of another lot, that the purchaser was entitled to be discharged:—Held, that the condition did not apply, and that the purchaser was entitled to the return of his deposit and to be indemnified against all expenses he had been put to, and to the bank annuities on which the deposit had been invested and the dividends which had accrued thereon. *Powell v. Powell* (2), 44 Law J. Rep. (n.s.) Chanc. 311; Law Rep. 19 Eq. 422.

29.—The plaintiff agreed to buy and the defendant to sell a house; the plaintiff paid a deposit, and the defendant was to prepare a written contract of sale; the defendant prepared one which stipulated that the purchaser should bear the expense of verifying the title, and the vendor be permitted to annul the sale if the purchaser insisted on any objection which the vendor was unable or unwilling to remove; the plaintiff refused to execute this contract, the defendant

resold, and the plaintiff brought his action to recover the deposit:—Held, that the contract was unreasonable, and the plaintiff entitled to recover his deposit. *Mooser v. Wisker*, 40 Law J. Rep. (n.s.) C. P. 94; Law Rep. 6 C. P. 120.

**30.**—When it appears from the abstract of title delivered to a purchaser in pursuance of conditions of sale, that the vendor has previously executed a conveyance—on the face of it voluntary—comprising the lands in question, but without evidence of its being void as against a purchaser for value, the purchaser may refuse to accept the title, seeing that its validity depends on a doubtful state of facts, and may recover back his deposit, although he might have made the title good by acceptance. *Clarke v. Willott*, 41 Law J. Rep. (n.s.) Exch. 197; Law Rep. 7 Exch. 313.

[And see *supra* Nos. 5, 6.]

#### (N) RESCISSION OF CONTRACT.

**31.**—A trader, after being served with the petition on which he was afterwards adjudicated bankrupt, purchased goods at an auction, and removed them without payment, without disclosing the fact of the bankruptcy proceedings:—Held, that this omission did not of itself amount to a misrepresentation such as to avoid the contract, and entitle the vendor to a return of the goods. *Ex parte Whittaker; In re Shackleton*, 44 Law J. Rep. (n.s.) Bankr. 91; Law Rep. 10 Chanc. 446.

[And see *supra* Nos. 1, 4, 5.]

#### (O) SALE BY COURT.

**32.**—Where real estate was sold, by order of Court, under conditions providing that the purchaser might take the timber at a price named,—Held, that the vendors were not entitled to have the timber revalued, or the sale rescinded, because their valuer had made a mistake in the valuation of timber. *Griffiths v. Jones*, 42 Law J. Rep. (n.s.) Chanc. 468; Law Rep. 15 Eq. 279.

**33.**—A testatrix in 1823 devised lands to A. and B. as tenants in common in fee, and in case of death of either under twenty-one and leaving no child, the whole to go to the survivor, and in case of death of both leaving no child, then over. A. died under twenty-one without issue; B. attained twenty-one:—Held, that the gift over would take effect in case of his death, leaving no child. *Else v. Else*, 41 Law J. Rep. (n.s.) Chanc. 213; Law Rep. 13 Eq. 196.

Conditions of sale, settled by the Court in 1871, provided that a conveyance on a sale made by B. in 1838 should be the root of title; that no objection or requisition should be made with respect to earlier title, and that recitals in deeds twenty years old should be conclusive evidence of the instruments recited. That conveyance purported to recite the will, but stopped short of the final gift over, thus shewing a good title to the fee in B.:—Held, that a purchaser under the Court was not precluded from shewing that B.'s title under the will was defective, and that he was entitled to

be freed from his contract, and to get all his costs. *Ibid.*

#### (P) REMEDIES AT LAW FOR BREACH OF CONTRACT.

**34.**—If one contracts to sell real estate and is unable to complete from want of title, whether he be aware of the defect at the time of entering into the contract, and does not disclose it, or not, and even if he never had title, nor possession, nor any right to possession, yet in the absence of fraud the intending purchaser cannot, in an action for breach of the contract, recover damages beyond his deposit with interest and costs. *Flureau v. Thornhill* (2 W. Bl. 1078) approved. *Bain v. Fothergill* (H.L.), 43 Law J. Rep. (n.s.) Exch. 243; Law Rep. 7 E. & I. App. 158.

By Lord Chelmsford.—The rule is, without exception, if a person enters into a contract for the sale of real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred, by an action for the breach of the contract. He can only obtain other damages by an action for deceit. *Hopkins v. Grazebrook* (6 B. & C. 31) overruled. *Ibid.*

Semble—where the breach of the contract arises not from the vendor's inability, that is, not upon a question of title, but upon a question of conveyancing, as from his own refusal on the ground of expense, or from whatever other motive, to perform the contract himself, or to compel others whom he can compel to concur in conveying or in giving up possession, the proper remedy is by bill in equity to enforce him to complete, and to compel the completion of the contract. Whether, therefore, *Engell v. Fitch* (38 Law J. Rep. (n.s.) Q. B. 304; Law Rep. 4 Q. B. 659) should be followed, *quære?* *Ibid.*

F. being under contract for the purchase of mining interests of large value, contracted to sell to B., one of them, a leasehold interest, which was subject to a restraint against assignment, except with the consent of the reversioners. The consent was refused, and F. was unable to complete. F. knew at the time of his contracting with B. that the consent was necessary, but he did not mention it to him:—Held, that B. could not recover in an action for damages any damages for the loss of his contract beyond his deposit with interest and costs. *Ibid.*

*Damages for defect of title.* [See DAMAGES, 3, 4.]

#### VENUE.

**1.**—An action cannot be maintained in the Courts at Westminster to enforce payment of a freehold rent issuing out of lands situate abroad. *Whitaker v. Forbes*, 44 Law J. Rep. (n.s.) C. P. 332; Law Rep. 10 C. P. 583; affirmed, on appeal, 45 Law J. Rep. (n.s.) C. P. 140; Law Rep. 1 C. P. Div. 51.

**2.**—In an action under 26 Geo. 2. c. 14, s. 2, to recover a penalty against a clerk to justices of the

peace for extorting excessive fees from the plaintiff, the venue is local by 31 Eliz. c. 5, s. 2; for 26 Geo. 2. c. 14, s. 2, gives a right of action for the penalty to any person, and not to the party grieved alone. *Lewis v. Davis*, 44 Law J. Rep. (n.s.) Exch. 86; Law Rep. 10 Exch. 86.

Semble—per Blackburn, J., Mellor, J., and Archibald, J., that the power given by 26 Geo. 2. c. 14, to justices of the peace from time to time to make a table of fees may be exercised, although no table was made in 1753 as required by the statute. *Ibid*.

3.—Where the defendant, in an application to change the venue, on the ground of preponderance of convenience in a trial at the place to which he seeks to change it, comes by way of appeal from a Judge at chambers, he must make out such a strong case of preponderance of convenience as will satisfy the Court that the determination of the Judge was wrong. *Church v. Barnett*, 40 Law J. Rep. (n.s.) C. P. 138; Law Rep. 6 C. P. 116.

The second resolution of the Committee of Judges as to change of venue by the defendant, referred to in *De Rothschild v. Shilston* (22 Law J. Rep. (n.s.) Exch. 280; 8 Exch. Rep. 506 n.) has never been adopted by the rest of the Judges—per Willes, J. *Ibid*.

#### VOLUNTARY ASSOCIATION.

*Action by member for expulsion.* [See ACTION, 4.]

#### VOLUNTARY SETTLEMENT.

##### (A) CONSIDERATION.

(a) *Consideration not expressed on face of deed.*

(b) *What amounts to payment or benefit.*

(c) *Immoral consideration.*

##### (B) VALIDITY AS AGAINST CREDITORS.

##### (C) EFFECT OF, ON TITLE OF SETTLOR.

##### (D) ENFORCEMENT OF.

(a) *Incomplete trust.*

(b) *Liability in respect of false recital.*

(c) *Trusts for maintenance of children.*

##### (E) SETTING ASIDE.

(a) *Absence of power of revocation.*

(b) *Innocent misrepresentation.*

(c) *Suit by creditor in action subsequent to settlement for tort committed before it.*

##### (A) CONSIDERATION.

(a) *Consideration not expressed on face of deed.*

1.—A loan of money repayable on demand is a sufficient consideration to take a settlement out of the operation of the statute of 27 Eliz. c. 4, notwithstanding such consideration may not have

been expressed on the face of the deed. *Bayspoole v. Collins*, 40 Law J. Rep. (n.s.) Chanc. 289; Law Rep. 6 Chanc. 228.

##### (b) *What amounts to payment or benefit.*

2.—In deciding whether a deed is voluntary or not, the Court will anxiously lay hold of any circumstances shewing a consideration moving from the grantee to the grantor. *Rosher v. Williams*, 44 Law J. Rep. (n.s.) Chanc. 419; Law Rep. 20 Eq. 210.

A contract for sale for value, which had been entered into by a vendor upwards of ninety years of age, was upon his death resisted by his devisee; first, on the ground of his incapacity and of undue influence on the part of the purchaser (the evidence as to which, however, entirely failed); and, secondly, on the ground that the vendor had, by a deed executed by him before the date of the contract, conveyed the property in fee to the devisee, his great nephew. The deed was expressed to be in consideration of "natural love and affection," and contained a covenant by the grantee to "commence" a house upon the property according to plans to be furnished by the grantor; and that if the grantor failed to furnish such plans, then the grantee "would build such house as he, the grantee, should think fit." No house was ever commenced, and the deed contained no proviso for re-entry, or other penalties for breach of covenant. Upon a bill by the purchaser for specific performance,—Held, that the deed was purely voluntary, there being an absence of any consideration, by way of payment or benefit moving from the grantee to the grantor, and specific performance decreed accordingly. *Ibid*.

##### (c) *Immoral consideration.*

3.—Where a settlement on the settlor's deceased wife's sister was founded on the illegal consideration of his marriage with her, and the settled property was legally vested in trustees, the Court declined, on bill by the legal personal representative ten years afterwards, to set aside the settlement. The settlor being *particeps criminis*, his representative stood in no better condition. Distinction between the case of an obligation resting *in fieri*, and of a completed transfer of specific property, both founded on illegal consideration. *Ayerst v. Jenkins*, 42 Law J. Rep. (n.s.) Chanc. 690; Law Rep. 16 Eq. 275.

##### (B) VALIDITY AS AGAINST CREDITORS.

4.—A voluntary settlement executed by a man on the eve of going into trade, and whether at the time actually contemplating trade or not, is void as against those who may become his creditors in the course of his trade. *Mackay v. Douglas*, 41 Law J. Rep. (n.s.) Chanc. 539; Law Rep. 13 Eq. 106.

A., while contemplating entering a firm as partner, and being at the time interested with the firm in certain mercantile speculations, but not actually indebted, made a voluntary settlement of all his property upon himself, his wife



and family. Six weeks afterwards he became partner, and in about seven months from the commencement of the partnership the firm became insolvent:—Held, that the settlement was fraudulent and void as against creditors. *Ibid.*

5.—A debtor made a voluntary settlement, but at the same time he made provision for raising enough money to enable him to pay all his existing debts. He raised the money, paid some, but not all of his debts, and afterwards became bankrupt. On bill by a creditor, whose debt existed when the settlement was made,—Held, that the settlement was not void under 13 Eliz. c. 6, as it was not made with a fraudulent intent, and it was not the natural result of it to defeat creditors. *Kent v. Riley*, 41 Law J. Rep. (n.s.) Chanc. 569; Law Rep. 14 Eq. 190.

6.—A voluntary settlement was executed, in 1865, by a trader who, in 1874, filed his petition for liquidation:—Held, that the settlement was governed by the 91st section of the Bankruptcy Act, 1869, and that, as the trader was unable to shew that he was solvent at the time it was executed, it was void as against the trustee. *Ex parte Dawson*; *In re Dawson*, 44 Law J. Rep. (n.s.) Bankr. 49; Law Rep. 19 Eq. 433.

[And see BANKRUPTCY, G 35–38.]

#### (C) EFFECT OF, ON TITLE OF SETTLOR.

7.—Vendor held entitled to a decree for specific performance against a purchaser who had been let into possession, notwithstanding a voluntary settlement by the vendor. *Peter v. Nicolls*, Law Rep. 11 Eq. 391.

*Effect of, in abstract of title, as to right of purchaser to rescind.* [See VENDOR AND PURCHASER, C0.]

#### (D) ENFORCEMENT OF.

##### (a) Incomplete trust.

8.—The Court will not enforce an incomplete voluntary assignment, evidenced by delivery of a box (retaining the key), such box containing what purported to be a written memorandum of gift of real estates and chattels, the memorandum not being under seal. *Morgan v. Malleson* (39 Law J. Rep. (n.s.) Chanc. 680) and *Richardson v. Richardson* (36 Law J. Rep. (n.s.) Chanc. 653) doubted. *Warriner v. Rogers*, 42 Law J. Rep. (n.s.) Chanc. 581; Law Rep. 16 Eq. 340.

##### (b) Liability in respect of false recital.

9.—A married woman executed a voluntary settlement, containing a recital that she had paid 2,000*l.* to the trustee, and declaring trusts of that sum. In point of fact she had not paid, and never did pay any money to the trustee. The trustee also executed the deed:—Held, that neither the settlor nor the trustee incurred any obligation whatever in respect of the 2,000*l.* *Marler v. Tommas*, 43 Law J. Rep. (n.s.) Chanc. 73; Law Rep. 17 Eq. 8.

##### (c) Trusts for maintenance of children.

10.—By a post-nuptial settlement a sum of 15,000*l.*, secured by mortgage of the settlor's property, was settled upon his children, with power for the trustees to apply the income for their maintenance. The money was never raised or paid to the trustees; the settlor maintained his children until his bankruptcy:—Held, that the children were entitled to the arrears of the fund. *In re Kerrison's Trusts*, 40 Law J. Rep. (n.s.) Chanc. 637; Law Rep. 12 Eq. 422.

The rule laid down in *Mundy v. Lord Howe* (4 Bro. C.C. 223), and *Stocken v. Stocken* (7 Law J. Rep. (n.s.) Chanc. 305), does not apply to voluntary settlements. *Ibid.*

#### (E) SETTING ASIDE.

##### (a) Absence of power of revocation.

11.—The authorities do not establish, and there is no foundation in principle for a rule, that a voluntary settlement of real estate containing no power of revocation is voidable at the will of the settlor. *Hall v. Hall*, 42 Law J. Rep. (n.s.) Chanc. 444; Law Rep. 8 Chanc. 430.

The circumstances of the case were such that a revocable voluntary settlement of real estate would have effectuated the settlor's intentions of providing for her children as well as an irrevocable settlement. The settlor, however, being free from any fraud or undue influence, executed an irrevocable settlement. She received the rents and managed the property, mortgaged a portion of it, and finally destroyed the settlement, believing it to have been revocable, and that the destruction of it was a revocation. She then devised the estates comprised in the settlement to trustees upon trusts different from those of the settlement. On a bill filed after the death of the settlor to establish the settlement, and on a cross bill to set it aside and carry out the trusts of the will,—Held, reversing the decision of one of the Vice-Chancellors (41 Law J. Rep. (n.s.) Chanc. 667; Law Rep. 14 Eq. 365), that there was no ground for setting the settlement aside, and the trusts thereof were directed to be carried into effect. *Ibid.*

12.—A young man of improvident habits settled, under the advice of a solicitor, 1,000*l.*, out of 2,700*l.*, to which he was entitled, upon trusts for investment, and to apply the income, or so much thereof as the trustees should consider might be beneficially so applied, for the benefit of the settlor, and any wife or children he might have during his life, with remainder to his wife for life, with ultimate trust in default of issue (the settlor being illegitimate), to relatives of the person from whom he derived his interest. The deed gave the settlor no voice in the appointment of new trustees and no power of revocation:—Held, affirming the decision of Stuart, V.C., that the deed was reasonable and proper, and a bill by the settlor to set it aside was dismissed with costs. *Coutts v. Ackworth* (38 Law J. Rep. (n.s.) Chanc. 694) observed upon. *Phillips v. Mullings*, 41

Law J. Rep. (N.S.) Chanc. 211; Law Rep. 7 Chanc. 244.

(b) *Innocent misrepresentation.*

13.—Where a son, tenant in tail in remainder, shortly after attaining twenty-one, executed a re-settlement, upon a misrepresentation innocently made by his father that a certain subsisting charge was only a charge if the father should so direct, and the release of the alleged powers to charge was the main consideration for the settlement:—Held, that it must be set aside. *Fane v. Fane*, Law Rep. 20 Eq. 699.

(c) *Action subsequent to settlement for tort committed before it.*

14.—Nine months after a voluntary settlement had been made the settlor became insolvent:—Held, that the onus lay on him to prove that he was solvent at the date of the settlement. A settlement was set aside as against creditors generally in a suit instituted by a person who had recovered judgment against the settlor in an action commenced after the date of the settlement for a tort committed before it. Guardian of infant defendants ordered to pay the plaintiff's costs. *Crossley v. Elworthy*, 40 Law J. Rep. (N.S.) Chanc. 480; Law Rep. 12 Eq. 158.

*Deed obtained by undue influence.* [See UNDUE INFLUENCE, 5.]

*Avoidance of voluntary settlement by bankruptcy.* [See BANKRUPTCY, G 35–38.]

### WAGES.

*Wages of seamen.* [See SHIPPING LAW, X 1, 2.]

*Preferential debt; bankruptcy.* [See BANKRUPTCY, E 28, 29.]

*Forfeiture of wages.* [See MASTER AND SERVANT, 3.]

*Claim for, under Master and Servant Act, 1867.* [See MASTER AND SERVANT, 17.]

*Deduction of fines under Hosiery Manufacture (Wages) Act.* [See HOSEIERY.]

### WAR OFFICE.

[Previous Acts amended, and certain officers for the management of certain departments of the War Office appointed by 33 & 34 Vict. c. 17.]

### WARD OF COURT.

The proper religion in which an infant should be brought up is that of its father. *Hawksworth v. Hawksworth*, 40 Law J. Rep. (N.S.) Chanc. 534; Law Rep. 6 Chanc. 539.

It is improper for the Court to question a child of eight and a half years upon doctrinal points, so

as to try to ascertain whether she has any predilection for one religion over another. *Ibid.*

*Stourton v. Stourton* (26 Law J. Rep. (N.S.) Chanc. 354, and 8 De Gex, M. & G. 760) considered. *Ibid.*

### WARRANTY.

*Implied Warranty.* [See CONTRACT, 26–29.]

*Of title to bills.* [See BANKRUPTCY, E 1.]

*In lease of mines.* [See MINE, 10.]

*On sale of goods.* [See SALE, 3, 4.]

*Between landlord and tenant.* [See LANDLORD AND TENANT, 18.]

*Of seaworthiness.* [See MARINE INSURANCE, 37, 38.]

### WARREN.

Grant of a “warren” does not *prima facie* pass the soil, though it may do so if such an intention is shown by the context; therefore, upon construction of a grant of certain closes and “all that warren of conies, with all and singular the rights, members, and appurtenances whatsoever in B., and all that lodge or house thereupon built called B. Lodge and all that warren of conies in R., both which said warrens of conies are known by the name of B. Warren, and extend themselves over the wastes of B.:”—Held, that the words “warren of conies” did not pass the soil, nor anything more than a right to the conies; and whatever was fairly incident to or necessary for preserving or making profit out of them. *Earl Beauchamp v. Winn* (H.L.), Law Rep. 6 E. & I. App. 223.

### WASTE.

(A) WHAT AMOUNTS TO WASTE.

(a) *Timber.*

(b) *New building.*

(B) INJUNCTION.

(C) ACCOUNT.

(D) DAMAGES.

[Equitable waste by tenants for life without impeachment of waste prohibited as from November 2, 1874. 36 & 37 Vict. c. 66, s. 25.]

(A) WHAT AMOUNTS TO WASTE.

(a) *Timber.*

1.—By the general law (which may, however, be varied by special custom), timber consists of oak, ash, and elm, of the age of twenty years and upwards, provided they are not so old as no longer to have a reasonable quantity of useable wood in them. *Honywood v. Honywood*, 43 Law J. Rep. (N.S.) Chanc. 652; Law Rep. 18 Eq. 306.

Except in the case of a timber estate, a tenant for life, impeachable for waste, cannot fell timber. He can fell anything that is not timber, save trees planted for purposes of special utility or ornament, the germens of underwood, and trees which, though too young to be properly timber, would grow into timber. Some, however, even of these last, he may fell, if for the purpose of promoting the growth of other timber in the same wood. *Ibid.*

The property in timber, felled by a tenant for life, or any other person, or blown down by a storm, is in the owner of the first vested estate of inheritance, unless he has colluded with the tenant for life to induce him to fell it, in which case equity will not allow him to get the benefit of his own wrong. The property in trees not timber is in the tenant for life, and at law remains so, though he may have committed waste by felling them wrongfully, and made himself liable for an action of waste; but, quære, if equity would allow him to take the property in trees felled thus. *Ibid.*

Where timber which is decaying, or which for any special reason requires to be felled, is felled with the sanction of the Court, the proceeds are invested and the income is given to the successive owners of the estate, till the fund is taken away by the owner of the first absolute estate of inheritance. The same course is adopted in cases of equitable waste, where ornamental trees have been felled. *Ibid.*

#### (b) *New building.*

2.—The erection of a new building which increases the value of the property is not waste, unless it destroy the identity of the property, or impair the evidence of title. *Jones v. Chappell*, 44 Law J. Rep. (n.s.) Chanc. 658; Law Rep. 20 Eq. 539.

The owner of a house occupied by weekly tenants is within the rule that a reversioner cannot maintain an action in respect of a temporary nuisance. *Ibid.*

Semble—that a weekly tenant can maintain a suit for an injunction against a nuisance in respect of his tenancy. *Ibid.*

#### (B) INJUNCTION.

3.—Where a person brings ejectment against another to recover certain land, and discontinues his action, he thereby admits that other's possession, and subsequent acts of ownership by him will be looked upon as acts of trespass not putting him in possession, and the person in possession will be entitled to an injunction to restrain him from cutting timber. *Loundes v. Bettie* (33 Law J. Rep. (n.s.) Chanc. 451) followed. *Stanford v. Hurlstone*, Law Rep. 9 Chanc. 116.

#### (C) ACCOUNT.

4.—The right to an account in equity of the proceeds of timber wrongfully felled in commission of waste, is only incident to the right to an in-

junction. *Higginbotham v. Hawkins*, 41 Law J. Rep. (n.s.) Chanc. 828; Law Rep. 7 Chanc. 676.

Where after legal waste has been committed time has run so as to bar the legal remedy in respect thereof, the remedy in equity is also barred. *Ibid.*

In a case of legal waste in cutting timber committed by a tenant for life, the Statute of Limitations begins to run as against the remainderman from the time of the waste being committed, or at all events from the time when the proceeds of the timber became money in the hands of the wrongdoer, and not from the time when the estate in remainder falls into possession. *Ibid.*

#### (D) DAMAGES.

5.—A tenant in fee simple having contracted to sell the reversion after his own life, cut down the ornamental timber. After his death, in a suit for the administration of his estate, the purchaser of the reversion brought in a claim for damages. In the opinion of the Court the evidence did not shew that any injury had been done to the reversion:—Held, that as the purchaser had not applied for an injunction to restrain the cutting, he could not now claim damages. But semble, if he had applied for an injunction, any timber, the loss of which would, in his opinion, have been injurious to the ornamental effect, would have been protected. *Bubb v. Yelverton*, 40 Law J. (n.s.) Chanc. 38; Law Rep. 10 Eq. 465.

#### WATERCOURSE.

##### *Diverging stream confined in artificial course.*

1.—A stream was divided at a spot E., by stones placed there before living memory. Part of the water flowed to a farm-yard, where it entered a trough used for watering cattle. The overflow of water from the trough found a way, not through any definite channel, but by percolation, into a river, which also received the main part of the stream. In 1847 W., who bought the land between E. and the river, together with a mill on the bank of that river, made a reservoir to collect the overflow at the trough, and conducted the water from the reservoir to the mill through a tunnel or covered drain. In 1867 W. conveyed to the plaintiff the mill, together with the right to all waters, reserving to himself a supply of water for domestic and other purposes. The defendants, owners of land on the banks of the stream above E., having caused an obstruction of the stream above that point, and having thereby substantially diminished the flow of water to the reservoir, and, consequently, to the mill, the plaintiff brought an action against them for the obstruction:—Held (affirming the decision of the Court of Exchequer, 42 Law J. Rep. (n.s.) Exch. 85; Law Rep. 8 Exch. 107), that the plaintiff having acquired the right of W. to an undiminished flow of water to the trough, and consequently a right to the water flowing thence to the mill, was entitled to recover for the obstruc-

tion. *Holker v. Porritt*, 44 Law J. Rep. (n.s.) Exch. 52; Law Rep. 10 Exch. 59.

*Right to have water diverted.*

2.—The plaintiff was the occupier of land near the margin of a brook. A canal company, under the powers of their special Act, diverted the greater part of the waters of the brook at a point higher up its course into a feeder, so as to prevent them from coming down to the land of the plaintiff. More than forty years afterwards the defendants, a railway company, under the authority of an Act of Parliament, acquired the canal, and having power to discontinue the use of it, made a cut in it so as to allow the water to flow in its ancient course, and assigned the portion of the canal on which the cut had been made to a purchaser. After the conveyance by the defendants, the plaintiff's crops were injured by a flood, owing to the fact that the watercourse during the long interval in which the stream was diminished had become silted up, so as to be no longer sufficient to carry off the flood of water in its old natural state:—Held, that the plaintiff had no cause of action against the defendants, by Blackburn, J., and Hannen, J., on the ground that although a claim to have water, which would otherwise have flowed down to the plaintiff's land, diverted over other land, was a claim to a "watercourse" within the meaning of the Prescription Act (2 & 3 Will. 4. c. 71), s. 2, yet that the forty years' enjoyment by the plaintiff had been of too precarious a character to satisfy the statute. By Cockburn, C.J., on the ground that the diversion of the water was made and existed solely for the benefit of the dominant owner, and conferred no right on the owner of the servient tenant. *Mason v. The Shrewsbury and Hereford Railway Company*, 40 Law J. Rep. (n.s.) Q. B. 293; Law Rep. 6 Q. B. 578.

*Right to protection against flood.*

3.—An extraordinary flood arising from natural causes is a common enemy, against which a man has a right to protect his own property, although the damage inflicted by the flood upon his neighbour be thereby increased, provided he does not interfere with the natural outlet of a natural stream. *Nield v. The London and North-Western Railway Company*, 44 Law J. Rep. (n.s.) Exch. 15; Law Rep. 10 Exch. 4.

Whether this right of self-protection against an extraordinary casualty exists where the exercise of it interferes with the natural outlet of a natural stream—*quære*. *Ibid*.

The defendants' premises adjoined a canal which they owned and managed, and the plaintiffs also possessed premises adjoining the canal at a point higher up. Owing to an extraordinary rainfall, the waters of a neighbouring river (which did not in any way communicate with the canal) rose, overflowed, flooded the adjacent fields, and broke into the canal. To protect their own premises the defendants placed boards across the canal at a point above their premises and below

the plaintiffs', after which the water in the canal, swelled by the flood from the river, rose higher and injured the plaintiffs' premises, doing them more damage than it would have done had it not been backed up by the boards:—Held, that as the canal was not a natural stream and the plaintiffs had no right to the outlet of the canal water, and as the flood had come into the canal from natural causes and had not been brought there by the defendants, the plaintiffs could not maintain an action against them. *Ibid*.

*Injunction at suit of canal company to restrain abstraction of water: rights of riparian owners.* [See CANAL COMPANY, 2.]

*Injunction: drawing off subterranean waters.* [See INJUNCTION, 14.]

*Pollution of stream.* [See NUISANCE, 1; INJUNCTION, 16, 19.]

## WATER RATE.

1.—The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), is incorporated with the New River Company's Act, 1852, and by section 68 of the former Act it is enacted that the water-rates "shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value, the same shall be determined by two justices." Section 46 of the New River Company's Act, 1852, enacts that "nothing in any Act incorporated therewith shall prevent the company from recovering any sum of money, not exceeding 50*l.*, which shall be due to them for water-rates," &c., "by action or proceeding in such manner as is by law provided for the recovery of debts not exceeding 50*l.*":—Held, that if a *bond fide* dispute as to the annual value of the tenement has arisen before any proceeding has been taken for the recovery of the water-rate, the company must get such value determined by the justices before they sue for the recovery of the water-rate, whether the same be under or over 50*l.* *The Governor and Company of the New River v. Mather*, 44 Law J. Rep. (n.s.) M. C. 105; Law Rep. 10 C. P. 442.

*Quære*—if the jurisdiction of the Court for the recovery of such rate is ousted, if the dispute as to the annual value has not arisen until after proceedings have commenced in such Court for the recovery of the rate. *Ibid*.

2.—The plaintiffs were required by their special Act to furnish water to every inhabitant occupying a house within a certain district, at a rate which varied according to the amount of the "rent per annum" of such house. The defendant was the owner of several houses, which he let to tenants for various terms not exceeding three months. In respect of some of the houses the defendant paid poor-rates, district rates, and water-rates, instead of the tenants, either because he had let the houses on those terms or because the obligation was imposed on him by statute:—Held (affirming the judgment of the Court below, 41 Law J. Rep. (n.s.) Exch. 233; Law Rep. 7

Exch. 409), that in calculating the water-rate, the payments made by the defendant in either case must be deducted from the rents at which the houses were let. *The Company of Proprietors of the Sheffield Waterworks v. Bennett* (Ex. Ch.), 42 Law J. Rep. (N.S.) Exch. 121; Law Rep. 8 Exch. 196.

## WATERWORKS.

[And see CANAL.]

The defendants, a waterworks company, laid down and maintained, under the powers conferred on them by Act of Parliament, a pipe for the purpose of conveying water. The pipe was carried along a turnpike road, the soil of which was in K., who owned the land on both sides. He employed the plaintiff to make a tunnel under the surface of the road which was in that spot raised upon an embankment. In the course of the work the plaintiff was obstructed by water which, without the knowledge of anyone, escaped from the pipe. The trustees of the road and the surveyor of highways had consented to the tunnel being made by K. The plaintiff gave notice to the defendants, who repaired the pipe, but not until after the plaintiff had suffered injury by reason of the obstruction to his works:—Held, that the plaintiff could not maintain an action against the defendants. *Cattle v. The Stockton Waterworks Company*, 44 Law J. Rep. (N.S.) Q. B. 139; Law Rep. 10 Q. B. 453.

## WAY.

### (A) CONSTRUCTION OF GRANT.

(a) *Right appurtenant or in gross.*

(b) *Nature of right granted.*

(c) *Mode of enjoyment of right.*

(d) *Level crossings over railway.*

(1) *Imposing additional burden on servient tenement.*

(2) *Restriction of user.*

### (B) OBSTRUCTION: RIGHT TO GO EXTRA VIAM.

### (A) CONSTRUCTION OF GRANT.

(a) *Right appurtenant or in gross.*

1.—Where, P. having a right of passage from the street to his yard over land of M., P. and M. agreed to make a new passage, and P. released his rights over the old passage, and M. conveyed to him a small strip of land reaching across the end of the new passage where it joined the yard, together with right of way along a passage intended to run between such strip of land and the street,—Held, that this right of way was not a right in gross, but appurtenant to the yard occupied by P. *Ackroyd v. Smith* (10 Com. B. Rep. 164) distinguished. Injunction granted to P. to restrain tenants of M. occupying warehouses from allowing waggons, &c., to stand in the passage while loading and unloading. *Thorpe v. Brumfitt*, Law Rep. 8 Chanc. 650.

(b) *Nature of right granted.*

2.—Grant in a lease of full liberty and right of way and passage, and of ingress, egress, and regress to and for the lessee, his workmen, and servants, from time to time during the continuance of the term by, through, and over a certain roadway or passage, jointly with certain persons:—Held, to pass a right of way for foot passengers only. *Cousens v. Rose*, Law Rep. 12 Eq. 366.

3.—The defendant, the owner in fee of a house called Roseville, with a cottage and stable attached to it, allowed the tenant to make an addition to the stable and to construct a hay loft. The only openings to the hay loft were towards an occupation road, part of Rose Cottage Farm, which adjoined Roseville, and was also the property of the defendant. The defendant further permitted the tenant to take hay and straw along this road to the openings in the hay loft, and the tenant did so for some years without interruption from the defendant or the tenant of Rose Cottage Farm. Subsequently, the defendant conveyed Roseville to the plaintiff in fee, together with "all ways and rights of way, easements and appurtenances to the messuage or dwelling-house, cottage, land and hereditaments, or any of them appertaining or with the same or any of them, now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appurtenant thereto":—Held, that this passed a right of way along the occupation road for the purpose of carrying hay and straw to the stable. *Kay v. Oxley*, 44 Law J. Rep. (N.S.) Q. B. 210; Law Rep. 10 Q. B. 360.

(c) *Mode of enjoyment of right.*

4.—When a private way is granted over a piece of land of stipulated dimensions, the grantee is not entitled to the use of every square inch of the surface of the land. All that the grant confers is a reasonable enjoyment of the land as a road. *Clifford v. Hoare*, 43 Law J. Rep. (N.S.) C. P. 225; Law Rep. 9 C. P. 362.

(d) *Level crossings over railways.*

(1) *Imposing additional burden on servient tenement.*

5.—The authorities establishing the principle that a right of way cannot be increased by imposing an additional burden on the servient tenement, do not apply to lands taken by a railway company. *The United Land Company v. The Great Eastern Railway Company*, 43 Law J. Rep. (N.S.) Chanc. 363; Law Rep. 17 Eq. 158.

(2) *Restriction of user.*

6.—A railway company were empowered for the purposes of their undertaking to take marsh lands at Harwich belonging to the Crown, and which had been acquired by the Crown for the purposes of defence; but they were required by their Act to construct and maintain across, over or under their railway, such communications as the Commissioners of Woods and Forests should

adjudge to be necessary for the convenient use and occupation of the Crown lands. Accordingly, the company took certain lands which lay between the railway and an estuary, and agreed with the commissioners to make four level crossings over their line as communications with these lands. At this time the land was used for grazing purposes only. Subsequently it was purchased by the plaintiffs and laid out for building. Thereupon the railway company disputed the right of the owners or occupiers of houses on the land to use the level crossings, on the ground that the right of way was restricted to the purposes for which communication with the severed lands was necessary at the time the railway was made:—Held, that the grant of the right of way was not so restricted, but gave the landowners a right of way over the level crossings for all purposes, which would not interfere with the proper working of the railway. *The United Land Company (Lim.) v. The Great Eastern Railway Company*, 44 Law J. Rep. (N.S.) Chanc. 685; Law Rep. 10 Chanc. 587.

A right of way acquired by prescription is restricted to the purposes for which it was acquired. But where such a right is acquired by grant, the limit to the right of user is a question depending on the construction of the instrument of grant. *Ibid.*

#### (B) OBSTRUCTION: RIGHT TO GO EXTRA VIAM.

7.—If the grantor of a right of way obstructs it, the grantee may go, *extra viam*, over the grantor's land; and the grantor or a purchaser with notice from him will not be allowed to obstruct the substituted mode of access so long as the original obstruction exists. *Selby v. Nettlefold*, 43 Law J. Rep. (N.S.) Chanc. 359; Law Rep. 9 Chanc. 111.

#### WEIGHTS AND MEASURES.

1.—A person is not liable to the penalty imposed by the 5 & 6 Will. 4. c. 63, s. 21, for using weights or measures which have been duly stamped or sealed, merely because such stamp or seal has become obliterated by time and use. *Starr v. Stringer*, Law Rep. 7 C. P. 383.

2.—The appellant, when in the act of selling provisions upon a highway, used for the purpose of weighing the said provisions a spring balance which was incorrect, as being against the seller and in favour of the purchaser. No fraud on the public was intended:—Held, that the spring balance could not be seized under section 3 of 22 & 23 Vict. c. 56, nor was the appellant liable to the penalty imposed by that section upon persons having in their possession false or unjust beams, scales or balances. *Booth v. Shadgett*, 42 Law J. Rep. (N.S.) M. C. 98; Law Rep. 8 Q. B. 352, *nom. Brooke v. Shadgate*.

#### WEST INDIES (INCUMBERED ESTATES).

[The appointment and jurisdiction of the Commissioners for the Sale of Incumbered Estates in the West Indies continued. 35 Vict. c. 9.]

#### WIFE.

[See *BARON AND FEME*.]

#### WILL.

##### (1) CONSTRUCTION OF WILLS.

- (A) PAROL EVIDENCE OF INTENTION.
- (B) CONTINGENT WILL.
- (C) WILL IN EXECUTION OF POWER.
- (D) DESCRIPTIONS OF PROPERTY.
  - (a) To what period referable.
  - (b) Lands.
  - (c) Lands in particular parish.
  - (d) Freehold houses: mortgage debt.
  - (e) Free occupancy of house.
  - (f) Leasehold villas with ornamental park.
  - (g) Property "specifically" devised.
  - (h) Interim rents.
  - (i) Intermediate income.
  - (k) Annuity.
  - (l) Articles in or about house and premises.
  - (m) Furniture, &c.
  - (n) "Money" or "moneys."
  - (o) Sums due and owing.
  - (p) Money in funds: "small balance."
  - (q) Funds purchased out of savings of married woman.
  - (r) Personal estate and effects.
  - (s) Testamentary expenses.
- (E) RESIDUARY AND GENERAL DEVISES AND BEQUESTS.
  - (a) What they comprise.
    - (1) Proceeds of real estate passing under gift of personality.
    - (2) Trust and mortgage estates.
  - (b) What words carry residue.
    - (1) Gift of particular residue.
      - (i) Of lands.
      - (ii) Fund to provide for annuities.
    - (2) "All the rest" carrying real estate not otherwise mentioned.
    - (3) Gift without naming donee.
  - (c) Residuary devise whether specific.
  - (d) Lapse of share of residue.
  - (e) Deduction of advances.
- (F) SPECIFIC DEVISES AND BEQUESTS.
- (G) AMBIGUITY AND UNCERTAINTY.
  - (a) Effect of blank in will.
  - (b) Misdescription of legatee.
  - (c) Misdescription of property.
  - (d) Parol evidence: when admissible.
- (H) WHO TAKE.
  - (a) Charitable bequests.
  - (b) Gift to a class.

- (1) *Lapse.*
  - (2) *Period of ascertaining members.*
  - (c) *Children surviving tenant for life.*
  - (d) *Children or their "families."*
  - (e) *"Children or legal issue."*
  - (f) *Illegitimate children.*
    - (1) *Whether they can take under gift to children.*
    - (2) *Provision for after-born illegitimate children.*
  - (g) *Brothers and sisters: brother en ventre sa mère.*
  - (h) *"Nephews and nieces."*
  - (i) *"Legal personal representatives."*
  - (k) *"Heirs."*
  - (l) *"Relatives" or relations.*
  - (m) *Child en ventre sa mère.*
  - (n) *"Eldest son."*
  - (o) *"Every other son during his life."*
  - (p) *Gift to a woman and her children.*
  - (q) *Gift to a woman for life with remainder to her husband.*
  - (r) *Per capita or per stirpes.*
  - (s) *Whether executors and trustees take beneficially.*
- (I) **WHAT ESTATE OR INTEREST PASSES.**
- (a) *Joint tenants or tenants in common.*
  - (b) *Joint tenancy or successive interests.*
  - (c) *Estate of trustees.*
    - (1) *Whether legal estate passes to trustees.*
    - (2) *Duration of legal estate.*
    - (3) *Annuity to trustee.*
  - (d) *Devise before Wills Act without words of limitation.*
  - (e) *Devise of income passing fee.*
  - (f) *Repugnant devise or bequest.*
  - (g) *Devise of copyholds.*
  - (h) *Renewable leaseholds: incidence of charges.*
  - (i) *Rule in Shelley's case.*
  - (k) *Estate tail or life estate.*
  - (l) *Life estate or absolute interest.*
  - (m) *Absolute gift, whether cut down.*
  - (n) *Absolute gift or trust.*
  - (o) *Trust or charge.*
  - (p) *Gift by implication.*
  - (q) *Adowson: tenancy for life.*
  - (r) *Accumulations of income.*
- (K) **PRECATORY TRUSTS.**
- (L) **VESTING: GIFT OVER.**
- (a) *Gift to sons for their lives and "at their death" to their children.*
  - (b) *Gift to children "when and as they should attain twenty-one."*
  - (c) *Gift to class ascertainable at a particular period with declaration as to vesting of shares.*
  - (d) *Gift over on death without issue.*
    - (1) *To what period gift over is referable.*
    - (2) *Whether importing indefinite failure of issue.*
  - (e) *Gift over on death "leaving" no issue.*
- (f) *Gift over in default of "such issue": ambiguity.*
  - (g) *Implication of cross remainders.*
  - (h) *"And" for "or" and "or" for "and."*
  - (i) *Gift over on death under twenty-one.*
  - (k) *Gift of income for maintenance.*
  - (l) *Direction for payment at twenty-four.*
  - (m) *Absolute gift at twenty-five: gift over on death.*
  - (n) *Gift over before interest vested.*
  - (o) *Gift over by implication.*
  - (p) *Gift over on insolvency.*
  - (q) *Gift over on failure of trust being ascertained.*
  - (r) *Shifting clause.*
- (M) **HOTCHPOT CLAUSE.**
- (N) **SUBSTITUTION AND SURVIVORSHIP.**
- (a) *Substitution in lifetime of testator or for life.*
  - (b) *Period of substitution of issue.*
  - (c) *Period of survivorship.*
  - (d) *"Survivor" read "other."*
  - (e) *"Living" held to mean "having issue living."*
- (O) **CONDITIONAL AND CONTINGENT GIFTS.**
- (a) *Conditional gift founded on mistake.*
  - (b) *Impossible condition.*
  - (c) *Devise contingent on non-sale of property.*
  - (d) *Gift for particular purpose.*
  - (e) *Condition as to residence.*
  - (f) *Condition in restraint of alienation.*
  - (g) *Condition in restraint of marriage.*
  - (h) *Condition not apportionable.*
  - (i) *Gift cum onere.*
- (P) **EXECUTORY GIFTS.**
- (Q) **TRUSTS BY REFERENCE TO OTHER TRUSTS.**
- (a) *Multiplication of powers, &c.*
  - (b) *Vesting of leaseholds in tenant in tail.*
- (R) **REMOTENESS.**
- (S) **PARTICULAR WORDS.**
- 
- (2) **VALIDITY OF WILLS AND REQUISITE FORMALITIES.**
- (A) **COMPETENCY OF TESTATOR.**
- (a) *Mental capacity.*
  - (b) *Undue influence.*
  - (c) *Onus of proof: suspicious circumstances.*
- (B) **WHAT PAPERS ARE TESTAMENTARY.**
- (C) **WHAT DOCUMENTS FORM PART OF WILL.**
- (D) **EXECUTION.**
- (a) *Place of signature.*
  - (b) *Acknowledgement of signature.*
  - (c) *Execution of wrong will by mistake.*
  - (d) *Addition of clause after signature.*
- (E) **ATTESTATION.**
- (a) *Form of subscription.*
  - (b) *Incomplete signature by witness.*
  - (c) *Signature as executor.*
  - (d) *Attestation by beneficiary.*
- (F) **WILL OF FEME COVERT INOPERATIVE IN EVENTS WHICH HAPPENED.**

## (G) REVOCATION OF WILL.

- (a) *Alterations and obliterations.*
- (b) *Tearing: animus revocandi.*
- (c) *Will burnt, but codicil preserved.*
- (d) *Revocation by subsequent instrument.*
- (e) *Dependent relative revocation.*
- (f) *Conditional revocation.*
- (g) *Evidence.*

(1) *Admissibility of declarations by testator.*

(2) *Burden of proof as to time of cancellation.*

## (H) REPUBLICATION AND REVIVAL OF WILL.

- (a) *Will of married woman.*
- (b) *Revival by codicil.*

## (A) PAROL EVIDENCE OF INTENTION.

*As to admissibility of parol evidence to explain ambiguity or uncertainty.* [See *infra* G 8-10.]

[And see EVIDENCE, 1, 2; LEGACY, 1, and *infra* G, H 20.]

## (B) CONTINGENT WILL.

1.—Testator while in India executed the following paper—"This is to certify that I, Robert Newton, &c., &c., do at this time enjoy good health, and am of a proper and sound state of mind. And I write this as my last will and testament in case of a sudden or accidental death befalling me in India," &c., &c.:—Held, that the will was contingent on his dying in India, and, as the testator returned and died in England, that it did not take effect. *Jobson v. Ross*; *In the goods of Newton*, 42 Law J. Rep. (n.s.) P. & M. 58.

2.—A will commenced thus: "This is the last will and testament of me, G. T. R., that in case of anything happening to me during the remainder of the voyage, &c., I give and bequeath, &c.":—Held, that it was a contingent will. *In the goods of Robinson*, 40 Law J. Rep. (n.s.) P. & M. 16; Law Rep. 2 P. & D. 171.

3.—Will of a sailor commencing "Instructions to be followed if I die at sea."—Held, contingent. *Lindsay v. Lindsay*, Law Rep. 2 P. & D. 459.

## (C) WILL IN EXECUTION OF POWER.

1.—A testator having a power to appoint the income of a fund to his wife for life, and no other power of appointment, by his will directed payment of his debts, and then, by a separate clause, devised all property, of whatever description, belonging to him, "or over which he might at his decease have any power, disposition or control," to his wife, her heirs and legal representatives, in full property for ever absolutely:—Held, that the will operated as an exercise of the power. *In re Teape's Trusts*, 43 Law J. Rep. (n.s.) Chanc. 87; Law Rep. 16 Eq. 442.

*Clogstoun v. Walcott* (13 Sim. 523) not followed. *Ibid.*

2.—R. D. bequeathed his residuary estate to his wife for life, with a general testamentary power over one moiety of it. The wife died,

having appointed to four persons, two of whom predeceased her and having directed payments of her debts, and appointed an executor:—Held, that the next-of-kin of R. D., and not the next-of-kin of the wife, were entitled to the shares of the two deceased appointees. *In re Davies's Trust*, 41 Law J. Rep. (n.s.) Chanc. 97; Law Rep. 13 Eq. 163.

[And see POWER, 2, 5, 6.]

## (D) DESCRIPTIONS OF PROPERTY.

(a) *To what period referable.*

1.—Testator by his will, dated 1861, devised his "estate called Cleeve Court, with the appurtenances." Between the date of his will and his death in 1866, he made several purchases of land contiguous to his Cleeve Court estate, and evidence was offered to shew he considered these after-acquired lands to be part of that estate:—Held, that the accretions to the property passed by the devise. *Castle v. Fox*, 40 Law J. Rep. (n.s.) Chanc. 302; Law Rep. 11 Eq. 542.

(b) *Lands.*

2.—The object of the 26th section of the Wills Act (1 Vict. c. 26) was to abrogate a merely technical rule tending in many cases to defeat the intention of a testator using language in a natural sense, and not to establish instead of that another technical rule, which in particular cases might have a like effect in a contrary direction. The section merely shifts the *onus probandi* in accordance with the natural *primâ facie* use of language, and throws it on those who deny that in a will the word "lands" is meant to include customary copyhold and leasehold estates. *Prescott v. Barker*, 43 Law J. Rep. (n.s.) Chanc. 498; Law Rep. 9 Chanc. 174.

The effect of limitations in strict settlement upon such question of construction considered. *Ibid.*

(c) *Lands in particular parish.*

[See *infra* E 3.]

(d) *Freehold houses: mortgage debt.*

3.—The owner in fee of certain land in S. Street leased the same on a building lease, and then took an assignment of the lease by way of mortgage. At the date of his death he was mortgagee in possession of the land and of certain houses which had been built on it. By his will he devised his real and personal estate to trustees, as to trust and mortgage estates, subject to the equities, and as to his "freehold houses in S. Street" upon the trusts therein mentioned:—Held, affirming the decision of the Master of the Rolls (40 Law J. Rep. (n.s.) Chanc. 373; Law Rep. 11 Eq. 454), that the mortgage debt did not pass by the devise, but formed part of the testator's personal estate. *Bowen v. Barlow*, 42 Law J. Rep. (n.s.) Chanc. 82; Law Rep. 8 Chanc. 171.



*(e) Free occupancy of house.*

4.—Gift of the free occupancy of a house to testator's wife:—Held, that she had a right to let it. *Mannox v. Greener*, Law Rep. 14 Eq. 456.

*(f) Leasehold villas with ornamental park.*

5.—Bequest of six leasehold villas to one for life, and by a subsequent codicil recting his death, bequest of the same to another, together with any other house testator might build on an adjoining space of ground, "together with the ornamental park I am now forming opposite that cottage and villas," for his life:—Held, that the legatee could not take the villas without the park, of which the tenure was onerous. *Green v. Britten*, 42 Law J. Rep. (N.S.) Chanc. 187.

*Bequest of share of leaseholds held in partnership.* [See LEGACY, 5.]

*(g) Property "specifically" devised.*

6.—A specific devise or bequest is a devise or bequest by a description which identifies a particular subject then existing as intended to pass to the donee in specie either directly or indirectly. *Giles v. Melsom* (H.L.) 42 Law J. Rep. (N.S.) C.P. 122; Law Rep. 6 E. & I. App. 24.

A testator devised three properties to his three sons respectively for life, with remainder in fee to their respective children, and in case of the death of either of them without issue between the others "in the same manner as the estates devised were limited to them respectively," subject to the proviso that if either died leaving a widow, but no children, the widow should have an estate for life in the premises "so specifically devised" to her husband:—Held, that the devise to such widow attached, not only to the property originally devised to her husband, but also to property coming to him under the contingent limitations. *Ibid.*

Decision of the Court of Exchequer Chamber, 40 Law J. Rep. (N.S.) C.P. 233; Law Rep. 6 C.P. 532, reversed, and previous decision (39 Law J. Rep. (N.S.) C.P. 325) of the Court of Common Pleas affirmed. *Ibid.*

*(h) Interim rents.*

7.—Where a testator had specifically devised certain lands, but notice to treat as to such lands was served by a railway company and the purchase-money fixed in his lifetime, so that the devise was adeemed:—Held, that the rents received between the death of testator and the conveyance of the property passed to the devisee. *Watts v. Watts*, 43 Law J. Rep. (N.S.) Chanc. 77; Law Rep. 17 Eq. 217.

8.—A testator devised land to the first son of J. M. in tail male, and after making other dispositions he gave the residue of his property to trustees upon certain trusts. J. M. had no son at the testator's death, but one was born about four months afterwards. The trustees of the residue received the intermediate rents:—Held, that these rents formed part of the residue of the testa-

tor's estate, the infant son being only entitled to the rents from his birth. *In re Mowlem*, 43 Law J. Rep. (N.S.) Chanc. 353; Law Rep. 18 Eq. 9.

[And see *infra* I 8.]

*(i) Intermediate income.*

9.—A testator declared a trust of the income of his residuary estate for the separate use of G. (one of three married daughters) during the joint lives of herself and his sons-in-law I. and F. (the husbands of the other two); and after the death of I. and F., or either of them, he directed that their or his widows or widow should participate equally with G. in the said income, so that the same should be enjoyed by his said daughters, and the survivors and survivor of them during their or her lives or life, for their separate use. And upon the death of the last survivor, he gave "the principal or capital" of the said stocks, funds and securities equally between his grandchildren then living who should attain twenty-one. G. died, leaving her sisters and their husbands her surviving:—Held, that the income until both daughters, or one of their husbands, should die, was not disposed of by implication or otherwise, but went to the next-of-kin. *Isaacson v. Van Goor*, 42 Law J. Rep. (N.S.) Chanc. 193.

*(k) Annuity.*

[See ANNUITY.]

10.—A testator gave all his property to trustees upon trust to pay the income to his wife for the maintenance of herself and his children until the youngest attained twenty-one, when the trustees were to invest a "sufficient sum" to secure an annuity of 50*l.*, which was to be paid to his wife "as the dividends were received;" and "subject thereto" the trustees were to "divide the whole of his said trust estate" amongst his eight children. Upon the testator's youngest child attaining twenty-one, the income of the entire property was insufficient to meet the annuity:—Held, that the deficiency was not payable out of the corpus. *Michell v. Wilton*, 44 Law J. Rep. (N.S.) Chanc. 490; Law Rep. 20 Eq. 269.

*Charge of annuity on specifically devised lands: freebench.* [See ELECTION, 5.]

*(l) Articles in or about house and premises.*

11.—A testator bequeathed his leasehold mill to trustees upon certain trusts, and all the corn and other articles which at his decease should be in or about his dwelling-house, mill or premises, he gave to his two sons absolutely:—Held, that a cargo of wheat consigned to the testator, and in course of transit on the day of his death, passed to the executors and not to the sons. *Lane v. Sewell*, 43 Law J. Rep. (N.S.) Chanc. 378.

*(m) Furniture, &c.*

12.—Devise and bequest "of all my furniture, &c., with my six freehold houses" (describing

them):—Held, that waterworks company shares did not pass under the expression, “&c.” *Barnaby v. Tassell*, Law Rep. 11 Eq. 363.

(n) “*Money*” or “*moneys*.”

13.—A testator possessed of a small amount of cash, but of considerable other property, both real and personal, bequeathed his “principal money” to his wife for life and children in remainder:—Held, that the bequest carried all the personalty, including leaseholds. *Prichard v. Prichard*, 40 Law J. Rep. (n.s.) Chanc. 92; Law Rep. 11 Eq. 232.

14.—A testator by his will—after stating that “as for his worldly goods and chattels, he bequeathed them as follows:” gave certain pecuniary legacies to his sons and daughter, and then bequeathed to his daughter “all things in the house remaining” of whatever kind, and “all moneys both in the house and out of it.” There was no other gift of his residuary estate. The testator had some moneys both in the house and out of it at his death. He had also a sum of consols standing in his name, and some shares in a benefit building society:—Held, that the bequest of “moneys” was specific, and that it did not carry the consols, the shares in the building society, or the residuary personal estate. *Collins v. Collins*, 40 Law J. Rep. (n.s.) Chanc. 541; Law Rep. 12 Eq. 455.

15.—A gift of money when accompanied with other gifts which shew that it does not mean the whole personal estate, will include money in the house and at the bankers and arrears of income due under a settlement, but it will not include the apportioned parts of current dividends or a legacy bequeathed to the testatrix by a person who predeceased her by less than a year, which at the time of her death remained unassented to by that person’s executors. *Byrom v. Brandreth*, 42 Law J. Rep. (n.s.) Chanc. 824; Law Rep. 8 Chanc. 475.

*Bequest of securities for money.* [See LEGACY, 8.]

(o) *Sums due and owing.*

16.—A testatrix trading in Antigua was entitled as next-of kin of her son to an unascertained share in certain partnership assets to which the son had been entitled under a will. She gave all the residue of her estate to trustees upon trust to get in all “sums of money due and owing” to her, to sell her stock, &c., and invest the proceeds for the purposes therein directed; and she gave all the rest and residue to her daughter:—Held (affirming the decision of the Master of the Rolls), that in the absence of any evidence as to the state and nature of the partnership assets, the interest of the testatrix therein under the intestacy of her son was not a debt or sum of money due and owing to her, and therefore not being included in the first gift passed under the final gift of residue to her daughter. *Martin v. Hobson*, 42 Law J. Rep. (n.s.) Chanc. 342; Law Rep. 8 Chanc. 401.

17.—Bequest of “all and every sum or sums of

money which may be due to me at my decease,”—Held, to pass a sum of money recovered by way of damages in an action by a testator’s executor for a breach of covenant committed by a lessee of the testator in the testator’s lifetime. *Bide v. Harrison*, 43 Law J. Rep. (n.s.) 86; Law Rep. 17 Eq. 76.

(p) *Money in funds*: “*small balance*.”

18.—Gift “of 4,500*l.*, money in the funds, to my sister for her absolute use and benefit,” followed by specific legacy to her, “and at her decease to H., the funded property to Y:”—Held, a specific gift of 4,000*l.* consols, belonging to the testatrix and to her sister for life, with gift over to Y absolutely. Gift of “any *small balance* in the bank” held to pass a balance of 1,300*l.* odd. *Page v. Young*, Law Rep. 19 Eq. 501.

(q) *Funds purchased out of savings of married woman.*

19.—A married woman with separate estate over which she had power of disposition notwithstanding coverture, gave by will the whole of the funds constituting such separate estate upon trust for her nephews and nieces, and also bequeathed all funds purchased out of the savings of her separate estate upon the same trusts. She died, leaving a large balance on her current account at her bankers:—Held, that the testatrix had not purchased any funds out of the savings at her bankers, and that such savings were undisposed of, and passed to her husband as administrator. *Askew v. Rooth*, 43 Law J. Rep. (n.s.) Chanc. 368; Law Rep. 17 Eq. 426.

(r) *Personal estate and effects.*

20.—A testator by his will devised his real estate (subject to certain charges) in strict settlement, and gave all his “railway, canal, and navigation shares . . . and personal estate” to C., his executor, upon trust, to pay his debts and legacies, and gave his “residuary personal estate and effects” to M. The testator was possessed of two navigation shares, which by the Act creating them were made of the nature of real estate. Before the testator’s death, the undertaking to which the shares belonged became vested in a railway company, by an Act which provided for the extinguishment of the freehold rights in the shares, upon their conveyance to the railway company. The testator’s shares were never conveyed to the railway company:—Held, that by the railway company’s Act, or if not, by the will, they were converted into personal estate, and went to the residuary legatee under the gift of his “personal estate and effects.” *Cadman v. Cadman*, 41 Law J. Rep. (n.s.) Chanc. 468; Law Rep. 13 Eq. 470.

(s) *Testamentary expenses.*

21.—A direction by a testator that his “testamentary expenses” shall be paid out of certain specified property includes the costs of a suit for the administration of his estate. *Miles v. Har-*

ri<sup>son</sup> (43 Law J. Rep. (n.s.) Chanc. 585) followed. *Harloe v. Harloe*, 44 Law J. Rep. (n.s.) Chanc. 471; Law Rep. 20 Eq. 471.

*Legacy for maintenance of infant.* [See LEGACY, 10.]

#### (E) RESIDUARY AND GENERAL DEVISES AND BEQUESTS.

(a) *What they comprise.*

(1) *Proceeds of real estate passing under gift of personality.*

1.—A testator gave his real estate and residuary personal estate in trust for sale and conversion, and directed his trustees to pay or apply the annual income thereof unto or for the benefit of his four illegitimate children (naming them), as the trustees should think proper, until they respectively attained the age of twenty-one years; and upon their attaining that age, or, as to daughters, marrying, to pay “the said residue of his said personal estate” unto the said four children equally. The testator’s four children survived him, and one of them, a son, died under twenty-one:—Held, first, that the proceeds of the sale of the real estate passed under the gift of the residue of the testator’s “said personal estate,” and secondly, that the child who died under twenty-one did not take a vested interest under the residuary gift, and that, consequently, there being no gift over, his one-fourth of the residue passed to the testator’s co-heiresses and next-of-kin. *Spencer v. Wilson*, 42 Law J. Rep. (n.s.) Chanc. 754; Law Rep. 16 Eq. 501.

(2) *Trust and mortgage estates.*

2.—A testatrix, by her will, directed her debts to be paid, and, after giving pecuniary legacies, gave and devised the rest, residue, and remainder of her real and personal estate to T. “for her own absolute use and benefit”:—Held, that the mortgaged estate passed by the residuary devise, notwithstanding the charge of debts and legacies, which charge extended only to the testatrix’s own estate. *In re Stevens’ Will*, 41 Law J. Rep. (n.s.) Chanc. 537.

(b) *What words carry residue.*

(1) *Gift of particular residue.*

(i) *Of lands.*

3.—A testatrix gave certain freehold lands in H., specifically described, to three persons in fee; she then devised “all the rest of my freehold hereditaments in the parish of” H. to T. B. S. in fee. There was no general residuary devise. The specific gift failed, by reason of its being made upon a secret trust for a charity:—Held, that the land in H. specifically described descended to the testatrix’s co-heiresses, and did not pass to T. B. S. *Springett v. Jennings*, 40 Law J. Rep. (n.s.) Chanc. 348; Law Rep. 6 Chanc. 333.

(ii) *Fund to provide for annuities.*

4.—A testator gave a fund to particular trustees,

upon trust to invest on freehold mortgage enough to provide for certain annuities, and gave the residue of that fund to his nephew, J. A. The will contained a general residuary bequest. Some of the gifts of annuities, being charitable, were void:—Held, that J. A. took the whole of the particular residue. *Aston v. Wood*, 43 Law J. Rep. (n.s.) Chanc. 715.

(2) *“All the rest” carrying real estate not otherwise mentioned.*

5.—A testatrix, after bequeathing a leasehold house and several pecuniary legacies, gave “all the rest” to A.:—Held, that the real estate of the testatrix passed under these words to A. *Attree v. Attree*, 40 Law J. Rep. (n.s.) Chanc. 192; Law Rep. 11 Eq. 280.

(3) *Gift without naming donee.*

6.—D., by his will, gave all his property to his executor upon trust for the purposes of his will, and after gifts of 300*l.* to a daughter, and five shillings a week to his son, J. D., bequeathed the remainder of his property “and any other property of which I may die possessed, and I nominate and appoint my son, R. D.,” sole executor; but the testator omitted to say to whom he bequeathed the remainder:—Held, that the testator had failed to express his intention, and that there was an intestacy as to the residuary real and personal estate. *Driver v. Driver*, 43 Law J. Rep. (n.s.) Chanc. 279.

(c) *Residuary devise whether specific.*

7.—A residuary devise of land is specific as well since as before the Wills Act (1 Vict. c. 26). *Lancefield v. Iggulden*, 44 Law J. Rep. (n.s.) Chanc. 203; Law Rep. 10 Chanc. 136.

(d) *Lapse of share of residue.*

8.—A testator bequeathed his residue to B. and six others “and their respective executors, administrators and assigns, to whom I bequeath the same accordingly, and I declare that such shares shall be vested interests in each of my residuary legatees immediately upon the execution hereof:” —Held, that on C. B.’s death before the testator died her share lapsed and did not go to her personal representatives. *Browne v. Hope*, 41 Law J. Rep. (n.s.) Chanc. 475; Law Rep. 14 Eq. 343.

(e) *Deduction of advances.*

9.—M. on the marriage of his daughter covenanted to settle 8,500*l.*, and he advanced 2,000*l.* to purchase a share in a business for his son; by his will he gave the residue of his property equally between his daughter and son:—Held, that these advances were both *pro tanto* in satisfaction of the children’s shares. *Stevenson v. Masson*, 43 Law J. Rep. (n.s.) Chanc. 134; Law Rep. 17 Eq. 78.

#### (F) SPECIFIC DEVISES AND BEQUESTS.

A testator gave certain legacies to his trustees and to his wife, and then gave to his trustees

copyhold and leasehold property, and all the stocks, funds, and securities, and all sums of money in his house or at his bankers, or elsewhere at the time of his death, and also all debts or sums of money and securities for money owing to him, upon trust to pay to his wife in addition to the legacies and bequests therein given an annuity, and subject to the annuity gave this property to two children equally. He then gave several other specific bequests and gave the residue of his property to trustees upon trust for his wife, but subject to the payment of debts, legacies, and other charges:—Held, that the gift of copyhold and leasehold properties, and of stocks, funds, securities, and debts was specific, and that as there was no residuary estate out of which to pay the legacies they must fail. *Roffey v. Early*, 42 Law J. Rep. (n.s.) Chanc. 472.

[And see *supra* D 6, 14, E 3, 7.]

#### (G) AMBIGUITY AND UNCERTAINTY.

##### (a) *Effect of blank in will.*

1.—Testator purported to give a legacy, but left the sum blank. A little further on the sum of “30*l.*” occurred casually in the middle of a direction to the executors to sell testator’s furniture, &c.—Held, that a legacy of 30*l.* was given. *Hibbert v. Hibbert*, 42 Law J. Rep. (n.s.) Chanc. 383; Law Rep. 15 Eq. 372.

2.—A will, after gifts of legacies and direction for payment of funeral expenses, contained the words: “I leave — to my sister, M. P.”:—Held, there was a gift of residue. *Perkins v. Fladgate*, 41 Law J. Rep. (n.s.) Chanc. 681; Law Rep. 14 Eq. 54.

3.—Bequest to “each of my four nieces,” the daughters of J., 500*l.*, with a blank after the word nieces. There were five daughters of J.:—Held, that the blank was not sufficient to take the case out of the settled rule and that each of the five was entitled to 500*l.* *McKechnie v. Vaughan*, Law Rep. 15 Eq. 289.

[And see *supra* E 6.]

##### (b) *Misdescription of legatee.*

4.—A testator bequeathed personality among his nephew John and his niece Hannah, and the children of his late nephew, Mark Ingle, and his niece Eliza. The testator had a brother, Mark Ingle, who was dead at the time of his making his will, and who had left children, a nephew, Mark Ingle, who was alive, and had children at the date of the will, and a nephew, Robert Ingle, who was dead at that date, and had left one child:—Held, that the children of the living nephew, Mark, took, and that there was a gift to the niece Z., and not to her children. *In re Ingle’s Trusts*, 40 Law J. Rep. (n.s.) Chanc. 310; Law Rep. 11 Eq. 578.

5.—A testator directed an annuity to be bought for “M. R., his housekeeper.” At the date of his will and his death E. R., the sister of M. R., was, and had been for some time, his housekeeper, and

M. R., who was his housekeeper nine years before, had changed her surname by marriage:—Held, that the description and not the name was material, and that the housekeeper took the annuity though wrongly named. *In re Nunn’s Will*, 44 Law J. Rep. (n.s.) Chanc. 255; Law Rep. 19 Eq. 331.

6.—A will and three codicils of a testator had been proved. The will contained a gift of 2,500*l.* each to the York and Leeds Hospitals, the second codicil reciting the gifts in the will added 1,500*l.* to each of these gifts, the third codicil purported to revoke the last will, except a gift therein of 1,000*l.* to St. Catherine’s College, which it purported to confirm. The will contained no such gift. By the third codicil the testator gave 25*l.* to the Rev. J. D. C. Wickham, describing him as curate of Holy Trinity Church. J. D. C. Wickham had never been curate of Trinity Church:—Held, that the will which had been admitted to probate was revoked by the third codicil, although inaccurately referred to, that the intervening codicils were not revoked, that St. Catherine’s College was entitled to the legacy of 1,000*l.*, which the testator purported to confirm by the third codicil. That the Rev. J. D. C. Wickham was entitled to the legacy of 25*l.*, although wrongly described, and that neither the instructions for the will nor any evidence of intention could be adduced to shew that he was not the person for whom the legacy was intended. *Farrer v. St. Catherine’s College, Cambridge*, 42 Law J. Rep. (n.s.) Chanc. 809; Law Rep. 16 Eq. 19.

[And see LEGACY, 1–3; and *infra* Nos. 8–10.]

##### (c) *Misdescription of property.*

7.—Testatrix devised “all that my share and interest in the messuages, lands, and premises, called or known by the name of the Dyffrydd and the Little Dyffrydd, situate in the parish of Kinnerley, in the county of Salop, now in the occupation of Mr. John Edwards.” The testatrix was entitled to an undivided moiety of a compact estate containing 224 acres, all held under one title, part of which was called the Dyffrydd, and the rest the Little Dyffrydd, the bulk of which answered the description contained in the will. There were, however, in the estate two small fields which, though in the occupation of John Edwards, were not in the parish of Kinnerley and county of Salop, but in the parish of Llandisilio and county of Montgomery; and one field which, though in the parish of Kinnerley, was not, and never had been in the occupation of John Edwards:—Held, that the leading words which defined the subject of the devise were “the lands known as the Dyffrydd and the Little Dyffrydd,” and that they were not restricted by the words which followed, which were merely an erroneous description, and might be rejected. *Hardwick v. Hardwick*, 42 Law J. Rep. (n.s.) Chanc. 636; Law Rep. 16 Eq. 168.

*Railway shares and railway stock.* [See LEGACY, 6.]

*Shares in specified names.* [See LEGACY, 7.]

*(d) Parol evidence: when admissible.*

8.—In construing a will the Court may, for the purpose of identifying the person or thing intended as the object or subject of the testator's bounty, enquire into every material fact, and all the extrinsic circumstances which were known to the testator, relating as well to the person who claims or the thing claimed as to the testator's family and affairs. But the Court may not admit any direct extrinsic evidence of the testator's intention, unless there are more than one person or thing equally answering the description he has used. *Charter v. Charter* (H. L.), 43 Law J. Rep. (n.s.) P. & M. 73; Law Rep. 7 E. & I. App. 364.

Where the object of the testator's bounty is not correctly named, or is described by a name which is only in part correct, then, if there is enough in the will, when read with the knowledge of surrounding circumstances, to shew who it was that the testator intended to benefit, so that, if the incorrect or partially correct description by name were expunged, the gift would not be void for uncertainty, the indications of intention discoverable in the rest of the will are to prevail over those which arise from the use of the inaccurate or only partially correct description by name. *Ibid.*

A testator by his will appointed his son, "Forster Charter," his executor, and made him his general devisee. At the date of the will he had two sons, William Forster Charter and Charles Charter. Another son, who was named Forster Charter, had died many years before. The elder son was usually called Willie—never Forster. He for many years had lived 100 miles or more away from his father, was married, and he carried on an independent business as butcher. The younger son, Charles, lived with his father and mother, working on their farm. The will directed the "executor, Forster Charter," to pay to the testator's wife an annuity of 10*l.*, and to allow her ordinary maintenance "so long as they reside together in the same house. . . . But should they think proper to live separately, then, besides the annuity and the maintenance, the said 'Forster Charter' shall allow my wife, rent-free, the use of the cottage," which adjoined his house. Any difference between the executor and widow as to the latter's maintenance was to be referred to the arbitration of a person named, who lived near the testator's farm. On the hearing of the case before the Judge Ordinary, Lord Penzance, evidence of the testator's intention to make Charles Charter his executor and devisee was admitted:—Held, that such evidence was not admissible. But that, from the words, "so long as they reside together," and from the other directions above mentioned, there was enough to shew that the testator intended to name his younger son, Charles, and that the demonstration of the legatee thus afforded must prevail over the incorrect description of the legatee by the name "Forster Charter." *Ibid.*

Lord Chelmsford and Lord Hatherley dissented on the ground that there were not in the will any indications of intention that Charles should be the executor so plain that they ought to be allowed

to prevail over the partially correct description by name of the elder son and heir. *Ibid.*

[For the reports of the above case in the Courts below, see 40 Law J. Rep. (n.s.) P. & M. 41; 41 *Ib.* 10; Law Rep. 2 P. & D. 315.]

9.—The testator appointed as his executrix "Georgiana Geraldine de Bellin," but there was no person answering to the description. He left a granddaughter named "Adelaide Geraldine de Bellin," and a great granddaughter (who was only six months old at the date of the execution of the will) named "Georgiana Geraldine Kate de Bellin":—Held, that extrinsic evidence was admissible to shew whom the testator intended to designate by the description "Georgiana Geraldine de Bellin," and the evidence shewing that his granddaughter, Adelaide Geraldine de Bellin, was the person whom he meant, probate of the will was decreed to her accordingly. *In the goods of O'Reilly*, 43 Law J. Rep. (n.s.) P. & M. 5.

10.—Testatrix, after making specific bequests to his niece Clara and "my niece Laura, second daughter of my brother, J. H. W.," bequeathed as follows: "to each of my nieces, K. G., H. M. T., H. B., and Laura W. the sum of 50*l.*," and further bequeathed "to each of my nieces C. W., Laura W., R. W., M. E. S. S. and E. G. S., the sum of 100*l.*," and gave the residue "in trust for the said M. E. S., Laura W., E. G. M. and R. W." It appeared that the testatrix had two nieces, one Laura W., a daughter of her brother J. H. W., and the other Laura Frances Tompkins W., a daughter of her brother William W. Parol evidence had been entered into to shew which Laura was intended:—Held, that in the first gift the person who was intended was accurately described; that there was no latent ambiguity and that parol evidence was not admissible; that the same Laura W. mentioned in the first gift took both the legacies of 50*l.* and 100*l.* and also the share of the residue. *Webber v. Corbett*, 43 Law J. Rep. (n.s.) Chanc. 164; Law Rep. 16 Eq. 515.

[And see *supra* No. 6.]

*(H) WHO TAKE.**(a) Charitable bequests.*

1.—Testator bequeathed several annuities payable out of the income of his residuary personal estate, and to abate rateably if the securities provided for them proved insufficient, directing the surplus income to be accumulated till the death of the surviving annuitants. He bequeathed his residuary personalty to be paid and divided into five public charities according to the amounts set after their names in the will. The sum of 100*l.* only was set after the name of each charity. There was a very large amount of personal estate after providing for the annuities; and the testator left no next-of-kin:—Held, that the charities were entitled to the whole of the residuary pure personalty; but that, being charities, they could not now call for the payment of the surplus to them, and the accumulations must go on till further order. *Harbin v. Masterman*, 40 Law J. Rep. (n.s.) Chanc. 760; Law Rep. 12 Eq. 559.

2.—A bequest of 200*l.* "to each of ten poor clergymen of the Church of England, to be selected by A." is not a charitable bequest. *Thomas v. Howell*, 43 Law J. Rep. (N.S.) Chanc. 799; Law Rep. 18 Eq. 198.

3.—S. bequeathed 600*l.* arising from such part of his estate as should not be secured upon mortgages or chattels real, to apply the income to keep in good repair the tombstones of himself and several of his relatives, and directed the surplus income to be given away on his birthday in charity:—Held, that the prior gift to keep the tombstones in repair being void, the whole fund went to the charity. *Dawson v. Small*, 43 Law J. Rep. (N.S.) Chanc. 406; Law Rep. 18 Eq. 114.

[And see CHARITY, 12–24.]

(b) *Gift to a Class.*

(1) *Lapse.*

4.—A gift to all the nephews and nieces of a testatrix's late husband who were living at the time of his decease (excepting two by name),—Held, a gift to a class, so that the shares of two who predeceased the testatrix survived to the others. *Dimond v. Bostock*, Law Rep. 10 Chanc. 358.

[And see *infra* No. 7.]

(2) *Period of ascertaining members.*

5.—By will the residue of a testator's real and personal estate was given to trustees upon trust to convert and get in as soon as conveniently might be after the testator's decease, and to invest the proceeds and assign the same unto all and every testator's grandchild or grandchildren (except T. E. B. H., or such grandchild as should then be in possession of certain real estates before specifically devised) as should "then be living," to be divided between them when and as such grandchild or grandchildren should respectively attain twenty-one:—Held, that the period of ascertaining the legatees was the time when the eldest of the grandchildren, who were to share in the residue, attained twenty-one. *Hilliard v. Fulford*, 42 Law J. Rep. (N.S.) Chanc. 624.

6.—Real and personal property was bequeathed on trust for division among such of the testatrix's grandchildren as should attain twenty-one equally, with power for the trustees, during the minority of any of the children, to raise money for maintenance:—Held, that the objects of the gift were ascertained on the eldest child attaining twenty-one, to the exclusion of after-born children. *Gimblett v. Perton*, 40 Law J. Rep. (N.S.) Chanc. 556; Law Rep. 12 Eq. 427.

*Iredell v. Iredell* (25 Beav. 485) and *Bateman v. Gray* (Law Rep. 6 Eq. 215) disapproved of. *Ibid.*

7.—A testator by his will, which recited and was intended to carry into effect articles made on the marriage of his daughter, devised certain real property to trustees to the use of the husband for life, or until bankruptcy or insolvency, and after

bankruptcy or insolvency to the use of trustees upon trust during the joint lives of husband and wife, to pay the rents and profits to the wife for her separate use, with remainder to the wife for life, with remainder to trustees to preserve contingent remainders, with remainder, subject to power of appointment, to the children of the marriage in fee as tenants in common, with benefit of survivorship, and if only one child then to that one, and in case every child, "born or to be born," should die under the age of twenty-one years, and without leaving lawful issue, born or to be born in due time afterwards, then "to the use of the heirs and assigns" of the wife "as if she had continued sole and unmarried." All the children died in the lifetime of the testator, but one had attained the age of twenty-one years. The husband became insolvent, and afterwards joined with the wife in a conveyance to such uses as she should by deed or will appoint. She appointed by will to the defendant. The plaintiff was heir-at-law both to the testator and to the wife. In an action of ejectment brought to recover possession of the property,—Held, that the words "born or to be born," must be referred to the time of making the will, and not to the death of the testator, that this was therefore not the case of a devise to a class that failed, but a case of lapse, and the plaintiff was entitled as heir-at-law of the testator.—Held, also, that the devise to the heirs and assigns of the wife "as if she had continued sole and unmarried," was a limitation to her collateral heirs which would not coalesce with the life estate previously limited to her, and that the word "assigns" did not give her a power of disposition over the property. *Brookman v. Smith*, 40 Law J. Rep. (N.S.) Exch. 161; Law Rep. 6 Ex. 291.

[And see *infra* No. 24.]

(c) *Children surviving tenant for life.*

8.—Bequests of residue to a testator's niece for life, with a direction that his trustees after her decease should divide such residue amongst all her children who should be living at her decease, the same to be a vested interest in them respectively on their attaining twenty-one, "but not to be transferred until after the decease of the testator's niece":—Held, reversing *Stuart, V.C.*, that the children of the niece who attained twenty-one, and died in her lifetime, were excluded from the bequest. *Williams v. Haythorne*. *Williams v. Williams*, Law Rep. 6 Chanc. 782.

(d) *Children or their "families."*

9.—Devise of freeholds to C. and his heirs, and "in case he should die leaving no issue, then equally between my surviving children or their families":—Held, a gift (on the death of C. without issue) to the children of the testator, and the children of such of them as were dead, as to such children in joint tenancy. *Burt v. Hellyar*, 41 Law J. Rep. (N.S.) Chanc. 430; Law Rep. 12 Eq. 160.

(e) "*Children or legal issue.*"

10.—A testator devised lands to his daughter A. in fee and by codicil ordered that the lands given by his will to A. and her heirs, &c., should not be so given but to all "the children or legal issue" of A. his daughter to be divided amongst them equally after the decease of his daughter A. and her husband:—Held, that all the children of A. living at the death of the testator (three of whom died in her lifetime) and those who were born afterwards took, subject to a life estate in A., vested interests in fee to the exclusion of remoter issue, who would, however, have been entitled if there had been no such children; in such case or would be read *and*. *Holland v. Wood*, Law Rep. 11 Eq. 91.

(f) *Illegitimate children.*(1) *Whether they can take under gift to children.*

11.—In construing a will, a gift to "children" may include existing illegitimate children, if from expressions in the will, or from the state of the testator's family at the date of the will, the probability that he intended them to take is sufficiently strong, and this although the gift may be capable of being extended to future legitimate children, so that such future legitimate children would take with the illegitimate children as a class under the same gift. *Hill v. Crook* (H.L.), 42 Law J. Rep. (n.s.) Chanc. 702; Law Rep. 6 E. & I. App. 265.

A testator by his will left property for his daughter, whom he described as Mary, the wife of John Crook. Mary was not in law the wife of John Crook, though she had gone through the ceremony of marriage with him, he being the widower of her deceased sister. The property was to be held in trust for her for life to her separate use, "independent of her present or any future husband," with remainder to her "children." There was issue of the union between Mary and John Crook four children, of whom two were living at the date of the will, and were always recognised by the testator as his grandchildren:—Held, that the two children living at the date of the will took under the bequest to the children of Mary Crook. *Ibid*.

Decision of the Court of Appeal in Chancery (40 Law J. Rep. (n.s.) Chanc. 216; Law Rep. 6 Chanc. 311) affirmed.

12.—A testator having two illegitimate children by M., married her, and by his will, executed the day after his marriage, gave all his property "to my wife M." for life, with liberty to direct the disposal of the property amongst "our children by will," in default to be divided "equally between my children by her." The testator in his lifetime acknowledged the two illegitimate children to be, and treated them as, his children, and died without having had any other children by M., leaving her and the two illegitimate children surviving:—Held, in a suit instituted by M. to administer the estate of the testator, that the two illegitimate children were the objects of the power of appointment given to M., and would take in default as the children of the testator by her. Further, that they

were not precluded from taking by the fact that the testator might have had future legitimate children by M., for such children would have taken as a class with the existing legitimate children. *Dorin v. Dorin*, 43 Law J. Rep. (n.s.) Chanc. 462; Law Rep. 17 Eq. 463.

*Wilkinson v. Adam* (1 Ves. & B. 422), *Beachcroft v. Beachcroft* (1 Madd. 430), and other authorities considered. *Ibid*.

But this decision was reversed on appeal to the House of Lords, their Lordships holding that the word "children" in a will means *primâ facie* "legitimate children" and cannot be extended beyond that meaning, and, therefore, that the property was undisposed of, subject to the widow's life interest. Law Rep. 7 E. & I. App. 568.

13.—A testator bequeathed moneys in trust after the decease of his daughter for "all the children of his said daughter whether by her present putative husband or by any other person whom she might marry, who should attain the age of twenty-one years, their executors, administrators and assigns. But in case his said daughter should die leaving no issue either by her said putative husband or by any other person, who should attain the age of twenty-one years," then over. The testator at the date of his will knew that his daughter had an illegitimate son by J. B., with whom she was then living, and he recognised this son as his grandchild. After the testator's death, his daughter married J. B., but had no other child:—Held, that the illegitimate child was sufficiently designated by the will, and he having acquired a vested interest on attaining twenty-one, and his mother being sixty-seven years of age, that they were entitled to have the fund transferred to them. *In re Brown's Trusts*, 43 Law J. Rep. (n.s.) Chanc. 84; Law Rep. 16 Eq. 239.

14.—A testator bequeathed trust funds and moneys "in trust for all the children, to be equally divided amongst them, their respective executors, administrators and assigns, of my brother H. M. W., of my nephew A. W. D., of my sister H. C. D., and of my niece M. B., of Jamaica, and my nephew G. D. himself (if he shall be then living, but not otherwise, the said G. D. taking a share with all such children), and the respective shares of such children to be absolutely vested on my decease." H. M. W. was dead at the date of the will. He left three illegitimate children only, who survived the testator. There was enough in the case to enable the Court to presume that the testator was aware of the state of H. M. W.'s family:—Held, following *In re Herbert's Trusts* (1 Jo. & H. 121; 29 Law J. Rep. (n.s.) Chanc. 870), that the children of H. M. W. could take under the bequest. Held, also, that G. D. took two shares under it: the one vested; the other vested subject to be divested. *Milne v. Wood*, 42 Law J. Rep. (n.s.) Chanc. 545.

15.—Gift to the child or children of testator's niece C. held not to include C.'s only child, who was illegitimate, although C. was fifty years old at the date of the will and fifty-seven at the date of a subsequent codicil. *Paul v. Children*, Law Rep. 12 Eq. 16

(2) *Provision for after-born illegitimate children.*

**16.**—A gift by will by a testator or testatrix to his or her illegitimate children by a particular person is good as well as to a child born after as before the date of the will, if the child obtains the reputation of being such a child before the death of the testator or testatrix. *In re Goodwin's Trusts*, 43 Law J. Rep. (n.s.) Chanc. 258; Law Rep. 17 Eq. 345.

**17.**—Under a bequest to a testator's reputed children C. and E. and all other the children which he might have or be reputed to have by M. L. (his deceased wife's sister, with whom he had gone through the ceremony of marriage), then born or thereafter to be born, a child *en ventre sa mère* at the date of the will, who was born and acquired in his lifetime a name by reputation as the testator's child by M. L.—Held, (reversing a decision of Wickens, V.C., 42 Law J. Rep. (n.s.) Chanc. 514), Lord Selborne, L.C., *dissentiente*, entitled to share; and held by the Lords Justices that every child who on the will coming into operation had acquired such a name by reputation would be entitled to share in such bequest; and that a provision by will for a testator's future illegitimate children is not *contra bonos mores*. *Occleston v. Fullalove*, 43 Law J. Rep. (n.s.) Chanc. 297; Law Rep. 9 Chanc. 147.

The decision of Wood, V.C., in *Howarth v. Mills* (Law Rep. 2 Eq. 389) disapproved of. Decision of Wickens, V.C., reported 42 Law J. Rep. (n.s.) Chanc. 514; Law Rep. 9 Chanc. 148*n.*, reversed. *Ibid.*

(g) *Brothers and sisters: brother en ventre sa mère.*

**18.**—Bequest to brothers and sisters, the shares of brothers to vest at twenty-one, and those of sisters at twenty-one or marriage:—Held, that a brother not born, though *en ventre sa mère* when the eldest brother attained twenty-one, was excluded. *In re Gardiner's Estate*. *Garratt v. Weeks*, Law Rep. 20 Eq. 647.

(h) "*Nephews and nieces.*"

**19.**—A testator having several nephews and nieces, the children of his only sister, and two great nephews, A and B, the children of a deceased niece, gave an estate to A, the eldest of the two great nephews. He then gave another estate upon trust for his sister for life, and after her death to be sold, the proceeds to be divided between B and such other of his nephews and nieces as should be living at his or his sister's decease. Throughout his will he used the word "great nephew" when he intended A, with one exception where he called him his nephew:—Held, that great nephews and great nieces other than B. were not entitled to any share in the proceeds of sale of the estate devised in trust for sale. *In re Blower's Trusts*, 42 Law J. Rep. (n.s.) Chanc. 24; Law Rep. 6 Chanc. 351. Decision of Stuart, V.C., Law Rep. 11 Eq. 97, reversed.

**20.**—Gift by the testator to his nephews and nieces, he having none of his own and no possibi-

lity of having any,—Held (affirming the decision of the Master of the Rolls, 42 Law J. Rep. (n.s.) Chanc. 353; Law Rep. 15 Eq. 305), to apply to his wife's nephews and nieces. *Sherratt v. Mountford*, 42 Law J. Rep. (n.s.) Chanc. 688; Law Rep. 8 Chanc. 928.

There being no evidence that there was any other class that could be intended, evidence that the testator did not mean his wife's nephews and nieces was held inadmissible. *Ibid.*

**21.**—The testatrix by will made this bequest: "I give to my niece A. B. my large china dish and basin and three china plates." A. B. was not the niece by blood of the testatrix, but of her husband. The will contained other specific bequests to nephews and nieces who were the testatrix's nieces by blood. The testatrix also bequeathed a sum of 600*l.* to two trustees upon trust for investment and for payment of the income to her sister E. B. for life, and after her decease she bequeathed the capital equally amongst the whole of her nephews and nieces who should be living at her decease, declaring that in case any nephew or niece should have died before the period of distribution leaving issue, the share of such nephew and niece was to go to such issue; and the testatrix directed her trustees to divide the residue of her household furniture and effects amongst, and gave and bequeathed all the residue of her personal estate and effects to, all her nephews and nieces who should be living at the time of her decease in equal shares. The testatrix died, leaving eleven nephews and nieces by blood, seven being the children of a sister and four the children of a brother. At the date of the will, and death of the testatrix, there were nine nephews and nieces by blood of her husband living, eight of them (including A. B.) being children of one and one being the child of another of the testatrix's husband's sisters:—Held, that neither A. B. nor the other children of the testatrix's husband's sisters were entitled to share in the household furniture or residuary estate. *Wells v. Wells*, 43 Law J. Rep. (n.s.) Chanc. 681; Law Rep. 18 Eq. 504.

(i) "*Legal personal representatives.*"

[See MARRIAGE SETTLEMENT, 12-14.]

(k) "*Heirs.*"

**22.**—Bequest of personality to the "heirs" of a testatrix's brother,—Held, a bequest to his next-of-kin according to the Statute of Distributions. The circumstance that the testatrix had devised real estate to a person "and to her heirs and assignees," was held to make no difference. *Ware v. Rowland* (15 Sim. 587) observed upon. *In re Stevens' Trusts*, Law Rep. 15 Eq. 110.

(l) "*Relatives*" or *relations.*

**23.**—Gift of residue "to my relatives share and share alike as the law directs":—Held, divisible amongst the relatives under the Statute of Distributions per stirpes and not per capita. *Fielden v. Ashworth*, Law Rep. 20 Eq. 410.



**24.**—Upon gift to relatives after the death of A. and B.:—Held, first, that relatives meant the persons who would take under the Statutes of Distribution. Secondly, that the class was to be determined at the death of the testatrix. Thirdly, that the members of it took as joint tenants. *Eagles v. Le Breton*, 42 Law J. Rep. (N.S.) Chanc. 362; Law Rep. 15 Eq. 148.

**25.**—Gifts of various legacies to relations of the testator, describing their relationship, and amongst such gifts the following—"I also give and bequeath to my niece, T. J., wife of S. J., or their heirs, the sum of 400l." . . . "I also give and bequeath to J. B., who married my niece, M. A. H., but is dead without leaving issue, the sum of 100l." T. J. was an illegitimate child of the testator's sister, and J. B. was, as described, only a relation by affinity; and there were other legatees in the same position as each of them. After some gifts to strangers, and other dispositions, the testator continued—"If the whole of my property makes more than the whole amounts mentioned in this my will, I request it to be divided amongst my relations in proportion to their separate amounts":—Held, that this residuary gift included only such of the legatees as were relations by blood. *Hibbert v. Hibbert*, 42 Law J. Rep. (N.S.) Chanc. 383; Law Rep. 15 Eq. 372.

(m) *Child en ventre sa mère.*

**26.**—In construing a will, a child *en ventre sa mère* is treated as living where the effect is to leave to the child an interest vested or contingent which any other construction would take away from it, unless there is a clear contrary intention. *Pearce v. Carrington*, 42 Law J. Rep. (N.S.) Chanc. 516; affirmed, on appeal, 42 Law J. Rep. (N.S.) Chanc. 900; Law Rep. 8 Chanc. 969.

(n) "*Eldest son.*"

**27.**—A gift to "all and every the sons of A. save and except an eldest son" cannot be held to include an *only* son of A. "Eldest" is equivalent to "first born." *Tuite v. Bermingham* (H.L.), Law Rep. 7 E. & I. App. 635, on appeal from the Master of the Rolls in Ireland.

[And see MARRIAGE SETTLEMENT, 5.]

(o) "*Every other son during his life.*"

**28.**—Devise of real estate on the death without issue of the eldest son of J. S., "to the use of every other son of J. S. and the assigns of such son during his life, with remainder to trustees to preserve &c., and after his decease to the use of such son's first and every other son successively" in tail male:—Held, that the younger sons of J. S. took as tenants in common for life, with remainder, as to the share of each, to his sons in tail with cross-remainders in tail. *Surtees v. Surtees*, Law Rep. 12 Eq. 400.

(p) *Gift to a woman and her children.*

**29.**—Bequest of residue to M. and such of her children, "including her two eldest sons," as should attain twenty-one. In a previous part of the will

was contained a bequest in trust for M. for life, with remainder to her children surviving her who should attain twenty-one, excluding the two eldest sons:—Held, that M. took a life estate in the residue with remainder to such of her children as should attain twenty-one. *In re Owen's Trusts* Law Rep. 12 Eq. 316.

[And see *infra* I 28–31.]

(q) *Gift to a woman for life with remainder to her husband.*

**30.**—A gift to an unmarried woman for life with remainder to her husband in fee gives a vested remainder in fee to her first husband. *Radford v. Willis*, 41 Law J. Rep. (N.S.) Chanc. 19; Law Rep. 7 Chanc. 7.

(r) *Per capita or per stirpes.*

**31.**—Devise and bequest to the testator's wife for life and after her decease as follows:—"one half to my brothers and sisters for their life, and then to come to their children, and in the same manner to my wife's brother and brother's children and grandchildren." At the date of the will the testator had one brother and three sisters living, another brother and another sister having died leaving children. At the same date there was one wife's brother living, two wife's brothers having died, of whom one left children and grandchildren. The testator's wife and brothers and sisters predeceased him, but his wife's brother survived:—Held, that one moiety was divisible among the children living at the testator's death, of all his brothers and sisters *per stirpes*; that the wife's brother took a life estate in the other moiety, and that after his death it was divisible among all the children and grandchildren living at the testator's death, or coming into existence during the lifetime of the tenant for life, of himself and the other wife's brothers who left children or grandchildren, families taking *per stirpes* and children and grandchildren of each family *per capita*. *Barnaby v. Tassell*, Law Rep. 11 Eq. 363.

**32.**—Devise and bequest of residue to the testator's children A., B., C., D., E., and "to the children of his daughter F. deceased," and "the children of his daughter G. deceased, to be divided amongst them in equal shares and proportions:—Held, that the grandchildren took *per capita* and not *per stirpes*. *Payne v. Webb*, Law Rep. 19 Eq. 16.

[And see *infra* N, 5.]

(s) *Whether executors and trustees take beneficially.*

**33.**—The statute 11 Geo. 4. & 1 Will. 4. c. 40, was not intended to introduce any new rule for the construction of wills, and does not therefore apply where there is an express gift of residue to an executor. Its effect merely is that an executor is to be a trustee for the next-of-kin, unless it appears by the will that he was intended to take beneficially. *Williams v. Arkle* (H.L.), Law Rep. 7 E. & I. App. 606.

Will (of a testator who had a sister, wife, and two illegitimate children) appointing G. executor

and trustee if he should survive him, but if he should die in his lifetime B. Gift of legacies of 1,000*l.* each to G. and B., 2,000*l.* to a great nephew, and 100*l.* apiece to the wife and children. Gift of annuities to wife, children and sister. Gift of freeholds and leaseholds (specially described) and all other real estate and residue of personal estate to G. "for all my estate therein if he shall be alive at my decease," and if not then to B. "for all my estate therein." Power to trustee to change investments, to be guardian of children during minority, and other usual powers:—Held (*dissentiente* Lord Chelmsford), that G. took beneficially. *Ibid.*

**34.**—Will appointing two of the testator's sons executors, and giving various legacies, but containing no residuary bequest. Codicil directing the executors and the three principal legatees to pay all expenses of administration &c., "it being the testator's desire that no part of the said expenses should be borne by the residuary legatees of his will:—Held, that the executors were not beneficially entitled to the residue, but that there was an intestacy. *Travers v. Travers*, Law Rep. 14 Eq. 275.

*Legacy to executor.* [See LEGACY, 4.]

#### (I) WHAT ESTATE OR INTEREST PASSES.

##### (a) Joint tenants or tenants in common.

**1.**—Gift to A. and B. (in terms creating a joint tenancy) followed by a proviso for survivorship to B. if A. died without children:—Held, to create a tenancy in common. *Ryves v. Ryves*, 40 Law J. Rep. (n.s.) Chanc. 252; Law Rep. 11 Eq. 539.

**2.**—The testator gave and devised his real and personal estate to his wife for the use and benefit of herself and all his children:—Held, reversing the decision of one of the Vice-Chancellors (40 Law J. Rep. (n.s.) Chanc. 640; Law Rep. 12 Eq. 432), that the wife and children took as joint tenants. *Newill v. Newill*, 41 Law J. Rep. (n.s.) Chanc. 432; Law Rep. 7 Chanc. 253.

**3.**—The words "all and every the child and children,"—Held to create a joint tenancy. *Morgan v. Britten*, 41 Law J. Rep. (n.s.) Chanc. 70; Law Rep. 13 Eq. 28.

**4.**—A direction that a class should take "between them" creates a tenancy in common. *The Attorney-General v. Fletcher*, 41 Law J. Rep. (n.s.) Chanc. 167; Law Rep. 13 Eq. 128.

**5.**—A testator, after giving by his will his residuary estate to J. J. and W. F., in terms which would create a joint tenancy, by codicil directed that J. W. should participate in the bequest with J. J. and W. F.:—Held, that the residuary legatees took as tenants in common. *Robertson v. Fraser*, 40 Law J. Rep. (n.s.) Chanc. 776; Law Rep. 6 Chanc. 696.

**6.**—A testator gave property to the children of A. living at a prescribed period, and the issue of deceased children, so as such issue should have no greater share than their parents would have taken if living, and he afterwards provided that if any one or more of such issue should be then dead, having left lawful issue, then the issue of such

issue as should be so dead should receive the share which their, his or her parent would have taken if living:—Held, that the effect was to create a joint tenancy amongst the members of the various families, subject to this, that if anyone died leaving issue it must be considered for the purpose of determining the share which such issue were to take, as if he had survived the period of distribution, but had severed the joint tenancy at the date of his death. Held, also, that the issue of grandchildren of A. must be confined to children, and that the issue of a grandchild who was dead at the date of the will took. *Heasman v. Pearce*, 41 Law J. Rep. (n.s.) Chanc. 705; Law Rep. 7 Chanc. 275; on appeal, from Malins, V.C., 40 Law J. Rep. (n.s.) Chanc. 258; Law Rep. 11 Eq. 522.

The words "then living," though in one clause of a will they were held by virtue of the above-mentioned proviso to refer to the period of distribution, were in another clause to which the proviso was held inapplicable, considered to refer to the death of a tenant for life. *Ibid.*

[And see *supra* H 24, and *infra* M 4.]

##### (b) Joint tenancy or successive interests.

**7.**—A testator by will directed that the share of his daughter should accumulate during the life of her husband, and after his death, if there should be any children living, "it should be secured for their benefit and that of their mother;" if no children, that it should go to the daughter absolutely:—Held, that after the death of her husband the daughter was entitled to the income for life, and with remainder to her children. *Combe v. Hughes*, 41 Law J. Rep. (n.s.) Chanc. 693; Law Rep. 14 Eq. 415.

[And see *supra* H 29.]

##### (c) Estate of trustees.

##### (1) Whether legal estate passes to trustees.

**8.**—A testator devised a freehold to trustees for the benefit of E. for life for her separate use, and after her death upon trusts for such of the children of E., as being sons should attain twenty-one or being daughters should attain that age or marry. E. died after the testator, leaving an infant daughter who did not marry before attaining twenty-one:—Held, that the legal estate was in the trustees, and the daughter of E. took the property on attaining twenty-one, but the interim rents went to the testator's residuary devisee. *In re Eddels' will*, 40 Law J. Rep. (n.s.) Chanc. 316; Law Rep. 11 Eq. 559.

On a petition for payment out of the interim rents which had been paid in under the Trustee Relief Acts, the Court decided that the legal estate was in the trustees. *Ibid.*

**9.**—A testator devised freehold and copyhold estates to trustees, their heirs, executors, administrators and assigns, upon trust during the natural life of his son A. to receive the rents and profits thereof, and to pay the same to A. and his assigns during his life, or permit him to receive the same.

And after the decease of A., the testator devised the same to the sole use and behoof of the heirs of his body lawfully begotten. The testator appointed the trustees and another executors, and declared that the receipts of his trustees and executors should be good discharges:—Held, on demurrer to a bill for specific performance of an agreement for the sale of freeholds and copyholds, that there was a legal estate in the trustees and their heirs during the life of A. in the copyholds, and demurrer allowed as to the copyholds. *Baker v. Parson* (42 Law J. Rep. (N.S.) Chanc. 228 not followed. *Houston v. Hughes*) 6 B. & C. 403 commented on. *Baker v. White*, 44 Law J. Rep. (N.S.) Chanc. 651; Law Rep. 20 Eq. 166.

[And see *infra* No. 20.]

10.—A testator, who died in 1826, being a mortgagee of Blackacre devised real estate (except mortgage and trust estates) on certain trusts, and devised mortgage estates to the trustees upon trust for reconveyance on payment of the mortgage debts. He afterwards entered into a contract to purchase the equity of redemption in Blackacre, and paid the purchase-money, but no conveyance was executed:—Held, that by the contract he had acquired a new absolute interest, that thereby the devise in the will was revoked, and Blackacre was thereby undisposed of, that no dry legal estate remained in the trustees, and that there was no express trust within the Statute of Limitations to support the claim of the heir, who had lain by for more than twenty years. *Yardley v. Holland*, Law Rep. 20 Eq. 428.

(2) *Duration of legal estate.*

11.—E. made the following will: "Subject to the payment of my just debts, funeral expenses, &c., I give and bequeath to my wife the clear rentals of my two dwelling-houses (which were leasehold), Nos. 17 and 19 in P. Street; and after the decease of my wife two other dwelling-houses, &c., I leave to my son R. as well as the house No. 17 P. Street. And I direct that my son R. is to have no power or authority whatever to receive any rents from the said property, except so far as to receive his share of any surplus existing after payment of ground rent, &c., but that the said rents shall be received and all matters appertaining to the property aforesaid to be under the management of the executor and executrix. And I also direct that after his decease his share of the property be equally divided between his children; but should he die without leaving lawful issue, I then direct that the same be equally divided amongst the surviving children of my daughter M. A., share and share alike. I appoint my son-in-law, J. C., and his wife, M. A., my executor and executrix." The executors proved the will, and received the rents, and paid those of No. 17 to the widow during her life, and after her death to R., who died without leaving issue:—Held, first, that the assent of the executors to the particular estates was an assent to the bequest in remainder,

Secondly, that the executors took the legal estate in No. 17 as trustees, though there was no direct bequest to them, but that the performance of the trust only required that the legal estate should be vested in them during the lives of the widow and R., and on the death of the latter without issue, the legal estate vested in the surviving children of M. A. *Stephenson v. The Mayor and Corporation of Liverpool*, 44 Law J. Rep. (N.S.) Q.B. 34; Law Rep. 10 Q.B. 81.

(3) *Annuity to trustee.*

12.—An annuity was given by will to A. B., one of the trustees of the testatrix, "so long as he should continue to execute the office of trustee under her will:—Held, that the annuity ceased when the estate was handed over to a *cestui que trust* absolutely entitled. *Hull v. Christian*, 43 Law J. Rep. (N.S.) Chanc. 861; Law Rep. 17 Eq. 546.

(d) *Devise before Wills Act without words of limitation.*

13.—A testator by a will made before 1838, gave to his wife, whom he nominated executrix, certain land, without words of limitation, and all his personalty, but if she married again, the land was to be reserved by trustees and sold for the benefit of all his children equally. Then he directed, "that my executrix shall pay my eldest son the sum of 5*l.* a year for wages, as long as he shall continue to labour on the farm after my decease:—Held (affirming the judgment below, 40 Law J. Rep. (N.S.) Exch. 132; Law Rep. 6 Exch. 190), that the wife's estate was, by the direction to pay wages, enlarged from an estate for life to an estate in fee defeasible on her marrying again. Also, that the estate for life was so enlarged, because the testator's intention that his wife should take the fee could be collected from the gift over in the event of her marrying again. *Pickwell v. Spencer* (Exch. Ch.), 41 Law J. Rep. (N.S.) Exch. 73; Law Rep. 7 Exch. 105.

(e) *Devise of income passing fee.*

14.—Devise to children of an equal share in all the income of real estate,—Held, to pass the fee. *Mannox v. Greener*, Law Rep. 14 Eq. 456.

(f) *Repugnant devise or bequest.*

15.—A testator devised "to my mother . . . all my real and personal estate . . . and knowing that what I . . . devise . . . to my said mother will become the property of her husband, R. G. . . . I therefore declare the intention of this my will to be that the said R. G. being my . . . mother's husband and a kind stepfather to me shall hold and enjoy all my said real and personal estate . . . to him, his heirs, executors, administrators, and assigns for ever, and to be absolutely at his free will and disposal, provided that he does not at any time dispose of any portion of my said property to any or either of my late father, T. G.'s family:—Held, that the mother took a life estate and interest in

the realty and personalty, and her husband a remainder in fee in the realty, and an absolute interest in remainder in the personalty. *Gravenor v. Watkins*, 40 Law J. Rep. (N.S.) C. P. 197; Law Rep. 6 C. P. 500.

And held, by the Exchequer Chamber, that, whatever might be the exact nature of the estate of the mother, her husband took at all events a remainder in fee in the realty after her decease. 40 Law J. Rep. (N.S.) C. P. 220; Law Rep. 6 C. P. 500.

16.—A testator gave all his real and personal estate to trustees upon trust to pay the residue of his personal estate to his wife for her own absolute use and benefit, and after several other devises he gave all the money, if any, that should be remaining after payment of his wife's just debts, &c., to legatees named:—Held, that the widow took an absolute interest in the residuary personal estate. *Perry v. Merritt*, 43 Law J. Rep. (N.S.) Chanc. 608; Law Rep. 18 Eq. 152.

(g) *Devise of copyholds.*

17.—A devise of copyhold estate under the Wills Act (7 Will. 4. & 1 Vict. c. 26), s. 3, conveys no estate to the devisee before admission, and where the devisee does not intervene, the heir has a right to be admitted. *Garland v. Mead*, 40 Law J. Rep. (N.S.) Q. B. 179; Law Rep. 6 Q. B. 441.

(h) *Renewable leaseholds: incidence of charges.*

18.—W. T. was beneficially entitled for his life to renewable leaseholds for three lives held on trust to renew and subject to certain charges. All the *cestuis que vie* having died, and W. T.'s right to renew being disputed by the reversioner, the trustee of the leaseholds, with the consent of the persons entitled to the charges, in order to facilitate the obtaining of a renewal, transferred the legal estate to W. T. by a deed which recited (though contrary to the fact) that the charges had been paid by W. T. Thereupon W. T. obtained a renewal (without prejudice to the question in dispute), and to avoid litigation, purchased the reversion in fee. He subsequently paid off the charges and mortgaged the premises in fee. By his will, reciting that the charges were subsisting, he devised his interest in the premises to T. T. subject to the charges:—Held (affirming the decision of Bacon, V.C., 41 Law J. Rep. (N.S.) Chanc. 673; Law Rep. 14 Eq. 295), that T. T. took the fee subject to the charges. *Trumper v. Trumper*, 42 Law J. Rep. (N.S.) Chanc. 641; Law Rep. 8 Chanc. 870.

(i) *Rule in Shelley's case.*

19.—Devise (after 1837) of copyholds and freeholds to trustees to hold unto them and their heirs on trust to pay unto or permit A. to receive the rents during his life, and after his death to the use of the heirs of his body, with a gift over in case he died without leaving issue:—Held, that A. took an equivalent estate for life with a legal remainder to the heirs of his body in both the freeholds and copyholds. *Baker v. Parson*, 42 Law J. Rep. (N.S.) Chanc. 228.

The Statute of Uses not applying to copyholds, on a devise of freeholds and copyholds together, the legal estate in the copyholds attracts that in the freeholds and makes it vest in the first devisee. *Ibid.*

Copyholds are, however, to the same extent as freeholds, subject to the rule that the legal estate in the trustee shall be construed to be the smallest estate necessary for the execution of the trust. *Ibid.*

20.—A testator, by will, dated in 1827, devised his estate to trustees and their heirs upon trusts that they and their heirs should stand seised of the same during the life of W. C., and until the whole of the testator's debts and the legacies were paid, upon trust, to set and let the same and apply rents and yearly profits and the value of whatever timber might be considered at its best growth, from time to time, in discharge of his debts and legacies until they were paid, and from thenceforth to pay the rents to W. C. during his life; and after W. C.'s death, and payment of the debts and legacies and expenses, the testator devised the estate to the heirs of the body of W. C., and for default of such issue, to his own right heirs. In 1830 the trustees by deed reciting that the debts and legacies were paid, conveyed the estates to W. C. for his life. W. C. shortly afterwards suffered a common recovery, and then mortgaged the estate in fee to W. In 1861 W. C., the father, and W., his mortgagee, had filed a bill for a conveyance of the fee against the heir of the surviving trustee and W. C., the son (W. C.'s heir-apparent). W. C., the son, instead of asking to be dismissed as not being heir during his father's lifetime, put in an answer disputing the plaintiff's title. In 1865 a decree was made for the conveyance of the fee to the plaintiff. W. C., the father, had since died. This suit was instituted in 1873 by W. C., the son, against W., the mortgagee:—Held, 1. That the trustees took a legal fee under the will, that the rule in *Shelley's case* therefore applied, and that W. C. acquired a good equitable fee by the recovery. 2. That if they had only taken a life estate, their conveyance of it to W. C., the father, enabled him to suffer a recovery, and bar the contingent remainders at law and in equity, and was no breach of trust. 3. That W. C., the son, having chosen to answer in the former suit, was bound by the decree. 4. A general devise to trustees and their heirs *primò facie* gives the fee, and it lies on the parties alleging that they take a less estate to shew what less estate they take. A trust to set and let, and a direction to sell timber, are grounds for not cutting down the estate. *Collier v. Walters*, 43 Law J. Rep. (N.S.) Chanc. 216; Law Rep. 17 Eq. 252.

The decision on the same will in *Collier v. McBean* (34 Beav. 426; 34 Law J. Rep. (N.S.) Chanc. 555), that the trustees took a fee determinable when the debts were paid, disapproved of. *Ibid.*

*Devise to the heirs and assigns of a married woman "as if she had continued sole and unmarried," held not to coalesce with a life estate previously limited to her.* [See supra H 7.]

(k) *Estate tail or life estate.*

**21.**—Devise to trustees upon trust to permit A. to receive the rents for his life, and after his decease upon trust to permit the first son of A. and the heirs of his body "to receive the rents for their respective lives, severally and successively in tail male," and in default of such issue over:—Held, that A. took an estate in tail male, and not merely a life estate. *Hugo v. Williams*, 41 Law J. Rep. (n.s.) Chanc. 661; Law Rep. 14 Eq. 224.

**22.**—Direction that certain real estate should remain in the testator's family, as long as there was a lineal son descendant of his sons, and if no lineal male descendant from the eldest, the next to be entitled, and so on:—Held, that the eldest son took an estate tail in possession. *Mannox v. Greener*, Law Rep. 14 Eq. 456.

(l) *Life estate or absolute interest.*

**23.**—A testator by his will, after reference to the provision thereafter made for his granddaughter, directed that, as to certain shares, until his granddaughter M. attained the age of twenty-one years, or should be married with consent, his executors should hold them upon trust to pay the dividends to his daughter, Mrs. S.; but when his said granddaughter should attain the age of twenty-one years, or before upon marriage with consent, upon trust to pay the dividends to M. during her life, apart from her husband; and in case of her marriage with consent, then upon such marriage he gave to his executors such a sum of money as would, with the value of the shares, make up 2,500*l.*, upon trust to settle the same for the benefit and provision of M., for her separate use, with power in such settlement for M. to dispose of the same among her issue, or if no issue, a general power of disposition; and the will contained a gift over in the event of M. dying under twenty-one and unmarried. M. attained twenty-one, but was still unmarried:—Held (affirming the decision of Wickens, V.C.), that she was not entitled absolutely but took an interest for life, subject to any question that might arise on marriage. *Savage v. Tyers*, 41 Law J. Rep. (n.s.) Chanc. 815; Law Rep. 7 Chanc. 356.

**24.**—A testatrix by will appointed certain real estate to her husband upon trust for his own use for life, "with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit." After his decease "subject as aforesaid" over to other persons. The husband died without exercising the power:—Held, that he had only a life estate, and that the property went to the persons to whom it was given in remainder after his decease. *Pennock v. Pennock*, 41 Law J. Rep. (n.s.) Chanc. 141; Law Rep. 13 Eq. 141.

(m) *Absolute gift, whether cut down.*

**25.**—Gift of entire residue to testator's "wife, E., and after her death to be equally divided to the children, should there be any," and appointment of wife executrix. There being no children:

—Held, that the wife was absolutely entitled. *Crozier v. Crozier*, Law Rep. 15 Eq. 282.

**26.**—Gift of residue in trust for testator's children (sons at twenty-one and daughters at twenty-one or marriage), and if any of the children should die before attaining a vested interest, their shares to go to their children, with a proviso that, notwithstanding the trusts aforesaid, on the marriage of any daughter a moiety of her share should be held in trust for her for life with remainder to her children:—Held, that the daughters who attained twenty-one without having been married took absolutely. *In re Dowling's Trusts*, Law Rep. 14 Eq. 463.

(n) *Absolute gift or trust.*

**27.**—A testator, a retail shopkeeper, devised a freehold house to his wife to be at her will and disposal in any way she might think best for herself and family:—Held (affirming a decision of one of the Vice-Chancellors), that a charge upon the house by the widow's will of an annuity in favour of an illegitimate child of a son of herself and the testator was valid. *Lambe v. Eames*, 40 Law J. Rep. (n.s.) Chanc. 447; Law Rep. 6 Chanc. 597; affirming *Malins, V.C.*, 40 Law J. Rep. (n.s.) Chanc. 15; Law Rep. 10 Eq. 267.

**28.**—Personal property was bequeathed to a married woman for her own proper use and benefit for ever for her separate use, and the proceeds to be applied in the bringing up and maintenance of her children:—Held, that there was no trust. *Mackett v. Mackett*, 41 Law J. Rep. (n.s.) Chanc. 704; Law Rep. 14 Eq. 49.

**29.**—Under a bequest of "all my property and effects, whatsoever and wheresoever, unto my dear wife, S. L. E. (trusting that she will do justice to any children we may have) for her own absolute use and benefit," S. L. E. was held entitled to the property absolutely. *Ellis v. Ellis*, 44 Law J. Rep. (n.s.) Chanc. 225.

**30.**—Will appointing testator's widow executrix and bequeathing to her all his property "for her sole use and benefit in the full confidence that she will so dispose of it amongst all our children both during her lifetime and at her decease, doing equal justice to each and all of them:—Held, that she took a life interest with a power of appointment amongst the children. *Ware v. Maltard* (16 Jur. 492) followed. *Curnick v. Tucker*, Law Rep. 17 Eq. 310.

**31.**—Gift to testator's wife "for her sole use and benefit, in the full confidence that she will so bestow it on her decease to my children in a just and equitable spirit, and in such manner and way as she feels would meet my full approval:—Held, a life interest with power of disposition amongst the children. *Le Marchant v. Le Marchant*, Law Rep. 18 Eq. 414.

**32.**—A testator before the Wills Act, bequeathed leaseholds to his daughter, E. H. He gave his residue, after a life interest to his wife, to E. H., "for her own benefit and her children;" if his daughter should die without issue he gave the whole to his wife, for life, with remainders over:—Held, that E. H. was entitled to the re-

sidue in remainder absolutely, and that the words, "without issue," referred to an indefinite failure of issue, and that the gift over was void for remoteness. *Fisher v. Webster*, 42 Law J. Rep. (N.S.) Chan. 156; Law Rep. 14 Eq. 283.

(o) *Trust or charge.*

*Trust or charge: devise to corporation: surplus rents.* [See CHARITY, 23, 24.]

(p) *Gift by implication.*

*As to gift of intermediate income by implication.* [See supra D 9.]

*Absolute gift by implication.* [See LEGACY, 12.]

(q) *Adowson: tenancy for life.*

**33.**—A testator, who, being a clergyman, was a patron of a living then full, directed that if it should become vacant by his decease, the presentation should be offered by his executors to two clerks named by him in succession, and if both should decline, he directed his executors to present any clerk whom they might select, and, when the church was full, to sell the adowson and invest the proceeds in Consols, and pay the income to his widow during her life, for the maintenance, support and education of herself and their children. The testator died, leaving five infant daughters, who were his co-heiresses-at-law. At his death the church was full, and the executors tried to sell the adowson; but before they could succeed in so doing, the living became vacant by the death of the incumbent; whereupon a special case was filed for the opinion of the Court as to whether the daughters, the widow, or the executors were entitled to present:—Held, that the widow would take the proceeds of the adowson for her life, and not jointly with her daughters. Also, that the legal estate in the adowson passed, until sold, to her daughters as trustees for the purposes of the will; and that the widow was entitled to nominate a clerk to be presented by her daughters to the existing vacancy. *Briggs v. Sharp*, 44 Law J. Rep. (N.S.) Chan. 510; Law Rep. 20 Eq. 317.

(r) *Accumulations of income.*

**34.**—A testator directed the income of real and personal estate to be accumulated so long as the rules of law would permit; and on the death of A., that the estate and accumulations should be applied in the purchase of freehold estate, which should be conveyed to G., and his heirs. G. was convicted of felony, and sentenced to four years' penal servitude:—Held, that G. had no immediate right to payment, and the Court refused to do anything beyond continuing the accumulation. Semble—the income after twenty-one years down to the death of A. was undisposed of, and so far as it arose out of realty would belong to the testator's heir, and so far as it arose from personalty to his next-of-kin. *Talbot v. Jevers*, 44 Law J. Rep. (N.S.) Chan. 646; Law Rep. 20 Eq. 255.

*Legacy to separate use with direction to settle.* [See LEGACY, 11.]

(K) *PRECATORY TRUSTS.*

[See supra I 27–32, and TRUST, K. A. 11, 12.]

A testator bequeathed a sum of stock to trustees of a charity to pay for painting and repairing a gravestone for a certain day yearly, and to pay the balance for the purpose of the charity:—Held, there was a valid bequest subject to a precatory trust. *Hunter v. Bullock*, 41 Law J. Rep. (N.S.) Chan. 637; Law Rep. 14 Eq. 45.

(L) *VESTING: GIFT OVER.*

(a) *Gift to sons for their lives and "at their death" to their children.*

**1.**—A testator directed the interest of the residue of his estate to be paid to his sons, C. T. and J., equally for their lives, and at their death the principal to be divided equally between the children of C. T. and the children of J. C. T. and J. survived the testator. C. T. having died in the lifetime of J.:—Held, that the words, "at their death," meant "at their respective deaths," and that, on the death of C. T., a moiety of the fund became immediately divisible among his children. *Wills v. Wills*, 44 Law J. Rep. (N.S.) Chan. 582; Law Rep. 20 Eq. 342.

(b) *Gift to children "when and as they should attain twenty-one."*

**2.**—A testator bequeathed money in trust for A. for life, and after her decease to the children of A., when and as they should attain the age of twenty-one years; but if A. should die without lawful issue, then over:—Held, that the gift to the children of A. was contingent upon their attaining the age of twenty-one years. *Bree v. Perfect* (1 Coll. C.C. 128) not followed. *Kidman v. Kidman*, 40 Law J. Rep. (N.S.) Chan. 359.

(c) *Gift to class ascertainable at a particular period, with declaration as to vesting of shares.*

**3.**—A legacy was given among a class payable at the death of M. S., with a declaration that the shares were to be vested interests on the majority or marriage of the donees. M. S. survived the testatrix:—Held, that the shares of members of the class who died after M. S. under age passed to their representatives. *Simpson v. Peach*, 42 Law J. Rep. (N.S.) Chan. 816; Law Rep. 16 Eq. 208.

**4.**—A testator gave the residue of a mixed fund (after a life interest to his wife) among the children of his three brothers who should be living at the death of his wife or his own death, which events should happen last, *per capita*, to be paid and vested in them at twenty-one, or if females on marriage. One of the nieces survived the testator and his wife, but died under twenty-one, unmarried:—Held, that she took a vested interest. *In re Parr's Trusts*, 41 Law J. Rep. (N.S.) Chan. 170.

[And see MARRIAGE SETTLEMENT, 8; and supra H 5–10.]

(d) *Gift over on death without issue.*(1) *To what period gift over is referable.*

5.—A testator bequeathed funds to A. for life, with remainder to his two daughters in equal moieties for their respective lives, with remainder to their children, and in default of such children, with remainder to the testator's two sons, with remainder in case his said sons should both die without issue to B. absolutely, and in case B. should die without issue then over. B. survived A. and all the testator's sons and daughters, who all died without issue, and finally died herself without issue:—Held, that B. took an absolute indefeasible interest in the funds, and that inasmuch as she survived the period of distribution, the divesting clause never took effect. *In re Heathcote's Trusts*, 43 Law J. Rep. (n.s.) Chanc. 259; Law Rep. 6 Chanc. 45.

6.—The fourth rule laid down in *Edwards v. Edwards* (15 Beav. 357; s. c. 21 Law J. Rep. (n.s.) Chanc. 324) that where a life or other estate is given to one or more of the objects of the testator's bounty, and on the determination of that estate the subject disposed of is given to another person with a direction that if the latter shall die, without leaving a child, his share shall go over, the words indicating death without issue refer to that event occurring before the period of distribution, that is before the determination of the estate, disapproved. *Ingram v. Soutten* (H.L.), 44 Law J. Rep. (n.s.) Chanc. 55; Law Rep. 7 E. & I. App. 408, and *O'Mahoney v. Burdett*, 44 Law J. Rep. (n.s.) Chanc. 56, n.; Law Rep. 7 E. & I. App. 388.

A testator bequeathed funds in trust for A. for life, with remainder to his two daughters in equal moieties for their respective lives, with remainder to their children, and in default of such children, to the testator's two sons, with remainder, in case his said sons should respectively die without issue living at their deaths, to B. absolutely, and in case B. should die without issue living at the time of her death, then over. B. survived A., and all the testator's sons and daughters, who all died without issue, and finally died herself without issue:—Held, that on B.'s death without issue, after the determination of the previous estates, the gift over took effect. For death without issue living at the time of such death, must be taken as intended in the absence of expressions pointing to death during the continuance of the prior estates, to mean death at any time. *Ibid.*

Held also, that the fact that the gift was in the first instance to B. absolutely was not enough to prevent this operation of the gift over contained in the proviso following that gift. *Ibid.*

7.—Under a gift to X. for life with remainder to A., and if A. die unmarried or without children, to B., the gift over to B. will take effect upon A.'s dying unmarried or without children at any time unless a contrary intention appear by the will. *O'Mahoney v. Burdett* (H.L.) Law Rep. 7 E. & I. App. 388; 44 Law J. Rep. (n.s.) Chanc. 56, n.

*Edwards v. Edwards* (15 Beav. 357) discussed, and the fourth rule laid down therein controverted. *Ibid.*

8.—The rule established by *O'Mahoney v. Burdett* (41 Law J. Rep. (n.s.) Chanc. 56, n.; Law Rep. 7 E. & I. App. 388) and *Ingram v. Soutten* (44 Law J. Rep. (n.s.) Chanc. 55; Law Rep. 7 E. & I. App. 408) is only that a gift over on death without issue means death without issue at any time, unless a contrary intention appears by the will. *Olivant v. Wright*, 45 Law J. Rep. (n.s.) Chanc. 1; Law Rep. 10 Chanc. 220.

A direction, after the death of the tenant for life, to divide the property,—Held, without relying on other possible grounds for the same construction, a sufficient indication of such contrary intention. *Ibid.*

(2) *Whether importing indefinite failure of issue.*

9.—Gift of realty and personality to J. and the heirs male of his body, but in case of his death without heirs male of his body to P. in the same manner, and in case of his death without heirs male of his body to S. in the same manner. Codicil reciting that by the will the property was given in the event of the death of J. "without leaving male issue him surviving" to P., revoking that gift, and in the event of the death of J. "without leaving male issue him surviving," giving the property to the eldest daughter of J.:—Held, that section 29 of 1 Vict. c. 26 (The Wills Act) did not apply; that the gifts over to P. and S. were void as to the personality, as being on an indefinite failure of heirs, and were not affected by the codicil; and that J. took an absolute interest in the personality subject to an executory gift over to his daughter if he died without male issue surviving him. *Dawson v. Small*, Law Rep. 9 Chanc. 651.

10.—Gift by will in 1821 to A. (subject to a life interest), and if A. died without issue then over:—Held, that the gift over was void for remoteness. *Fisher v. Webster*, 42 Law J. Rep. (n.s.) Chanc. 156; Law Rep. 14 Eq. 283.

[And see MARRIAGE SETTLEMENT, 9.]

(e) *Gift over on death "leaving" no issue.*

[And see *infra* No. 15.]

11.—A testatrix devised to her granddaughter for her sole use during her lifetime, and after her death to her children in equal parts, and in case she should die leaving no issue, then to the next-of-kin. The granddaughter had one child who died before her:—Held (affirming the judgment of the Court of Queen's Bench), that the words "leaving no issue" meant "having had no issue," and that the child took a vested interest. *Trehaine v. Layton*, 44 Law J. Rep. (n.s.) Q. B. 202; Law Rep. 10 Q. B. 459.

(f) *Gift over in default of "such issue": ambiguity.*

12.—A testator had issue living at the time of his will, a son F. (who had then living two sons, F. and and three daughters E., I. and S.), a daughter I. and four grandchildren, issue of a deceased

daughter S. By his will he devised his hereditaments to his son F. for life, with remainder to his eldest grandson F. for life, with remainder to the first and other sons of the grandson successively in tail male; and for default of such issue to R., the second son of his son F. for life, with remainder to his first and other sons successively in tail male, or for default of such issue to the third, fourth and other sons of his son F. thereafter to be born successively in tail male; and in default of such issue, to the testator's daughter I. for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to his granddaughter I. for life, with remainder to her first and other sons successively in tail male; and for default of such issue to his granddaughter S. for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to all and every the fourth, fifth and other daughter or daughters of his son F. successively, and in remainder, one after another, and the heirs male of their bodies; and "for default of such issue, to the use and behoof of all and every other the issue of my body; and for default of such issue, to my right heirs for ever." And he expressed a desire "to prevent as far as might be the dispersion of his estates among several persons":—Held, that the words "all and every other the issue" were not to be read in the strict sense of intending to exclude those coming within the class who were provided for before, and were supposed to have failed, but rather to complete a provision for all the issue, so as to make the estate go over by force of the words in the limitation "in default of such issue" only upon failure of all the testator's issue; and that thus a vested remainder in tail general was created which descended to the testator's grandson F.; and that, he having executed a disentailing deed, and all the previous estates having expired, his devisees were entitled to the property. *Allgood v. Blake*; *Reed v. Blake*; and *Roach v. Blake* (Exch. Ch.), 42 Law J. Rep. (N.S.) Exch. 101; Law Rep. 8 Exch. 160.

Decision of the Court of Exchequer (41 Law J. Rep. (N.S.) Exch. 217; Law Rep. 7 Exch. 339) affirmed. *Ibid.*

**13.**—Devise to a trustee "as to" one estate to uses in favour of a testator's elder son and the sons of that son in tail male and tail general, with remainder to the second son and his sons in tail male and tail general, with remainder to the daughters of the two sons successively in tail male, and "as to" another estate to similar uses, preferring the second son and his issue to the first son and his issue, with a gift over "in default of such issue male and female of all the sons and daughters of my sons then in trust and to the use of my daughter":—Held (by Lords Chelmsford, Westbury, Colonsay, and Cairns, Hatherley, L.C., *dissentiente*), that the gift over was ambiguous, and that under the circumstances the most reasonable construction was to refer it to both estates, and that the words "as to" did not necessarily indi-

cate the commencement of a devise complete in itself. *Abbott v. Middleton* (7 H. L. C. 89) approved and followed. *Gordon v. Gordon*, Law Rep. 5 E. & I. App. 254.

(g) *Implication of cross remainders.*

**14.**—J. H. by his will devised his estate to his brother W. H., and "After his decease, I give and devise the same unto his four sons, William, George, Peter, and Thomas Pitts Hannaford, my nephews, for their respective natural lives, as tenants in common, and not as joint tenants; and after the several and respective deceases of my said nephews, then I give and devise the share or shares of them, my said nephews respectively, unto their respective eldest sons now living, for and during their respective natural lives; and after the several deceases of such eldest sons, I give and devise the same share or shares unto the first son of the body of such eldest sons of my said respective nephews, and the heirs male of the body of such first sons lawfully issuing; and, in default of such issue male of the first sons of the body of the eldest sons of my said nephews respectively, then I devise the aforesaid share or shares unto the said second, third, and all and every other son and sons of the body of the respective eldest sons of my said respective nephews, severally and successively, according to their respective seniorities, and the heirs male of the body of such second, third, and all and every other sons of such eldest sons respectively lawfully issuing. And for default of such issue, I give and devise the same share or shares unto the second and third, and all and every other son and sons now living of my said respective nephews, severally and successively, according to their respective seniorities; and unto the son and sons of such second and third, and other sons of my said respective nephews, in the same manner, and for the same estate and estates, as I have hereinbefore given the same to the eldest sons of my respective nephews and their sons. And, for default of such issue, I give and devise the same unto all and every the son and sons hereafter to be born of my said respective nephews, severally and successively, according to their respective seniorities, and their heirs in tail male. And, for default of such issue, I give and devise the same to my own right heirs for ever, it being my will and intention that the said lands shall go and remain in my name and family for ever, or as long as the law will permit such enjoyment of the same":—Held, that the effect of the limitations of the will was to create by implication cross remainders between the devisees and their respective heirs, and that therefore two of the testator's nephews having died without leaving male issue, the male heirs of the two other nephews were entitled as tenants in common to the shares of the two first above-mentioned nephews. *Hannaford v. Hannaford* (Exch. Ch.), 41 Law J. Rep. (N.S.) Q. B. 62; Law Rep. 7 Q. B. 116.

**15.**—A testator gave his residuary estate upon trust for his three daughters for life, and if any



of his daughters should die leaving issue, a share proportioned to the number of his daughters was to go to the issue of such daughter, and if only one of such daughters should die leaving issue the whole to such issue, and if all his daughters should die without issue, then to his sisters. The testator had three daughters. One daughter died leaving four children, one of whom died leaving two children born after their grandmother's death; afterwards another of the testator's daughters died a spinster:—Held, reversing the decision of one of the Vice-Chancellors, that there were implied cross limitations so that the surviving daughter had a life interest in half the share of the daughter so last dying. *In re Ridge's Trust*, 41 Law J. Rep. (n.s.) Chanc. 787; Law Rep. 7 Chanc. 665.

Held, further, that the gift to issue was to the issue living at the death of the daughter, and, therefore, the three survivors of the four children and the representative of the dead one were now entitled to the second moiety, and would, if the third daughter of the testator died without issue, become entitled to the whole. *Ibid.*

[And see *supra* H 28.]

(h) "And" for "or," and "or" for "and."

16.—A gift over in case A. B. dies in the lifetime of a testator's wife and without issue will fail, if A. B. survive the testator's wife, though he die without issue. *Reed v. Braithwaite*, 40 Law J. Rep. (n.s.) Chanc. 355; Law Rep. 11 Eq. 514.

The cases of *Grey v. Pearson* (6 H. L. C. 61) and *Doe v. Jessop* (12 East, 280) (which established the above rule) and *Brownwood v. Edwards* (2 Ves. sen. 243) (*contra*) considered. *Ibid.*

17.—A testatrix in 1823 devised lands to A. and B. as tenants in common in fee, and in case of death of either under twenty-one and leaving no child, the whole to go to the survivor, and in case of death of both leaving no child, then over. A. died under twenty-one without issue; B. attained twenty-one:—Held, that the gift over would take effect in case of his death, leaving no child. *Else v. Else*, 41 Law J. Rep. (n.s.) Chanc. 21; Law Rep. 13 Eq. 196.

"Or" read "and." [See *supra* H 10.]

(i) Gift over on death under twenty-one.

18.—A testator, by his will, which recited, and was intended to carry into effect, articles made on the marriage of his daughter; devised certain real property to trustees to the use of the husband for life, or until bankruptcy or insolvency, and after bankruptcy or insolvency to the use of trustees upon trust during the joint lives of the husband and wife to pay the rents and profits to the wife for her separate use, with remainder to the wife for life, with remainder to trustees to preserve contingent remainders, with remainder, subject to power of appointment, to the children of the marriage in fee as tenants in common, with benefit of survivorship, and if only one child, then to that

one, and in case every child "born or to be born" should die under the age of twenty-one years, and without leaving lawful issue born or to be born in due time afterwards, then "to the use of the heirs and assigns of the wife as if she had continued sole and unmarried." There was one child living at the date of the will. All the children died in the lifetime of the testator, one having attained the age of twenty-one years. The husband became insolvent, and afterwards joined with the wife in a conveyance to such uses as she should by deed or will appoint. She appointed by will to S.:—Held, in an action of ejectment, brought by the heir-at-law of the testator against S., that a child having attained the age of twenty-one years, the ultimate limitation never took effect, that the case was one of lapse, and that the heir-at-law was therefore entitled to the property. *Tarbut v. Tarbut* (41 Law J. Rep. (n.s.) Chanc. 129) approved. *Brookman v. Smith* (Exch. Ch.), 41 Law J. Rep. (n.s.) Exch. 114; Law Rep. 7 Exch. 271.

19.—Gift by a testator of all his real and personal estate on trust to convert and pay legacies, with a direction that the trustees should hold the residue of his "said personal estate so converted" upon trust to pay the income for the benefit of his four natural children until they respectively attained twenty-one, and upon their attaining that age upon trust to pay the "said residue of his said personal estate" to his four children equally:—Held, first, that the proceeds of sale of real estate passed under the gift of residue; secondly, that the children's shares did not vest till twenty-one, and that the share of a child dying under twenty-one was undisposed of, and passed to the testator's heir-at-law and next-of-kin. *Hanson v. Graham* (6 Ves. 239) distinguished. *Leigh v. Leigh* (17 Beav. 605) not followed. *Spencer v. Wilson*, 42 Law J. Rep. (n.s.) Chanc. 754; Law Rep. 16 Eq. 501.

[And see MARRIAGE SETTLEMENT, 10.]

(k) Gift of income for maintenance.

20.—A legacy, which would otherwise be contingent on the legatee attaining a certain age, will become vested if there is a direction to apply in the meantime the income or so much thereof as the trustees think fit for the legatee's maintenance, and no gift over of the unapplied income. *Fox v. Fox*, Law Rep. 19 Eq. 286.

*Pulsford v. Hunter* (3 Bro. C. C. 416), and *In re Ashmore's Trusts* (39 Law J. Rep. (n.s.) Chanc. 202; Law Rep. 9 Eq. 99), not followed. *Ibid.*

[And see *supra* E 1.]

(l) Direction for payment at twenty-four.

21.—A testator directed his trustees to pay the income of 5,000*l.* to his nephew P., for his maintenance or education, until he should attain the age of twenty-four years; and to pay him the capital when he should attain that age, and if he should die under that age, gift over. P. survived the testator, and died under twenty-four. At the

time of his death the trustees had in their hands a sum of money representing accumulations of income which had not been applied for P.'s benefit:—Held, that this surplus income belonged to P.'s representatives on two grounds: first, that the legacy had become vested liable to be divested; and secondly, that the income and capital were subjects of separate and distinct gifts. *In re Peek's Trusts*, 42 Law J. Rep. (N.S.) Chanc. 422; Law Rep. 16 Eq. 221.

(m) *Absolute gift at twenty-five: gift over on death.*

22.—A testator gave all his personal estate to his two sisters, one of whom was twenty-five years old, and the other under that age; and he directed, that the former should have the immediate control of her share, and the younger upon attaining the age of twenty-five years. And "in case of the death of either of my sisters before me, or before marrying and having children, the whole of the property to go to the survivor:—Held, affirming the decision of Malins, V.C. (40 Law J. Rep. (N.S.) Chanc. 151; Law Rep. 11 Eq. 222), that the younger sister who after the testator's death attained twenty-five, but had not married and had children, took, at twenty-five, an absolute and indefeasible interest in her share. *Clark v. Henry*, 40 Law J. Rep. (N.S.) Chanc. 377; Law Rep. 6 Chanc. 588.

(n) *Gift over before interest vested.*

23.—Legacy to A. to be vested in him at twenty-one, or if he should die under that age leaving issue at his death, and in case he should die without attaining a vested interest, then over. A. attained twenty-one, and died in the testator's lifetime, leaving issue:—Held, that the gift over took effect. *In re Gaitskell's Trusts*, Law Rep. 15 Eq. 386.

(o) *Gift over by implication.*

24.—A testator gave residuary personalty to trustees in trust for his daughter for life, and after her death in trust for her issue as she should by deed or will appoint, and in default of such appointment and subject to any incomplete appointment in trust for such persons generally as she should appoint, and in default in trust for next-of-kin according to the Statutes of Distribution. The daughter by her will, after reciting that, as the fact then was, there were no children of the marriage, exercised her general power of appointment in favour of her husband. After the date of the will she had several children, but died without having altered it, or otherwise exercised the power. Upon petition by the husband for payment out to him of the fund,—Held, first, that in default of exercise of the limited power the children took by implication; secondly, that if not, the motive for the exercise of the general power being the failure of children, the appointment based upon such motive could not take effect, and the children took in default of appointment as next-of-kin under the Statute of Distributions to the exclusion of the husband. *In re Jeffery's Trusts*, 42 Law J. Rep. (N.S.) Chanc. 17; Law Rep. 14 Eq. 36.

25.—A testator bequeathed a legacy to Mrs. C., "for her absolute use and benefit, except as hereinafter limited," and directed the same, with other legacies to females, to be invested, and the interest therefrom to be for the legatees' separate use; and in case any of the legatees should become bankrupt, or assign the interest bequeathed to her, the same was to fall into the testator's residuary estate, "except in respect of Mrs. C., whose legacy is to go to her children, according to her appointment, and in default to them absolutely." By Mrs. C.'s marriage settlement her husband had covenanted to settle all after-acquired property of his wife. Mrs. C. died without having become bankrupt or assigned her interest in the legacy, and having by will appointed the same to her children equally. The Commissioners of Inland Revenue thereupon insisted that Mrs. C.'s share did not go to her children directly under the will, but that her husband must take out administration to her estate, in order to obtain possession of it. By consent the question was raised upon a petition for the opinion of the Court under Lord St. Leonards' Act (stat. 22 & 23 Vict. c. 35, s. 30):—Held (not without doubt), that by consent the question, although between the Crown and a subject, might be decided on this petition; and held that under the will the legacy upon Mrs. C.'s death went directly to her children. *In re Ware's Trusts*, 41 Law J. Rep. (N.S.) Chanc. 121.

[And see *supra* D 9.]

(p) *Gift over on insolvency.*

26.—A testator gave the income of property to one of his trustees for life, or till bankruptcy, or till he should do or suffer anything to deprive himself of the enjoyment of the income. He was adjudicated bankrupt, the bankruptcy was annulled, and ultimately his property revested in himself. The trustees managed the property so that there was no income payable to him in the meantime:—Held, that he had not forfeited his life interest. *Robins v. Rose*, 43 Law J. Rep. (N.S.) Chanc. 334.

27.—A gift over of leaseholds on insolvency held to take effect though the insolvency (being in Australia) did not affect the leaseholds. *In re Aylwyn's Trusts*, 42 Law J. Rep. (N.S.) Chanc. 745; Law Rep. 16 Eq. 585.

[And see *FORFEITURE*, 1-7.]

(q) *Gift over on failure of trust being ascertained.*

28.—A testator bequeathed the residue of his estate in trust for such children as should be living at the time of his death, or might be born within due time afterwards; and in case of failure of such trust, to such of his brothers as should be living at the time of the failure of the said trust being ascertained. The testator left no children, and had no posthumous child by his wife, who survived him. A brother of the testator survived him only a few days:—Held, that the failure of the trust was ascertained at the time of the death of the testator, as his widow was not then *en ventre*, and that the gift of the residue had therefore vested. *In the*

*goods of Sidebottom*, 41 Law J. Rep. (N.S.) P. & M. 23; Law Rep. 2 P. & D. 365 *nom.* *Sidebottom v. Sidebottom*.

(r) *Shifting clause.*

29.—A testator devised estates in P. in trust for T., the second son of C., for life, with remainders to his first and other sons in tail with remainders over, and declared that if T. or his issue male should come into possession of estates in S. settled on the marriage of his father, the trusts of the P. estates in favour of T. and his issue male should cease, and the estates go over to the persons next entitled in remainder. The S. estates, which were settled on the marriage of T.'s father on the father for life, with remainder to his first and other sons successively in tail, were disentailed by the father and the eldest son, and a considerable portion of them, but not the whole, resettled to uses under which, on the death of the elder son without issue, T. and his father had an absolute joint power of appointment over them. The father afterwards died:—Held, that the event contemplated by the shifting clause had not occurred, the interest acquired by T. being under what was substantially a new title, and not a continuation of the old one. *Meyrick v. Mathias*; and *Meyrick v. Laws*, 43 Law J. Rep. (N.S.) Chanc. 521; Law Rep. 9 Chanc. 237.

*Divesting clause: eldest son.* [See MARRIAGE SETTLEMENT, 11.]

*Legacy vested or contingent.* [See LEGACY, 14.]

(M) HOTCHPOT CLAUSE.

1.—Gift of realty among some of a testator's children and bequest of personalty among all, with a direction that to equalise their shares the children to whom real estate was given should bring them into account at values named. The executor absconded with personalty, a considerable portion of which was after many years recovered:—Held, that the sum recovered must be treated as consisting of principal with interest at 4l. per cent. from the testator's death; that the devisees must account for the values of their estates as part of the principal, and that the part of the sum attributable to interest must be apportioned among them according to their shares. *Ackroyd v. Ackroyd*, Law Rep. 18 Eq. 313.

2.—A testator directed his business to be carried on for a period, not longer than until his youngest child attained twenty-one, and then sold; and directed the annual income of his estate to be applied as a common fund for the benefit of his children as the trustees thought fit until the youngest attained twenty-one, the surplus income to be accumulated in aid of the common fund, and the income and accumulation to "follow the destination of the capital whence the same shall have arisen." The capital was made divisible amongst the children equally, and by a codicil the testator directed that all advances by him should be brought into hotchpot:—Held, that the accumulations ought to be divided amongst the children equally, they giving credit for sums allowed for

maintenance with interest, and for interest from the testator's death on advances, and that the capital of the advances ought to be brought into hotchpot on the division of the capital of the estate. *Hilton v. Hilton*, Law Rep. 14 Eq. 468.

3.—A testator being indebted to the trustees of his daughter's settlement upon a covenant contained in the settlement, by his will directed his estate, after payment of debts, to be divided amongst his children equally; but if the net produce of his estate exceeded 40,000l. then his sons were to have one-twentieth part more than the daughters; and he declared that the moneys due on the above-mentioned covenant should be taken in satisfaction *pro tanto* of the daughter's share, and should be brought into hotchpot, and accounted for accordingly. Upon realising the testator's estate it was found that, if the moneys due upon the covenant were not to be brought into account for the purpose of distribution, but were to be treated as a debt, the estate would be under 40,000l.:—Held, that the moneys due upon the covenant must be brought into account and treated as part of the daughter's share, and that the sons were therefore entitled to one-twentieth more than the daughters. *Fox v. Fox*, 40 Law J. Rep. (N.S.) Chanc. 182; Law Rep. 11 Eq. 142.

4.—A testator directed that in the division of his property an estate belonging to one of his children should be brought into hotchpot. After the date of his will he acquiesced in the sale of this estate and the settlement of the proceeds on the child for life, with remainder to her children:—Held, that the condition was not thereby waived, and that in the division of the testator's property the estate must be brought into hotchpot. *Middleton v. Windross*, 42 Law J. Rep. (N.S.) Chanc. 555; Law Rep. 16 Eq. 212.

5.—Bequest of proceeds of sale and conversion of real and personal estate in trust for a testator's wife during life or widowhood, and afterwards for her children living at her death or second marriage, and the issue of any child dying before that time, as tenants in common *per stirpes*, with a direction that no "child" to whom he should have "paid" any portion in his lifetime should participate in the trust property without bringing such portion into hotchpot. On the marriage of one of his daughters, the testator had covenanted to stand seised of freehold property in trust for her in fee. The daughter predeceased her father, leaving several children:—Held, that the hotchpot clause could not be extended to include issue, and therefore (whatever was the effect of the word "pay") the daughter's children need not bring the value of the freehold into hotchpot. *Hewitt v. Jardine*, Law Rep. 14 Eq. 58.

(N) SUBSTITUTION AND SURVIVORSHIP.

(a) *Substitution in lifetime of testator or tenant for life.*

1.—Bequest to the children of R., with a proviso that if any "legatee" should die in the lifetime of the testatrix leaving children, such legacy should be paid to the children of the deceased

"legatee":—Held, that a child of R. who was dead at the date of the will was not a "legatee" within the clause, and that the children of such child could not take. *In re Potter's Trusts* (Law Rep. 8 Eq. 52) and *Adams v. Adams* (Law Rep. 14 Eq. 246) distinguished. *Hunter v. Cheshire*, Law Rep. 8 Chanc. 751.

2.—Bequest to a testator's sister S., for her life and after her decease, equally among the testator's brothers and sisters, with a direction that should any of his brothers and sisters die leaving issue during the lifetime of S., their shares should be equally divided among their children:—Held, that the children of a brother who died fifteen years before the date of a will were entitled to a share. *Adams v. Adams*, Law Rep. 14 Eq. 246.

*In re Potter's Trusts* (Law Rep. 8 Eq. 52) followed. *Ibid*.

3.—Devise to trustees for sale in trust for A. for life, and at her death for her children then living, and the issue of her children then dead, followed by a proviso, that if the estate should be sold and any money should become payable to the issue of A., and any of such issue should then be dead leaving issue, the issue of such issue should take the share to which their parent would have been entitled. In the will there was a previous gift in joint tenancy to persons described as issue of A., and who were issue, but were not children:—Held, that the word "issue" in the proviso did not include children of A., and that a child of A., who survived her, but died before the period of distribution, leaving issue, was indefeasibly entitled. Decision of Malins, V.C., affirmed. *Heasman v. Pearce*, Law Rep. 7 Chanc. 660.

#### (b) Period of substitution of issue.

4.—A testator directed his residue to be divided on the death of his wife (who survived him) equally between his brothers and sisters by name, and declared that if any of them should die leaving issue, his, her, or their shares should go to his, her, or their respective issue:—Held, first, that the class was to be ascertained, as to the issue of a legatee who had died before the testator, at the death of the testator, and as to the issue of a legatee who had survived him at the death of the legatee; secondly, that the members of each class, whether children or remoter issue of the legatee, took *per capita*; thirdly, that they took as joint tenants. *Hobgen v. Neale*, 40 Law J. Rep. (N.S.) Chanc. 36; Law Rep. 11 Eq. 48.

#### (c) Period of survivorship.

5.—A testator gave the income of 4,000*l.* to his wife, which he directed after her death to fall into the residue. He gave his residue to his four sons *nominatim*, with benefit of survivorship, but if they should leave issue their shares were to go over to their issue:—Held, that the 4,000*l.* belonged absolutely to the sons who were alive at the death of the widow and the issue of such as were dead. *In re Hill's Trusts*, 40 Law J. Rep. (N.S.) Chanc. 594; Law Rep. 12 Eq. 362.

#### (d) "Survivor" read "other."

6.—A testator devised freeholds in moieties to the use of A. and B. respectively for life, with remainder to the use of their respective children equally as tenants in common in tail, and in default of issue of either A. or B., then to the same uses in favour of the "survivor of them" and her issue as thereinbefore declared concerning their original shares; remainders over. A. died leaving a child, who thereupon became tenant in tail of A.'s moiety. Subsequently B. died without issue:—Held, that A.'s child then became tenant in tail of B.'s moiety, "survivor" being read "other." *In re Row's Estate*, 43 Law J. Rep. (N.S.) Chanc. 347; Law Rep. 17 Eq. 300.

7.—A testator directed one-sixth share of a sum of Bank annuities to be held upon trust for each of his six daughters for life, with remainder for benefit of her children, with a proviso that if any of his daughters should die without leaving a child who should live to attain a vested interest, her share should be in trust for his surviving daughters in equal shares during their respective lives, with remainder for their respective children *per stirpes*, and the will contained a gift over in case none of the testator's daughters should have a child who should live to attain a vested interest. One of the daughters died, leaving three sisters and children of two deceased sisters her surviving, and without leaving any child who attained a vested interest in her share. Upon failure of issue of the daughter so dying,—Held, reversing the decision of the Master of the Rolls, that the children of the deceased sisters were entitled to participate in the share to which the daughter so dying had been entitled for life, and the words, "surviving daughters," must be construed to mean daughters whose *stirpes* were surviving. *Waite v. Littlewood*, 42 Law J. Rep. (N.S.) Chanc. 216; Law Rep. 8 Chanc. 70.

[And see DEED, 8.]

#### (e) "Living," held to mean "having issue living."

8.—A testator gave real estate to his son T. for life, with remainder to his children in tail, with cross remainders as to original and accruing shares, and failing such issue of T., "in trust for my other children equally and the heirs of their respective bodies, as tenants in common, or if there be only one of my said children then living, in trust for that child only, and the heirs of his or her body," with cross remainders as to original and accruing shares. Similar gifts of other real estates were made to five other children. And the testator gave personalty on trusts for the children and issue, corresponding with the devise of the real estates, and the will contained a clause substituting the issue of any child dying in the testator's lifetime for the parent. One of the other children died without issue before T., and the personal representatives of such child claimed a share of the personalty of which T. was tenant for life:—Held, that the limitation was to be read "in trust for my other children who, or the issue of whose bodies may be then living as tenants in

common in tail, and if only one, for that one, and the heirs of his or her body;" and that the representatives of the child, who had previously died without issue, took nothing. *Cooper v. MacDonald* (No. 2), 42 Law J. Rep. (N.S.) Chanc. 539; Law Rep. 16 Eq. 258.

#### (O) CONDITIONAL AND CONTINGENT GIFTS.

##### (a) *Conditional gift founded on mistake.*

1.—A testator having by his will given 4,000*l.* to certain charitable institutions, made a codicil as follows: "Presuming and believing that the rental of my estate will produce 16,000*l.* a year, I give those institutions 4,000*l.* more." The income of the testator's estate, however, was at his death much less than 16,000*l.* a year:—Held, that, the testator's reason for the gift of the second 4,000*l.*, being the supposed increase of his property, and the fact of such increase being incorrect, the gift of this 4,000*l.* failed. *Thomas v. Howell*, 43 Law J. Rep. (N.S.) Chanc. 511; Law Rep. 18 Eq. 198.

Gifts founded on reasons applicable on the one hand to the legatee, and on the other to the testator's property, distinguished. *The Attorney-General v. Lloyd* (3 Atk. 551) observed upon. *Ibid.*

##### (b) *Impossible condition.*

2.—Bequest to a college to found a professorship according to certain rules which the testator expressed his intention to prepare, and upon the acceptance of which by the college, the bequest was to be conditional. The testator having died without preparing any rules,—Held, that the reference to the rules could not be read as a description of the professorship, but as a condition attached to the bequest, and that, the condition having been rendered impossible by the act of the testator, the bequest took effect. *Yates v. The University College, London*, Law Rep. 8 Chanc. 454: affirmed on appeal (H.L.), 45 Law J. Rep. (N.S.) Chanc. 137; Law Rep. 7 E & I App. 438.

*Non-compliance through ignorance.* [See LEGACY, 22, 23.]

##### (c) *Devise contingent on non-sale of property.*

3.—A testator, by codicil, after reciting that he had contracted to purchase certain land, and that his personality might be deficient to enable his executors to carry out the obligation of his will, directed them to realise any such deficiency by sale for not less than 8,000*l.* of the L. farm; and in case they should be unable to obtain 8,000*l.* for the farm, he bequeathed the farm upon certain conditions to his son, C. A., and in case they did sell and obtain 8,000*l.* he directed 4,000*l.* of the same to be invested in land for the benefit of C. A. upon the same conditions as he would have inherited the L. farm in case of non-sale. There was no deficiency, and the executors did not sell:—Held, reversing the judgment of the Court of Exchequer (39 Law J. Rep. (N.S.) Exch. 111), that the intention of the testator was not merely to protect C. A. from damage, but to benefit him to the further extent of at least 4,000*l.*, and that to

carry out this intention the provision, "in case of non-sale," might be construed as intended to apply to the case of a non-sale by reason of there being no deficiency of personality. *Warde v. Plumb* (Exch. Ch.), 40 Law J. Rep. (N.S.) Exch. 105.

##### (d) *Gift for particular purpose.*

4.—A testator by his will declared that it should be lawful for his trustees, at the request of E. P., during her life, and after her death, at their discretion, to expend any sum or sums not exceeding 6,500*l.*, in purchasing commissions for or obtaining the promotion of W. P., in the army. E. P. requested the trustees to pay, under the trusts of the will, the sum of 6,500*l.* absolutely to W. P., who was in the army. Before any payment had been made, purchase in the army was abolished:—Held, that W. P. was entitled to have the 6,500*l.*, with interest at 4 per cent., from the date of the request paid to him absolutely. *Palmer v. Flower*, 41 Law J. Rep. (N.S.) Chanc. 193; Law Rep. 13 Eq. 250.

##### (e) *Condition as to residence.*

5.—A testatrix made a codicil to her will as follows: "I direct all interest given by my said will to my niece, Elizabeth, the wife of William Wilkinson, shall pass, as in my said will named in case of her death, should she not cease to reside in Skipton within eighteen months of my death":—Held, that the condition as to non-residence was void. *Wilkinson v. Wilkinson*, 40 Law J. Rep. (N.S.) Chanc. 242; Law Rep. 12 Eq. 604.

6.—A testatrix being entitled to a leasehold house for the life of K., and a term of twenty-one years from his death, bequeathed it by that description in trust for her two nieces till marriage, imposing conditions as to residence. Afterwards, K. having died, the testatrix surrendered the old lease, and took a fresh one for seventy-five years. She then made a codicil, confirming her will. One of the nieces married:—Held, that the trusts of the will subsisted with regard to the seventy-five years' term but only for the same period as they would have subsisted in case the former lease had been still in existence, and that the conditions were not discharged. *Wedgwood v. Denton*, 40 Law J. Rep. (N.S.) Chanc. 526; Law Rep. 12 Eq. 290.

##### (f) *Condition in restraint of alienation.*

7.—Devise as follows: "To my mother all my real and personal estate, and knowing that what I devise to my said mother will become the property of her husband, R. G., I therefore declare the intention of my will to be that the said R. G., being my mother's husband and a kind step-father to me, shall hold and enjoy all my said real and personal estate to him, his heirs, executors, administrators, and assigns for ever, and to be absolutely at his free will and disposal, provided that he does not at any time dispose of any portion of my said property to any or either of my late father's family":—Held, that whatever estate the mother took, her husband took an estate in

fee in the realty. *Gravenor v. Watkins*, 40 Law J. Rep. (n.s.) C. P. 197, 220; Law Rep. 6 C. P. 500.

8.—Devise in fee to a brother of a testatrix, "on the condition that he never sells it out of the family:"—Held, that "the family" meant the blood relations of the devisee, and that the condition was valid in law as a partial restraint on alienation. Observations on *Attwater v. Attwater* (18 Beav. 330; 23 Law J. Rep. (n.s.) Chanc. 692). In *re Macleay*, 44 Law J. Rep. (n.s.) Chanc. 441; Law Rep. 20 Eq. 186.

(g) *Condition in restraint of marriage.*

9.—H. B. by his will devised and bequeathed his residuary real and personal estate to his two sons, H. W. B. and C. B., in trust for sale and conversion, and for investment on various securities; and he directed his trustees to divide the annual income of the trust fund, after certain deductions, among his seven other children, during their lives, in specified shares, of which his two daughters, L. P. B. and N. M. S. B., were to have ten each; and he further directed that after the death of the survivor of his said seven children, the trust fund should be divisible between his two sons, H. W. B. and C. B., and their respective executors, administrators and assigns, in equal shares. By a codicil to his will H. B. declared that on the marriage of either of his daughters, L. P. B. and N. M. S. B., the bequests of shares made to them by his will should be void; and in lieu of the same he gave to such one of them as should have married four shares only for her separate use; and he gave such one of them as should remain unmarried thirteen of the same shares, and directed that on one of his said daughters being married the three overplus shares, and in case of both his said daughters marrying, the twelve overplus shares should fall into and form part of his residuary estate, and be divided as in his will was mentioned. L. P. B. married after the death of H. B.—Held, that the condition reducing her shares in case of marriage was void, and that she was, although married, entitled to the ten shares of the income of the trust fund during her life. *Bellairs v. Bellairs*, 43 Law J. Rep. (n.s.) Chanc. 669; Law Rep. 18 Eq. 510.

10.—If a gift is made to a married man, coupled with a condition that in the event of his second marriage the gift is to go over, the condition is inoperative. *Allen v. Jackson*, 44 Law J. Rep. (n.s.) Chanc. 336; Law Rep. 19 Eq. 631.

(h) *Condition not apportionable.*

11.—A testator directed that a specific sum of 10,000*l.* should be applied in paying off a charge on his B. estate, if established; and that, in case it should be so applied, a charge of 13,000*l.* to which his D. estate was liable should be raised out of his B. estate. The 10,000*l.* was accordingly applied in paying off the charge on the B. estate. Subsequently, the other personalty having proved insufficient for payment of the testator's debts,

the B. estate had to refund a portion of the 10,000*l.*:—Held, that the disposition in favour of the D. estate was upon a condition which was not apportionable; and that, unless the B. estate got the 10,000*l.* in full, the right of the D. estate to exoneration did not arise. *Caldwell v. Cresswell*, Law Rep. 6 Chanc. 278.

(i) *Gift cum onere.*

[See LEGACY, 13, and supra D 5.]

(P) EXECUTORY GIFTS.

1.—A testator gave shares of his property to his two infant daughters "to be settled on themselves at their marriage." Upon the daughters attaining twenty-one without having married,—Held, they were entitled to have their shares paid and transferred to them absolutely. *Magrath v. Morehead*, 41 Law J. Rep. (n.s.) Chanc. 120; Law Rep. 12 Eq. 49.

2.—A testator devised his real estate to trustees upon trust for one of his granddaughters, and directed that in the event of her marrying under twenty-one (which event happened), then they should assure the same by deed to her for her life to her separate use, without power of anticipation, with remainder to her children as tenants in common in tail with remainders over, with power to the trustees to secure a life interest to the husband after the death of the granddaughter either with or without impeachment for waste:—Held, that the life estate of the granddaughter must be subject to impeachment for waste. *Clive v. Clive*, 41 Law J. Rep. (n.s.) Chanc. 386; Law Rep. 7 Chanc. 433.

(Q) TRUSTS BY REFERENCE TO OTHER TRUSTS.

(a) *Multiplication of powers, &c.*

1.—A testator by will gave specific estates to trustees for each of his children for life, remainder to their issue in tail with cross-remainders. He gave each tenant for life power to appoint an annuity not exceeding one-third of the estates specifically devised to him or her to a husband or wife surviving. After directing payment of his debts, he gave the residue of his real and personal estate to the trustees to divide between his children, and hold on the same trusts as the specifically devised estates:—Held, that the referential trusts of the residue included all the powers given over the specifically devised estates, and gave powers to each tenant for life to appoint an annuity of one-third of the income of his or her share of residue, as well as of the specifically devised estate, to a husband or wife surviving. *Cooper v. Macdonald*, 42 Law J. Rep. (n.s.) Chanc. 533; Law Rep. 16 Eq. 258.

2.—A bequest of leaseholds by reference to the uses declared respecting freeholds:—Held, to make the leaseholds subject to other limitations and restrictions declared concerning the freeholds. *Heasman v. Pearce*, 40 Law J. Rep. (n.s.) Chanc. 258; Law Rep. 11 Eq. 522.

(b) *Vesting of leaseholds in tenant in tail.*

3.—A testator devised and bequeathed real and personal estates in trust for the eldest son then living of the testator's daughter C. for life, remainder to his first and other sons in tail, with like remainder to the other sons of C., with divers remainders over, and an ultimate remainder to the testator's right heirs and next-of-kin. The will of the testator then provided that such person or persons as should thereunder be entitled to an estate tail in possession in the real estate should not be absolutely entitled to the leasehold and personal estates until he, she or they respectively should attain the age of twenty-one years, and that the said leasehold and personal estates should absolutely belong only to such person or persons as should first attain the age of twenty-one years, and become entitled to an estate tail in possession in his real estate under the trusts therein aforesaid, and in the meantime the same leasehold and personal estates should remain subject to the trusts thereinbefore declared:—Held (affirming the decree of Stuart, V.C., 37 Law J. Rep. (N.S.) Chanc. 865, *sub nom. Holloway v. Webber* and *Holloway v. Holloway*), that the words "in possession" in the proviso in the will did not mean the actual receipt of the rents and profits of the real estate, and that the proviso included only tenants in tail by purchase, and was valid, and that the tenant in tail entitled by purchase who first attained the age of twenty-one years, although in the lifetime of the tenant for life, was absolutely entitled (subject to his father's life interest) to the leasehold and personal estates. *Martelli v. Holloway* (H.L.) 42 Law J. Rep. (N.S.) Chanc. 26; Law Rep. 5 E. & I. App. 532.

*Devise and bequest of estate and effects: trusts applicable to personality: resulting trust to heir.* [See TRUST, A 14.]

[And see HEIRLOOMS.]

## (R) REMOTENESS.

1.—A testator gave a fund to trustees upon trust, after the decease of his daughter, for all the children of his said daughter who should attain the age of twenty-one years and the lawful issue of such of them as should die under that age leaving issue, which issue should afterwards attain the age of twenty-one years or die under that age leaving issue, as tenants in common, such issue to take only the share which his, her or their parent would have taken if living. In the events which happened, no child of the daughter died under twenty-one leaving issue:—Held, that the true construction of the gift was to treat it as severed; so that if the interest attributable to any one child should, in the events which happened, become void for remoteness, the interests of the other children would not be affected. Therefore, in the events which had happened, the entire gift was good. *Webster v. Boddington* (26 B. & W. 128) distinguished. *Seaman v. Wood* (22 Beav. 581) not followed. *In re Moseley's Trusts*, 40 Law J. Rep. (N.S.) Chanc. 275; Law Rep. 11 Eq. 499.

Digest, 1870-1875.

2.—Where property is limited in remainder after an estate tail to trustees upon trust to sell and distribute the proceeds amongst a class to be ascertained at the determination of the estate tail, the gift of the proceeds will not be void for remoteness, even though the class may comprise individuals beyond the limits of the rule against perpetuities. *Heasman v. Pearse*, 41 Law J. Rep. (N.S.) Chanc. 705; Law Rep. 7 Chanc. 275.

Decision of Malins, V.C. (40 Law J. Rep. (N.S.) Chanc. 258; Law Rep. 11 Eq. 522) reversed. *Ibid.*

And see LEGACY, 33 and supra I 32, Q 2.

## (S) PARTICULAR WORDS.

- "All and every child or children." [See supra I 2.]
- "All my shares." [See LEGACY, 19.]
- "All the rest." [See supra E 5.]
- "And" for "or." [See supra H 10; L 16, 17.]
- "As to." [See supra L 13.]
- "Between them." [See supra I 3.]
- "Children." [See supra H 11-14.]
- "Children born or to be born." [See supra H 7.]
- "Children or legal issue." [See supra H 10.]
- "Eldst son." [See supra H 27, and MARRIAGE SETTLEMENT, 5.]
- "Et cetera." [See supra D 12.]
- "Every other son during his life." [See supra H 28.]
- "Family." [See supra D 9; H 9; O 8.]
- "Free occupancy of house." [See supra D 4.]
- "Freehold houses." [See supra D 3.]
- "Furniture, &c." [See supra D 12.]
- "Heirs." [See supra H 22.]
- "In or about house and premises." [See supra D 11.]
- "Issue." [See supra N 3.]
- "Lands." [See supra D 2.]
- "Leaving no issue." [See supra L 11.]
- "Legatee." [See supra N 1.]
- "Living" read "having issue living." [See supra N 8.]
- "Money." [See supra D 13-15.]
- "Nephews and nieces." [See supra H 19-21.]
- "Next-of-kin." [See MARRIAGE SETTLEMENT, 15.]
- "Or" read "and." [See supra H 10; 16, 17.]
- "Personal estate and effects." [See supra D 20.]
- "Personal representatives." [See supra, MARRIAGE SETTLEMENT, 12-14.]
- "Railway shares." [See LEGACY, 6.]
- "Relatives," "relations." [See supra H 23-25.]
- "Securities for money." [See LEGACY, 8.]
- "Small balance." [See supra D 18.]
- "Specifically" devised. [See supra D 6.]
- "Such issue." [See supra L 12, 13.]
- "Sums due and owing." [See supra D 16, 17.]

"Survivor" read "other." [See supra N 6, 7.]

"Testamentary expenses." [See supra D 21; LEGACY, 17.]

"Then living." [See supra H 5.]

"Without issue." [See supra I 32.]

## (2) VALIDITY OF WILLS AND REQUISITE FORMALITIES.

[Mortgage or deed of sale by a devisee of lands in a register county to prevail over any assurance from an heir-at-law, if previously registered, although the will was not registered. 37 & 38 Vict. c. 78, s. 8.]

### (A) COMPETENCY OF TESTATOR.

#### (a) Mental capacity.

1.—In contemplation of law the expression, "sound mind" does not mean a "perfectly balanced mind." The question of mental soundness is one of degree. In considering it large allowance must be made for the difference of individual character; but in every case the highest degree of mental soundness is required in order to constitute capacity to make a testamentary disposition, inasmuch as the act involves a larger and a wider survey of facts and things than is required in the other transactions of life. *Banks v. Goodfellow* (39 Law J. Rep. (N.S.) Q.B. 237) considered. *Boughton v. Knight*, 42 Law J. Rep. (N.S.) P. & M. 25; Law Rep. 3 P. & D. 64.

#### (b) Undue influence.

2.—The influence which is "undue" in the case of gifts *inter vivos* is different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos*, it is considered by the Courts of Equity that the natural influence arising out of the relation of parent and child, husband and wife, doctor and patient, attorney and client, confessor and penitent, or guardian and ward exerted by those who possess it to obtain a benefit for themselves is an "undue" influence. Gifts or contracts brought about by it are, therefore, set aside, unless the party benefited can shew affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment. The law regarding wills is different. The natural influence which such relations as those in question involve may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing and is a free agent; and hence the rules adopted in Courts of Equity in relation to gifts *inter vivos* are not applicable to the making of wills. *Parfitt v. Lawless*, 41 Law J. Rep. (N.S.) P. & M. 68; Law Rep. 2 P. & D. 462.

#### (c) Onus of proof: suspicious circumstances.

3.—There is no rule that if it is proved or admitted that a testator was of sound mind, memory and understanding, and that a will has been read over to him or that he has read it to himself, and that he has signed it, he must be taken to have known and approved of the contents of such will, and that such knowledge and approval must be held to extend to every part of such will. The presumption in favour of every part of the will arising where these circumstances exist may be removed where the proof that the will was read to or by the testator is open to suspicion, or where there is room for a suggestion of fraud, especially in cases where the will has been prepared and propounded by strangers in blood to the testator, but who are beneficiaries under it. For the onus of proving an instrument as the last will of a free and competent testator lies on him who propounds it, and where the person propounding is himself a beneficiary under it and also a stranger in blood to the testator, the Court should be vigilant and jealous in examining the evidence supplied in support of the instrument or will. *Fulton v. Andrew* (H.L.), 44 Law J. Rep. (N.S.) P. & M. 17; Law Rep. 7 E. & I. App. 448.

### (B) WHAT PAPERS ARE TESTAMENTARY.

4.—A. executed as a will a paper writing, which commenced—"I have given all that I have to B.;" and contained provisions which were consistent with an intention that it should take effect after A.'s death:—Held, that the instrument was testamentary. *In the goods of Coles*, 41 Law J. Rep. (N.S.) P. & M. 21; Law Rep. 2 P. & D. 362.

### (C) WHAT DOCUMENTS FORM PART OF WILL.

5.—A testator wrote his will on the first side of a half sheet of paper. There was an unfinished bequest in the body of the will, and this he completed on the back of the page, marking by an asterisk the place where the endorsement was to be read into the will. The attesting witnesses did not see the endorsement, but there was evidence that it was written before the execution of the will:—The Court held that the endorsement formed part of the will, and ordered it to be included in the probate. *In the goods of Burt*, 40 Law J. Rep. (N.S.) P. & M. 26; Law Rep. 2 P. & D. 214, *sub nom. Birt*.

6.—The presumption that several sheets found tied together constituted a testator's will,—Held, not rebutted by suspicious circumstances, arising from the numbering of the sheets, tending to a contrary conclusion. *Rees v. Rees*, Law Rep. 3 P. & D. 84.

*Mistake in residuary clause: words introduced not in instructions: codicil.*  
[See PROBATE, 30, 31.]

*Validity and effect of probate in Canada: construction of statute.* [See COLONIAL LAW, 8.]



## (D) EXECUTION.

## (a) Place of signature.

7.—A will was written on the upper part of one side of a piece of paper with a considerable blank beneath it, and on the back of the paper was written the attestation clause and signatures of the deceased and witnesses. Upon proof that the will was written before execution,—Held, that it was duly executed. *In the goods of Archer*, 40 Law J. Rep. (N.S.) P. & M. 80; Law Rep. 2 P. & D. 252.

8.—A testatrix wrote her will on a "lithograph form." She began the instrument—"This is the last will" &c.—on the second side of the sheet of foolscap, continued it on the third side, and passing over the fourth side, on which were printed the words—"Form of will where the property is given to one or more absolutely," finished it on the first side by inserting the names of the executors in the blank space left for the purpose in the "form," filling in the date and signing her name on the bottom of the page:—Held, a valid execution within the meaning of 15 Vict. c. 24. *In the goods of Wotton*, 43 Law J. Rep. (N.S.) P. & M. 14; Law Rep. 3 P. & D. 159.

9.—A testatrix made her will, using for the purpose a printed form, which covered two sides of a sheet of paper. The first side contained the usual heading, a clause of revocation, and one for the appointment of executors, and at the foot of the page there was a printed attestation clause. At the top of the second page were printed the words, "The will continued," and at the foot of the page there was a second printed attestation clause. The blank spaces in both pages had been filled up, and specific legacies given, but the residue was not disposed of. The testatrix executed the will by making her mark in the space left for her name in the attestation clause at the foot of the first page, and the witnesses attested her mark by subscribing their names on the same page. She then made her mark in the space left for her name in the attestation clause at the foot of the second page, but the witnesses did not attest it:—Held, that the two pages constituted the will, and, consequently that it was not duly executed the signature of the testatrix at the foot or end of it not having been attested by the witnesses. *In the goods of Dilkes*, 43 Law J. Rep. (N.S.) P. & M. 38; Law Rep. 3 P. & D. 164.

10.—Where a testator signed his name at the end of his will on the tenth sheet, and put his initials on the first nine sheets, and two out of three witnesses signed on the first nine sheets, but not on the tenth sheet:—Held, that the will was not duly executed. *Phipps v. Hale*, Law Rep. 3 P. & D. 166.

11.—A testator's will covered four pages of a sheet of foolscap paper, and was continued on a fifth page, being the first of a second sheet. At the bottom of the fifth page was a formal attestation clause, with the signatures of the witnesses, and the signature of the testator appeared at the top of the sixth or following page, preceded by these words: "To which will and testament I

hereunto annex my seal and signature:"—Held, a valid execution, within the 15 Vict. c. 24. *In the goods of Horsford*, 44 Law J. Rep. (N.S.) P. & M. 9; Law Rep. 3 P. & D. 211.

A testator wrote a codicil to his will upon a sheet of foolscap paper, covering the first page and half the second. The signatures of the testator and attesting witnesses were on a separate paper, which was attached to the codicil by a string. The Court being satisfied that the papers were so attached when the testator acknowledged his signature to the witnesses, and they attested it:—Held, that the instrument was duly executed. *Ibid.*

## (b) Acknowledgment of signature.

12.—A testator asked two witnesses to put their mark to a paper, but did not tell them that it was his will, or make any statement in regard to it. Being illiterate, the witnesses could not say whether his signature was on the paper at the time, and there was no evidence on the point:—Held, an insufficient execution of the will. *Pearson v. Pearson*, 40 Law J. Rep. (N.S.) P. & M. 53; Law Rep. 2 P. & D. 451.

The cases on execution by acknowledgment of the testator's signature reviewed. *Ibid.*

13.—The attesting witnesses to a will, which purported to be executed by mark, were asked, in the deceased's presence, to sign the will. A mark was on the will when they signed, but there was no evidence that it was made by the deceased, or that he knew the contents of the will, nor did he refer to it. The Court pronounced against the will on the ground that the evidence failed to shew an acknowledgment of the deceased's signature or that he knew and approved of its contents. *Morrill v. Douglas*, 42 Law J. Rep. (N.S.) P. & M. 10; Law Rep. 3 P. & D. 1.

14.—A testator's acquiescence in any act of a third person done in his presence and in that of the attesting witnesses, which imports that a signature upon the will is that of the testator (*ex. gr.*, a request that the witnesses should sign "beneath the testator's signature") is a virtual acknowledgment of the signature. And such acquiescence may be inferred from the testator's silence. *Inglesant v. Inglesant*, 43 Law J. Rep. (N.S.) P. & M. 43; Law Rep. 3 P. & D. 172.

15.—A testatrix produced a paper to A. and B., and saying, "This is my will," asked them to witness it. The will covered three pages of a sheet of paper. The signature of the testatrix was at the foot of the third page. The witnesses subscribed their names on the fourth page, but did not see the signature of the testatrix or any part of the writing on the paper. The Court, being satisfied that the signature of the testatrix was on the will at the time she produced it to the witnesses:—Held, that there had been a sufficient acknowledgment, and that the will was duly executed. *In the goods of Janaway*, 44 Law J. Rep. (N.S.) P. & M. 6.

16.—The mere production of a testamentary instrument, which has no formal attestation clause, with a request by the deceased that the witnesses will sign it, is not sufficient to justify the infer-

ence that it has already been signed by the deceased. *Fischer v. Popham*, 44 Law J. Rep. (N.S.) P. & M. 47; Law Rep. 3 P. & D. 246.

(c) *Execution of wrong will by mistake.*

17.—B. and C., sisters, living together, having agreed to make mutual wills, B. prepared the instruments. In both wills the bequests and objects of the sisters' testamentary bounty were the same, with this exception, that while B. gave a legacy of 19l. 19s. to a particular charity, C. gave a legacy of like amount to a different charity; and in both wills the same executors were appointed. On the death of B. it was found that each sister had by mistake executed the paper prepared for the other. The Court was moved to grant probate of the instrument executed by B., but declined to treat it as her will, and rejected the application for probate. *In the goods of Hunt*, 44 Law J. Rep. (N.S.) P. & M. 43; Law Rep. 3 P. & D. 250.

(d) *Addition of clause after signature.*

18.—A testator added a clause to his will after he had himself signed, but before the witnesses had signed:—Held, that probate must issue without the clause. *In the goods of Arthur*, Law Rep. 2 P. & D. 273.

(E) ATTESTATION.

(a) *Form of subscription.*

19.—No particular form of subscription is required by 1 Vict. c. 26. s. 9. A mark will do, though the witness may be able to write; but whatever form the subscription may assume, it must be made *animo testandi*. *In the goods of Eynon*, 42 Law J. Rep. (N.S.) P. & M. 52; Law Rep. 3 P. & D. 92.

A. and B. attended to witness the execution of his will by C. The testator and B. signed by mark. A then wrote the testator's name against his mark, and also the name of B. against his mark, together with the word "witness"—Held, an insufficient subscription by A., the writing being intended by him as an identification of the marks of B. and C., and not as evidence of his own attestation. *Ibid.*

(b) *Incomplete signature by witness.*

20.—A testatrix executed her will by making her mark in the presence of two witnesses. The first witness signed his name. The second witness then proceeded to subscribe the will, but being old and infirm, could only write "Saml," the abbreviation of his Christian name, and left his signature incomplete:—Held, an insufficient subscription, the act which the witness intended as his subscription—the writing of his full signature—not having been completed. *In the goods of Maddock*, 43 Law J. Rep. (N.S.) P. & M. 29; Law Rep. 3 P. & D. 169.

(c) *Signature as executor.*

21.—A. signed his will in the presence of two persons who also signed in A.'s presence. Opposite the signature of one of the witnesses was written "executor," opposite the signature of the

other "witness." The Court being of opinion on the evidence that though the former witness deposed that he signed as executor, he did not mean to sign exclusively as executor, but also to attest the signature of the deceased:—Held, that the will was duly executed. *Griffiths v. Griffiths*, 41 Law J. Rep. (N.S.) P. & M. 14; Law Rep. 2 P. & D. 300.

(d) *Attestation by beneficiary.*

22.—A testatrix by her will gave a bequest to her son G. A. One of the two witnesses attesting the execution of the will was the wife of G. A. By a subsequent codicil attested by two independent witnesses the testatrix confirmed her will:—Held, that the execution of this codicil was equivalent to a re-execution of the will; and since the codicil was attested by independent witnesses, the bequest to G. A. was valid. *Anderson v. Anderson*, 41 Law J. Rep. (N.S.) Chanc. 247; Law Rep. 13 Eq. 381.

23.—A beneficiary under a will attested the will as a third witness, and deposed that he did so at the testator's especial request as a token of approval:—Held, that the attestation invalidated the bequest. *Cozens v. Croust*, 42 Law J. Rep. (N.S.) Chanc. 840.

24.—By a will made since 7 Will. 4. & 1 Vict. c. 26, certain land and houses, after the deaths of the testator's niece S. A. and her husband J. A. (to whom life interests had been given), were directed "to be equally divided among the children" of the said S. A. and J. A. The will purported to be attested by three witnesses, two of whom were Thomas and Sarah, children of the said S. A. and J. A.:—Held, that the devise to the children, although it was a devise to them as tenants in common, was a devise to a class, so that the whole was to be taken by those who after the testator's death came within the limits of such class and were capable of taking, and therefore the shares of Sarah and Thomas, who as attesting witnesses were themselves incapable of taking, went to the other members of the class, and not to the heir-at-law of the testator. *Fell v. Biddulph*, 44 Law J. Rep. (N.S.) C. P. 402; Law Rep. 10 C. P. 701.

Quære—whether a person who sees the testator sign the will, and who afterwards attests the will but not in the testator's presence, and who therefore is not an attesting witness within the meaning of section 9 of 7 Will. 4. & 1 Vict. c. 26, is rendered by the 15th section incapable of taking anything under the will.

(F) WILL OF FEME COVERT INOPERATIVE IN EVENTS WHICH HAPPENED.

25.—A married woman made a will in exercise of a power, but appointed no executor. The will was dependent on events which never happened, and the legatees named in it died in the lifetime of the testatrix. The will being clearly inoperative, the Court refused to admit it to probate. *In the goods of Graham*, 41 Law J. Rep. (N.S.) P. & M. 46; Law Rep. 2 P. & D. 385.

## (G) REVOCATION OF WILL.

## (a) Alterations and obliterations.

**26.**—A testator duly executed his will and subsequently a codicil in which he confirmed his will. On his death the will was found with several passages scored out in pencil, and before those passages the word "query" in the handwriting of the deceased. There was evidence to shew that the alterations were made before the execution of the codicil, and that when he executed it he had not the will before him nor made any reference to it. The Court being satisfied that the alterations were intended by the testator to be deliberative, not final, excluded them from the probate. *In the goods of Hall*, 40 Law J. Rep. (N.S.) P. & M. 37; Law Rep. 2 P. & D. 256.

**27.**—A will was written upon a lithographed form, which was filled up by the testatrix in her own handwriting. In the body of the instrument there was certain pencil writing, which was partly obliterated, and partly written over in ink. A portion of the pencil writing remained however legible, and was capable of being read on with the rest of the will. The Court, looking to the appearance of the instrument, and to the fact that the writing in ink read on with the print and formed a complete will, held that the writing in pencil was merely deliberative, and ordered that probate should issue without it. *In the goods of Adams*, 41 Law J. Rep. (N.S.) P. & M. 31; Law Rep. 2 P. & D. 367.

**28.**—A testator obliterated certain bequests in the will by pasting strips of paper over them, so that the writing beneath could not be read, and on these strips wrote new legacies. In the codicil to the will a strip of paper was placed over the amount of a legacy, and on the strip of paper covering the amount of the legacy the word "ten" was written, but the legatee's name remained untouched. The alterations were unattested, and the witnesses did not notice the strips of paper pasted on the instruments at the time of execution:—Held, that the word "apparent," in the 1 Vict. c. 26. s. 21, means apparent on the face of the instrument in the condition in which it is left by the testator, and that if he has recourse to extraordinary means to obliterate what he has written, the Court is not bound to take any steps to undo what he has done. It therefore declined to order the strips of paper, which effectually obliterated the passages which they covered, to be removed from the will, and directed that probate should issue with those parts in blank. *In the goods of Horsford*, 44 Law J. Rep. (N.S.) P. & M. 9; Law Rep. 3 P. & D. 211.

With respect to the codicil, being of opinion that the testator's intention was only to revoke the original bequest, in the event of his having effectually substituted another bequest in its place, it held that the doctrine of dependent relative revocation became applicable, and that the Court might have recourse to any means of legal proof by which to ascertain the original disposition of the testator. It therefore directed the strip of paper pasted on it to be removed, and de-

creed probate of the codicil in its original and unaltered condition. *Ibid.*

**29.**—A testator duly executed his will, bequeathing *inter alia* some leasehold property therein described to trustees for his children. Upon his death it appeared that the description of the property had been struck through with a pen, and that before the final clause of the will a bequest of the same property to trustees for the benefit of his wife had been interlined in the handwriting of the testator. After the original signature a duly executed and attested memorandum followed, stating that the words had been struck out for the benefit of his wife:—Held, that the memorandum sufficiently referred to the alteration and interlineation to entitle the will as altered to be admitted to proof. *In the goods of Treeby*, 44 Law J. Rep. (N.S.) P. & M. 44; Law Rep. 3 P. & D. 242.

**30.**—Alterations in a will bearing an earlier date than that of the will, but not otherwise shewn to have been made prior to the execution of the will, will not be recognised or admitted to probate. *In the goods of Adamson*, Law Rep. 3 P. & D. 253.

(b) Tearing: *animus revocandi*.

**31.**—A testator duly executed his will in 1828. It was written on seven sheets of brief paper, and each sheet was signed by the testator and the three attesting witnesses. On the testator's death, in 1870, the will was found in a chest in which he kept papers of importance, with about eight lines at the top of the first sheet torn off. In all other respects the will was perfect, and there was no evidence as to the circumstances under which the mutilation was effected:—Held, that part revocation of the instrument was only intended, and probate accordingly decreed of the will in its mutilated state. *In the goods of Woodward*, 40 Law J. Rep. (N.S.) P. & M. 17; Law Rep. 2 P. & D. 206.

**32.**—A testator being led to believe by a friend that his will was invalid, tore it and told his wife to put it in the fire. The fire had not been lighted, but the wife placed the pieces in the grate. A few minutes afterwards the testator thought himself that his friend might possibly be wrong, and he took the pieces from the grate and preserved them:—Held, that there had been no revocation, the act of tearing not having been accompanied by the *animus revocandi*; and probate was granted of the will as contained in the pieces. *Giles v. Warren*, 41 Law J. Rep. (N.S.) P. & M. 59; Law Rep. 2 P. & D. 401.

**33.**—Where a testator, in a fit of delirium tremens, tore up his will, but, on recovering, expressed regret,—Held, that the will was not revoked. *Brunt v. Brunt*, Law Rep. 3 P. & D. 37.

## (c) Will burnt; but codicil preserved.

**34.**—Where a testatrix, having executed a will and codicil, destroyed the will by burning it, but preserved the codicil,—Held, that the codicil, notwithstanding that its meaning was dependent upon the will, must be admitted to probate. *In the goods of Turner*, Law Rep. 2 P. & D. 403.

*(d) Revocation by subsequent instrument.*

**35.**—A testator executed two wills—the first in England, the second in Italy, where he was domiciled at the time of his death. The English will disposed of realty and personalty, and nominated B. executor. The second, or Italian will, disposed of the personalty only, but contained a general revocatory clause:—Held, that the second will revoked the first, including the appointment of the executor. And B., the executor, who resisted revocation of the probate of it, granted to him in common form, was condemned in costs. *Cottrell v. Cottrell*, 41 Law J. Rep. (n.s.) P. & M. 57; Law Rep. 2 P. & D. 397.

**36.**—A testator duly executed his will. On the day of his death he wrote to his brother the following letter:—"Enclosed I hand you an order to get my will from Mr. D., which please burn as soon as you receive it without reading it. I will leave you my share as a deed of gift, leaving it to your honour to pay out of it 100l. each to each of my two sisters, and 100l. to T. P." The signature of the deceased was attested by two witnesses, and the paper was valid as a testamentary paper:—Held, that it was a writing declaring an intention to revoke, within the meaning of 1 Vict. c. 26, s. 20, and that it revoked the will. *In the goods of Durance*, 41 Law J. Rep. (n.s.) P. & M. 60; Law Rep. 2 P. & D. 406.

**37.**—A testator, who was by birth a British subject, but domiciled in Spain at his death, duly executed a will in England. He subsequently executed in Spain several codicils which were valid by the law of Spain, and he lastly executed in England a further codicil. This paper contained no mention of the Spanish codicils, or the property with which they dealt, and it concluded thus—"I confirm the dispositions contained in my will, in whatever does not clash or interfere with the contents of this codicil, which is to be considered as my last and deliberate will".—Held, that the Spanish codicils were not revoked, and that they were entitled to probate with the English documents, as together constituting the complete testamentary disposition of the deceased. *In the goods of De La Saussaye*, 42 Law J. Rep. (n.s.) P. & M. 47; Law Rep. 3 P. & D. 42.

**38.**—A. by her will bequeathed the residue of her estate, after the payment of debts and certain legacies, to her daughter absolutely, and appointed her sole executrix. By a subsequent testamentary paper which purported to be her last will, but contained no revocatory clause or bequest of the residue, she gave all her estate to her daughter for life and appointed her sole executrix, and then gave certain legacies payable after her daughter's decease:—Held, that as the second will did not dispose of the residue, it did not revoke the residuary bequest in the earlier will, and that both instruments were therefore entitled to probate. *In the goods of Petchell*, 43 Law J. Rep. (n.s.) P. & M. 22; Law Rep. 3 P. & D. 153.

**39.**—A testatrix, a married woman, made, in 1859, under a power contained in her marriage settlement, a will, whereby she appointed all the real

and personal estate over which she had any power of appointment to her husband. In 1863 she made a second will, which also referred to the power, but left undisposed of a portion of the property included in the settlement. The will concluded with a general revocatory clause:—Held, that the will of 1859 was revoked by the later instrument. *In the goods of Eustace*, 43 Law J. Rep. (n.s.) P. & M. 46; Law Rep. 3 P. & D. 183.

[And see WILL, CONSTRUCTION, G 6.]

*(e) Dependent relative revocation.*

**40.**—A testatrix, in 1865, duly executed a will, in which she appointed A. and B. executors, and named A. one of the residuary legatees. Some years afterwards she determined to exclude A. from the will, and in 1872 she dictated to C., using the will as a copy, what was apparently intended to be a formal testamentary paper. She then tore off and burnt the upper portion of the will, leaving the residuary clause and the attestation and the signatures of herself and attesting witnesses, and having drawn her pen through A.'s name in the clause, she put away the papers, viz., the portion of the will which she had preserved and the paper which was written from her dictation, saying that she would "leave them there with her signature as her will," and that "she would consult her solicitor to see that what she had done was correct." She saw her solicitor some months afterwards, but did not mention to him the subject of her will:—Held, that the testatrix did not intend to cancel her will *in toto*; that she intended the cancellation of the portion of it which she destroyed to be dependent on the validity of the new disposition, and that as it failed, there had been no cancellation. Probate was therefore decreed of the portion of the will which was preserved, with A.'s name restored, together with the draft of the part of the will which was destroyed. *Dancer v. Crabb*, 42 Law J. Rep. (n.s.) P. & M. 53; Law Rep. 3 P. & D. 98.

**41.**—A testator executed a will on the 8th of September, 1866, and on the 21st of February, 1871, added a codicil thereto. The will was subsequently destroyed by his wife, by his direction, but not in his presence. On the 29th of September, 1872, he executed the following codicil—"I desire to cancel the will that I made in 1866, and that the will that I made on the 17th of October, 1855, with the codicil dated the 21st of February, 1871, shall stand as my last will and testament." The document which he executed on the 17th of October, 1855, was a marriage settlement and not a will:—Held, that the will of the 8th of September, 1866, was sufficiently identified by the reference in the second codicil, that its revocation was not dependent on the validity as a testamentary paper of the settlement, and that the will was therefore absolutely revoked. *In the goods of Gentry*, 42 Law J. Rep. (n.s.) P. & M. 49; Law Rep. 3 P. & D. 80.

The Court, by consent of parties, allowed the

settlement of 17th October, 1855, to be included in the probate granted of the codicils. *Ibid.*

[And see *supra* No. 28.]

(f) *Conditional revocation.*

42.—Where a testator obliterates the name of a legatee and substitutes that of another, intending to revoke the former bequest by substituting the name of the second legatee, but the second bequest cannot take effect for want of compliance with the Wills Act, the will may be pronounced for in its original state, if that is ascertainable by any means of legal proof. *In the goods of M' Cabe*, 42 Law J. Rep. (N.S.) P. & M. 79; Law Rep. 3 P. & D. 94.

A will contained a bequest to "my sister, Louisa Galsworthy," the words, "sister Louisa," being written on an erasure, and the writing obliterated being illegible. In the absence of evidence when the alteration was made, the Court being of opinion, upon extrinsic evidence, that the words erased were "niece Edith," and that the testatrix only intended to revoke the original bequest conditionally on her sister taking it, granted probate with the words, "niece Edith," restored. *Ibid.*

(g) *Evidence.*

(1) *Admissibility of declarations by testator.*

43.—A will which was in the testator's possession was not forthcoming at his death. In order to rebut the presumption of revocation by destruction, evidence was produced and admitted of declarations by the testator shewing an intention to adhere to the will. Evidence of declarations to the opposite effect, viz., that he did not intend to leave his property in the manner disposed of by the will, and that he had destroyed it by burning it, was produced by the opponents of the will:—Held, that such declarations by the testator were also admissible, not as evidence of the fact of destruction, but as evidence of intention not to adhere to the will. *Keen v. Keen*, 42 Law J. Rep. (N.S.) P. & M. 61; Law Rep. 3 P. & D. 105.

44.—Where the presumption of revocation, arising from a testator's will which was in his possession not being found after his death, is sought to be rebutted by evidence of declarations by the testator of an intention to adhere to the will, counter-evidence of declarations of an intention not to adhere to the will, e.g., a declaration by the testator that he had burnt his will, is admissible. *Keen v. Keen*, Law Rep. 3 P. & D. 105.

(2) *Burden of proof as to time of cancellation.*

45.—A testator made his will in 1834, and upon his death in 1870 the will was found among his papers with the signature cancelled:—Held, that it lay upon the party who alleged the revocation of the instrument by cancellation to prove that the cancellation took place before the Wills Act came into operation, and that in the absence

of such proof the will was entitled to probate *Benson v. Benson*, 40 Law J. Rep. (N.S.) P. & M. 1; Law Rep. 2 P. & D. 172.

(H) REPUBLICATION AND REVIVAL OF WILL.

(a) *Will of married woman.*

46.—The object of section 34 of the Wills Act is to get rid of republication as a method of conferring testamentary validity even as regards a will made before the date of the Act, and not to extend its operation to wills made since the Act. Therefore, the will of a married woman, made in 1869 with the assent of her husband, was held not to be revived by republication after his death, and held further, that whatever support, authority, or efficacy the will might have derived from the husband's concurrence was extinguished by his death. *Noble v. Willock*, 40 Law J. Rep. (N.S.) P. & M. 60; Law Rep. 2 P. & D. 276, *nom. Noble v. Phelps and Willock*.

The testatrix made her will while under coverture, and by it, after disposing of certain property to which she was entitled to her separate use, bequeathed "all the residue of the real and personal estate which I shall possess or have power to dispose of at the time of my decease to my niece M. W." After the will was executed her husband died, bequeathing her considerable personal property. Shortly afterwards she died herself, without having executed her will.—Held, that although the Court would be warranted by the principles laid down in *Thomas v. Jones* (2 J. & H. 475; 31 Law J. Rep. (N.S.) Chanc. 732; 1 De Gex, J. & S. 63; 32 Law J. Rep. (N.S.) Chanc. 139), in holding that the testatrix, having full power over the property acquired from her husband at the time of her death, and having used language in the will sufficiently large to include it, had effectually disposed of it, yet that it was its duty to conform to the decision of the Privy Council in *Barnes v. Vincent* (1 Moo. P.C. 201), and to leave the question for the Court of Construction. It accordingly refused a general probate of the will, but made the limited grant as full as it possibly could so as not to prejudice the parties or fetter the Court of Construction. *Ibid.*

(b) *Revival by codicil.*

47.—The name of J. S., one of the executors appointed by the will, was written on an erasure. There was no evidence to shew at what time the alteration was made in the will, but there was evidence of a declaration by the testator before the execution of the codicil to the will, that he had appointed J. S. one of his executors:—Held, that the declaration sufficiently shewed that the alteration had been made in the will before the execution of the codicil, and that the codicil being a republication of the will, confirmed it in its altered state. *In the goods of Sykes*, 42 Law J. Rep. (N.S.) P. & M. 17; Law Rep. 3 P. & D. 26.

48.—A testator executed a will on the 11th of May, 1866, in which he appointed his son sole executor and residuary legatee, and on the 12th of May, 1871, he added a codicil thereto. On the

7th of November, 1871, he executed another will which in terms revoked all other wills and codicils. On the 19th of December, 1872, he executed a codicil which began—"This is a codicil to the will of B. Reynolds, dated May, 1866," and it concluded—"I confirm the appointment of my son as residuary legatee and executor of my will and codicil. Signed and declared to be a codicil to the will of B. Reynolds, dated May, 1866:"—Held, that the will of the 11th of May, 1866, was alone revived, and probate granted of such will with the codicil of the 19th of December, 1872. *In the goods of Reynolds*, 42 Law J. Rep. (N.S.) P. & M. 20; Law Rep. 3 P. & D. 35.

[And see *supra* No. 22.]

*Will in execution of power.* [See *POWER*, 7.]

### WINDING UP.

[See *COMPANY*, I.]

### WINE AND BEERHOUSE ACT.

[See *ALBHOUSE*, 21.]

### WITNESS.

[See *ADMIRALTY*, 31; *COMPANY*, I 34-40; *DIVORCE*, 33-35; *EVIDENCE*; *PRACTICE AT LAW*, 22; *PRACTICE IN EQUITY*, 143-145; *PROBATE*, 50, 51.]

### WORK AND LABOUR.

The plaintiff had been employed by a local board of health to construct certain main sewers. Having completed the main sewer, the plaintiff was leaving the work, when the surveyor stopped him and requested him not to go away, as he was wanted to construct the connections between the house drains and the sewer. The plaintiff asked who was to be responsible for the payment, to which the surveyor answered that the defendant, who was the chairman of the local board, was waiting to see the plaintiff about it. The plaintiff then had an interview with the defendant, at which the defendant said, "What objection have you to making the connections?" The plaintiff said, "I have none, if you or the board will order the work, or become responsible for the payment." The defendant said, "Go on and do the work, and I will see you paid." Accordingly the plaintiff constructed and completed the connections:—Held, reversing the judgment of the Court of Queen's Bench (39 Law J. Rep. (N.S.) Q. B. 275), that there was evidence to go to the jury of the personal liability of the defendant. *Mountstephen*

*v. Lakeman* (Ex. Ch.), 41 Law J. Rep. (N.S.) Q. B. 67; Law Rep. 7 Q. B. 196: affirmed, on appeal to the House of Lords, 43 Law J. Rep. (N.S.) Q. B. 188; Law Rep. 7 E. & I. App. 17.

*Action: cross-action.* [See *ACTION*.]

### WORKSHOP REGULATION ACT.

[The above Act amended as to penalties incurred by Jews for working on Sunday. 34 & 35 Vict. c. 19.]

By 30 & 31 Vict. c. 146, s. 6, the following regulations shall be observed with respect to the employment of children, &c., in workshops:—No child under the age of eight years shall be employed in any handicraft. By section 4, "employed" shall mean occupied in any handicraft, whether for wages or not, under a master or under a parent. "Handicraft" shall mean any manual labour exercised by way of trade or for the purposes of gain in or incidental to the making any article or part of an article, or the altering, repairing, &c., or otherwise adapting for sale any article. "Workshop" shall mean any room or place whatever, whether in the open air or under cover, in which any handicraft is carried on by any child, &c., or to which and over which a person by whom such child is employed has the right of access and control. By section 5, if any such child is so employed, in contravention of the Act, the occupier of the workshop in which it is so employed, and the parent of, or the person deriving any direct benefit from the labour of, or having control over the child, are made liable to penalties. An information was preferred against the respondent, as the occupier of a workshop, for employing a child under eight years of age, in contravention of the Act. It appeared from the evidence that the child was found in a workroom occupied by the respondent, engaged in plaiting straw under his superintendence. The mother of the child sold the plait for her own benefit, found the straw, and paid the respondent threepence a week for the teaching:—Held, that the child was employed in a workshop in contravention of the Act, and that the respondent was liable to the penalty, although he had no interest in the work done, or in the proceeds of it. *Beadon v. Parrott*, 40 Law J. Rep. (N.S.) M. C. 200; Law Rep. 6 Q. B. 718.

### WOUNDING.

Under the 20th section of the 24 & 25 Vict. c. 100, it is a misdemeanour to unlawfully and maliciously wound any person. By 14 & 15 Vict. c. 19, s. 5, upon the trial of any indictment for felony where the indictment shall allege that the prisoner wounded any person, if the jury are satisfied that the defendant is guilty of wounding, but are not satisfied the defendant is guilty of the felony charged, the jury may acquit him of the felony and find him guilty of unlawful wounding,

and he may thereupon be punished as if he had been convicted of the misdemeanour of unlawful wounding. The prisoner was indicted for unlawfully and maliciously wounding with intent to do grievous bodily harm. The prosecutor was using a punt in a creek of a river for the purpose of shooting wild fowl, lying with his face downwards in the punt, and paddling with his arms over the sides. When slewing the punt round to return home, he suddenly heard the report of a gun, and found himself shot and wounded seriously. The prisoner had fired the shot in the direction of the punt, with the intention of frightening the prosecutor from again coming into the creek for the purpose of fowling, and not with the intention of doing him grievous bodily harm. The prisoner at the time and afterwards asserted that if the prosecutor had not slewed the punt round at the moment of his shooting, the shot would not have struck him. The jury found the prisoner guilty of unlawful wounding under 14 & 15 Vict. c. 19, s. 5:—Held, that the 5th section of the 14 & 15 Vict. c. 19, must be construed as if the word "malicious" were applied to wounding; and that there was evidence on the above facts of a malicious wound-

ing by the prisoner, and the conviction was right. *The Queen v. Ward*, 41 Law J. Rep. (N.S.) M. C. 69; Law Rep. 1 C. C. R. 356.

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#### WRIT OF ERROR.

[See ERROR.]

The fiat of the Attorney-General is a condition precedent to the issuing of a writ of error in a criminal case, and if a convicted person bring an action against the Clerk of the Petty Bag for not sealing a writ of error to bring up his conviction, the Court will stay the action as frivolous and vexatious, on its appearing that no fiat had been obtained. *Castro v. Murray*, 44 Law J. Rep. (N.S.) M. C. 70; Law Rep. 10 Exch. 213.

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#### YORKSHIRE REGISTRY ACT.

[See MORTGAGE, 26, 27.]

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